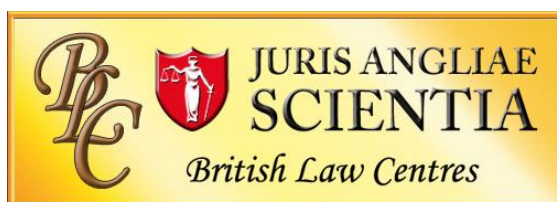




Central and Eastern Europe Moot Competition 26-28 April 2024

Organised by:



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MOOT BUNDLE

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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

CEEMC Moot Problem 2024

Tsitra Evitaerc (Applicant)

v.

The Arty-Zen Gallery, Oleg Nalechim and Nevet Sbergspiel (Respondents)

Tsitra Evitaerc

1. Tsitra Evitaerc is a professional photographer and a national of Melbop, an EU Member State. Tsitra completed a degree in fine arts at the University of Melbop in 1983. After graduation, she was employed for fifteen years as a press photographer at a major newspaper, during which time she won a number of awards for her work. However, Tsitra's artistic passion was for human and feline subjects, and in 1998 she left the newspaper to focus on her own projects.
2. Since then, Tsitra's work has become very well-known in Melbop. She has secured a reputation as one of Melbop's leading portrait photographers and enjoys a steady stream of commissions. She also produces and sells a popular line of merchandise featuring photographs of cats and kittens. The photographs have a very distinctive style: Tsitra dresses the animals in costumes and/or stages them with props, these costumes and props often being inspired by gardens and nature. For example, Tsitra has photographed cats wearing bee, lion and bat costumes. The clothes and accessories she uses are made to an extremely high quality by a team of costume makers and milliners commissioned by Tsitra. In terms of props, Tsitra has photographed cats sitting in or alongside wheelbarrows, flowerpots, pumpkins, and so forth. The photographs are taken in a studio, and the backdrop is usually quite plain, in order to focus attention on the feline subject. The merchandise produced by Tsitra comprises greeting cards, calendars and books. In 2018, she licensed a toy manufacturer to make a range of stuffed toys based on her photographs and bearing her name. She has also licensed her photographs to appear in books and magazines, and in promotional campaigns run by cat-related charities. She has turned down all requests for her photographs to be used in commercial advertising. She has never received a request to licence one of her photographs as an artist's reference.
3. More recently, Tsitra has also ventured into moving image by making a short film, 'Tsitra's Cats', featuring her three cats, Picatso, Purrsephone and Bill. The film was inspired by the question of what Tsitra's cats do during the day when she is out and at night while she is asleep. From July to November 2019, Tsitra regularly collected and reviewed footage from fifteen motion sensor cameras installed throughout her home. She retained any footage showing incidents that were particularly funny, surprising, heart-warming, destructive, and so forth. Once she had a sufficiently large collection of material, she made a final selection of the footage to be included in her film and developed a story arc to bring together the various incidents. Tsitra created the film on her computer by editing the footage, overlaying mood music and sound effects, adding credits, and so forth. The finished film was 29 minutes long. Not including Tsitra's time, it cost approximately €1,500 to make, this being the cost of the motion-sensor cameras and the use of royalty-free mood music and sound effects in the film. (NB. Royalty-free' means material that has been licensed for unlimited commercial use without any further money being payable.) The film has been broadcast by television station, Channel Six, in a deal in which Channel Six paid Tsitra €30,000 to have the exclusive broadcast rights in Melbop for five years. The film is also available to rent and purchase on a number of online video platforms.

The Gallery and its activities

4. The Arty-Zen Gallery (the '**Arty-Zen**') is a commercial art gallery in Kamino, the capital of Melbop. It was opened in 1972 by a group of artists with the goal of promoting and showcasing Melbopian art. Its current director is Anson Johndrew. Anson is the husband of the Melbopian Minister for Justice, Louise Fonceca.

5. As a commercial art gallery, the Arty-Zen represents and supports a range of artists, including many emerging artists. Its premises include four large rooms that are used for exhibitions. Sometimes these exhibitions comprise the work of a single artist (a solo exhibition); at other times they are curated around an idea or theme and include the works of multiple artists (a group exhibition). Works in each exhibition are generally available for sale; for works which are sold, the Arty-Zen takes a commission. It does not, however, charge artists for its costs in running its exhibitions or in representing them – it makes its money almost exclusively from sales of artworks. An exhibition will typically be launched with an opening: an invitation-only party in which drinks and canapes are served, and which might include some speeches or words of welcome. Outside of these private events, members of the public are welcome to visit the Arty-Zen during its opening hours to view the artworks. The Arty-Zen runs a website where it promotes its exhibitions and its artists, including information about purchasing works. Copyright in all artworks remains with the artists; as part of its standard form contract with its artists, the Arty-Zen obtains a licence to reproduce images of the works on its website and as part of its catalogues and promotions, and (for any video works) to play those works on its premises.
6. In May 2022, a new exhibition was launched at the Arty-Zen: 'Feline Groovy: Catisfaction Guaranteed'. This cat-themed group exhibition included the following works: (i) a sculpture, 'Roar Energy', by Oleg Nalechim; and (ii) a short film, 'A Wild Day's Night', by Nevet Sbergspiel. The artists (both of whom were 26 years old at the time of the launch) were identified by the Arty-Zen as exciting up-and-coming artists in the Melborean art scene: Oleg as a sculptor with strong pop art influences, and Nevet as a photographer and video artist. In addition to being exhibited on the Arty-Zen's premises, photographs of 'Roar Energy' also appeared on the Arty-Zen's website and in the exhibition catalogue. In contrast, 'A Wild Day's Night' was only screened to visitors in-person.

The creation of the works

7. The work 'Roar Energy' was created by Oleg in 2018 as a limited edition of four works and an AP (Artist Proof). 'Roar Energy' is made of polychromed wood. The sculpture is of a cat in a lion costume. The cat is seated on the floor with its hind legs bent underneath it and its front legs extended straight down, perpendicular to the floor, in front of its chest. Its head faces directly ahead. It is wearing a headpiece that encircles its face and emulates the mane and ears of a lion. The sculpture has a surreal colour palette: the cat is a vibrant orange with bright yellow stripes, while the lion's mane and ears are hot pink.
8. It is not in dispute that 'Roar Energy' is based on a photograph taken by Tsitra. Oleg has indicated that he used one of Tsitra's greeting cards, 'Lion Cat', when creating the sculpture. The body position of Oleg's sculpture is the same as the cat in 'Lion Cat'; plus Oleg crafted the shape of the mane and ears, and the expression on his cat's face, to follow closely that in the photograph. The most obvious point of departure was that Oleg decided to use an unrealistic colour palette to convey the dream-like idea of a cat that thinks it's as big and important as a lion. In contrast, 'Lion's Cat' was taken in black-and-white. Oleg has also indicated that he had to 'fill in the gaps' of what the back of the cat looked like from behind, as Tsitra's photograph gave only a single view of the front of the animal (capturing the cat's face, chest and tummy, front legs, back feet, and tail).
9. Oleg often uses photographs as a reference for his sculptures. For this work, he selected 'Lion Cat' not only because he liked the pose and expression on the cat's face, but because he wanted to capture the importance of cats in human culture. He hoped that, when viewing his sculpture, people would feel a familiarity with the subject matter, and in fact that his work might be understood as paying homage to Tsitra's work. The description of 'Roar Energy' in the Arty-Zen's catalogue and website did not include any mention of Tsitra, although Oleg referred to Tsitra's photograph in an interview in an art magazine in 2019. Oleg did not ask Tsitra for permission to use her photograph as an artist's reference.
10. Oleg's sculpture was available for sale at the Feline Groovy exhibition and sold for €10,000. This was the highest price Oleg had achieved for the sale of a single work. It meant that he was able to give up one of his three part-time jobs to focus greater energy on his art.
11. The work 'A Wild Day's Night' is a montage film consisting of clips from over 150 different sources, including feature films, television programmes, advertisements and videos posted on social media. It was one of Nevet's long-term projects, taking several years to finish. The film was first shown publicly in Melbore in April 2022. The clips all feature cats and have been carefully edited to create a narrative of what cats do overnight – sleep, eat, play, meet up with other cats, and so forth. The shortest clip is three seconds and the longest is twenty-five seconds. The film is fifteen minutes in length. Given the volume and length of the clips used in the film, Nevet did not seek any copyright permissions. Although 'A Wild Day's Night' played at the Feline Groovy exhibition, it was not available for sale – instead, it was played alongside some of Nevet's still photography in order to help promote those works and develop

Nevet's reputation. In fact, the only income that Nevet has made directly from 'A Wild Day's Night' was in February 2023, when he was paid €500 for a licence to play his film in a temporary exhibition at the Kamino Science Museum.

12. One extract in 'A Wild Day's Night' was taken from the film, 'Tsitra's Cats'. This footage was shot on a high, wall-mounted camera looking down a hallway containing a number of doors opening onto other rooms. The clip starts with an empty hall. A cat runs through the doorway at the end of the hall and heads down the hallway in the direction of the camera; it disappears out of view as it runs under the camera. Barely a second later, that cat reappears, running up the hall in the opposite direction, being chased by another cat. Both cats disappear through the same doorway that the first one appeared from. After a few seconds those two cats re-emerge, being chased by a third cat. The group stops abruptly in the centre of the hall, and after a brief melee, all run in different directions. The extract used by Nevet was 13 seconds long. He used it in 'A Wild Day's Night' without any of the original audio (being some mood music). Instead, Nevet added some different background music, in order to give continuity to the sequence of events at that point.

The dispute

13. Tsitra visited the Feline Groovy exhibition on 17 June 2022. When she saw 'Roar Energy' and 'A Wild Day's Night', she spoke immediately with Arty-Zen staff in relation to her concerns that those works copied, without permission, her own works. She was told that if she wanted to raise any complaints, she should put those in writing. Tsitra contacted her lawyer to explain her concerns. On 27 June 2022, her lawyer sent a letter to the Arty-Zen, Oleg and Nevet claiming that the making of 'Roar Energy' and 'A Wild Day's Night', and their onsite and (for 'Roar Energy') online public presentation by the Arty-Zen, infringed Tsitra's copyright. The letter set out various acts demands in order to settle Tsitra's claims, including the payment of retrospective licensing fees. The Arty-Zen obtained legal advice which suggested that neither itself nor its artists had infringed copyright. As such, the Arty-Zen responded through its lawyers on behalf of itself, Oleg and Nevet to deny any wrongdoing.
14. In early August 2022 – and after the exchange of further correspondence which failed to resolve the matter – Tsitra commenced proceedings against the Arty-Zen, Oleg and Nevet in the Copyright Court of Melbop. Her claims were all made under provisions of the Melbop's Act on Copyright and Related Rights ('**Copyright Act**'). Extracts from the Copyright Act are included in Appendix 1. The essence of Tsitra's claim was that–
 - a. Oleg infringed Tsitra's artistic copyright in 'Lion Cat' by copying the subject-matter of that photograph in his sculpture, 'Roar Energy'.
 - b. The Arty-Zen infringed Tsitra's copyright in 'Lion Cat' by each of:
 - i. including photographs of 'Roar Energy' in its exhibition catalogue, thus infringing the reproduction right;
 - ii. including photographs of 'Roar Energy' on its website, thus infringing the reproduction right and the right of communication to the public; and
 - iii. exhibiting 'Roar Energy' on its premises, thus infringing the right of communication to the public (applying *FAPL (Joined Cases C-403/08 & C-429/08)* [2012] ECDR 8 and *Phonographic Performance (Ireland) Limited v Ireland (C-162/10)* [2012] ECDR 15).
 - c. Nevet infringed Tsitra's cinematographic and film copyright in 'Tsitra's Cats' by copying a 13 second extract of 'Tsitra's Cats' in his video, 'A Wild Day's Night' (applying *Pelham GmbH v Hütter (C-476/17)* [2019] ECDR 26).
 - d. The Arty-Zen infringed Tsitra's copyright in 'Tsitra's Cats' by playing the film on its premises, thus infringing the reproduction right, the public performance right and the right of communication to the public (applying *FAPL (Joined Cases C-403/08 & C-429/08)* [2012] ECDR 8).

Events in the Copyright Court

15. In order to ensure that justice is rendered swiftly and reliably, in Melbop, all Presidents of court are appointed by the Minister of Justice for two-year terms which are renewable at the discretion of the Minister based on satisfactory performance. The Presidents allocate cases to chambers and have the power to veto any procedural measures proposed by individual judges where they think that they would lead to undue delay. To compensate them for their significant administrative work and increased responsibilities, Presidents receive double the salary of ordinary judges, and are provided with an official car and a personal assistant by the Ministry of Justice. Presidents are also

given a lavish entertainment budget and enjoy free access to the catering services of the Ministry for any functions they organise at their homes.

16. All copyright disputes in Melbop are decided at first instance by the Copyright Court, an independent specialist jurisdiction. It is for this reason that Tsitra issued proceedings in this Court. Appeals from the Copyright Court may be made to the Supreme Court of Melbop, but only in relation to points of law.
17. As noted above in para. 4 above, the Arty-Zen Gallery is owned by the husband of the Minister of Justice. The Minister for Justice appointed the President of the Copyright Court, President Rouge, in October 2021 (some 10 months before Tsitra filed her claim). Prior to appointment, Justice Rouge had been the Minister's personal lawyer and was a member of the same political party as the Minister. He resigned from both functions on taking office as President of the Copyright Court. President Rouge's daughter, who has just finished her law degree, works as a personal advisor to the Minister of Justice.
18. When Tsitra's case was filed at the Copyright Court, President Rouge allocated the case to a chamber of five judges over which he presides (being the Third Chamber). Tsitra's lawyers sought to challenge the President's independence and impartiality because of (i) his past functions, (ii) his daughter's employment and (iii) the fact that his re-appointment depends on the goodwill and support of the Minister for Justice. Tsitra's lawyers requested that the President be recused, relying on, amongst other things, Article 19 TEU and Article 47 of the Charter of Fundamental Rights. They questioned the compatibility with EU law of the national legal framework concerning the appointment of Presidents of courts in Melbop.
19. The question of the President's recusal was considered as a preliminary issue by the four other members of the Third Chamber. Under Melbopian law, past functions may not be taken into account when deciding whether a judge should be recused. A majority of the chamber also considered that the employment of the President's daughter in the office of the Minister of Justice was insufficient to give rise to a conflict requiring recusal. However, the four judges were evenly split on whether a Chamber composition including the President was contrary to EU law. They therefore decided to refer the following question to the Court of Justice of the European Union pursuant to Article 267 TFEU:

"Do Article 19 TEU, Article 47 of the Charter or any other provisions of EU law preclude a President of a court appointed in accordance with rules such as those in force in Melbop from sitting in a case in circumstances such as those of the present case?"

20. As soon as the order for reference came to the attention of President Rouge, he exercised his right of veto, on the basis that the answer to the question was obvious and that a reference to the CJEU would cause unnecessary delay in hearing the case. President Rouge therefore ordered the case to proceed, overruling the objections of his colleagues.
21. In preliminary submissions to the Copyright Court on the merits of the case, a number of points were not in dispute between the parties:
 - a. 'Lion Cat' is an original photographic work under Article 2 of the Copyright Act. Tsitra made free and creative choices and stamped her personal touch on the work through staging the subject matter and making choices in how the photograph was taken: *Painer v Standard Verlags GmbH* (C-145/10) [2012] ECDR 6. Tsitra, as photographer, is the sole author of 'Lion Cat'.
 - b. 'Tsitra's Cats' is an original cinematographic work under Article 2 of the Copyright Act. It is a cinematographic work as it is not just raw footage; rather, the footage has been assembled and edited to create a story arc with action and dramatic elements. It is original because of the creative choices Tsitra made in relation to which incidents to include, the storyline linking those incidents, the inclusion of music and other audio aspects, and so forth. Tsitra is the principal director of 'Tsitra's Cats' and, in the absence of any other contributors, is its sole author.
 - c. The recording of 'Tsitra's Cats' is separately and additionally protected as a film under Article 78 of the Copyright Act. The definition of film as a related right is broad and includes not just recordings of cinematographic works but audiovisual works and moving image more generally. Tsitra is the producer of 'Tsitra's Cats'.

22. Instead, the three defendants focused their arguments on infringement and exceptions. The essence of their arguments was as follows:

- a. Oleg argued that, in EU copyright law, the right of reproduction 'in part' applies only to literal copying of discrete parts, as seen in cases such as *Infopaq International v Danske Dagblades Forening* (C-5/08) [2009] ECDR 16. It does not extend to non-literal copying, for instance where a three-dimensional work is said to copy a work in two-dimensional form, or vice versa. As such, there was no infringement of 'Lion Cat' by his creation of 'Roar Energy'.

Oleg raised two alternative arguments if this one was rejected: first, that protection must only be given to original elements of the photograph, and that there was no copying of any such elements; and second, if there was infringement, the creation of 'Roar Energy' was permitted under the pastiche exception in Article 40 of the Copyright Act.

- b. The Arty-Zen argued that, if Oleg's arguments were successful under any of the grounds, above, it meant that its acts with 'Roar Energy' were also non-infringing. In this regard, it argued that it could also take the benefit of the pastiche defence.

The Arty-Zen also argued that, even if 'Roar Energy' infringed copyright in 'Lion Cat', there was no infringement by exhibiting the work on its premises as physical exhibition is outside the communication right and there is no exhibition right in Melborean law.

- c. Nevet argued that the 13 second extract used in 'A Wild Day's Night' did not 'copy in part' either (i) 'Tsitra's Cats' as an authorial work (i.e. a cinematographic work) or (ii) 'Tsitra's Cats' as a related right (i.e. a film fixation).

In relation to authorial copyright, Nevet argued that the part copied must itself be original, i.e. be the author's own intellectual creation: *Infopaq International v Danske Dagblades Forening* (C-5/08) [2009] ECDR 16. There was nothing original about the aspect copied – it was an isolated sequence without any of the dramatic context or selection that conferred originality on 'Tsitra's Cats'.

In relation to the film fixation, Nevet argued that the amount taken was quantitatively miniscule and was therefore too short to be a reproduction 'in part' for the purposes of Article 78.

Nebet also presented an alternative argument that, if there was *prima facie* infringement of either authorial or film copyright, the pastiche exception in Articles 40 and 80(b) applied.

- d. The Arty-Zen argued that, if 'A Wild Day's Night' did not infringe copyright in 'Tsitra's Cats', neither would its conduct in playing the film on its premises. It also argued that if Tsitra was able to take the benefit of the pastiche defence, so could it.

Separately, it resisted the argument that there was any 'communication to the public' by playing the film on its premises. It said that these facts were very different to those in *FAPL*, as that case involved the broadcast of football matches, thus permitting the argument that the 'origin' of the communication was at the football grounds.

23. As a member of the EU, Melbore has an obligation to implement a number of copyright-related directives into its domestic law. Relevantly for this dispute, these include:

- a. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (**'Information Society Directive'**);
- b. Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (**'Rental and Lending Directive'**); and
- c. Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (**'Term Directive'**).

24. As they were hearing preliminary submissions, the Chamber – including President Rauge – identified some questions they wanted to refer to the CJEU pursuant to Article 267 TFEU, in order to assess whether the Melborean Copyright Act conforms with EU copyright law.

25. One copyright-related question related to whether the thirteen second extract included in 'A Wild Day's Night' was a reproduction 'in part' for the purpose of Article 2(d) of the Information Society Directive. Tsitra directed the Copyright Court to *Pelham GmbH v Hütter* (C-476/17) [2019] ECDR 26, in which the CJEU indicated that a sound sample from a phonogram, even if very short, was in principle a reproduction 'in part' for the meaning of Article 2(c) of that Directive. The defendants countered that *Pelham*, which related to phonograph rather than film copyright, involved a two-second sample being taken from a song, whereas this case involved a thirteen-second extract from a film that was 29 minutes long. The defendants argued that there had to be some quantitative threshold below which there was no copying 'in part', otherwise the Information Society Directive would over-protect copyright holders. They argued that a fair balance had to be struck between the interests of copyright holders, on the one hand, and the interests of the users (including freedom of the arts) on the other. They argued that the approach in *Pelham* (in which there was no reproduction in part if a sound sample was included in the second work 'in a modified form unrecognisable to the ear') was not exhaustive of the circumstances in which that balance would result in the conclusion that there was no copying in part.
26. The second question related to the scope of the right of communication to the public. Tsitra argued that it was unambiguously the case that playing 'A Wild Day's Night' in the exhibition space communicated to the public part of his work, 'Tsitra's Cats', given the former included an extract from his film. He pointed to *FAPL* (Joined Cases C-403/08 & C-429/08) [2012] ECDR 8, where the CJEU indicated that broadcasts and films of football matches were communicated to the public, for the purposes of Article 3 of the Information Society Directive, through the act of turning on a television in a public bar. Tsitra also argued that exhibiting Roar Energy was also an infringement of the communication right, given the broad definition of an 'intervention to give access' seen in cases such as *Phonographic Performance (Ireland) Limited v Ireland* (C-162/10) [2012] ECDR 15. Initially, the judges of the Copyright Court were strongly persuaded by Tsitra's first submission. However, they became less convinced of its application following the submissions of the defendant that *FAPL* concerned the *broadcast* of *live* football matches, such that the viewers at the public bar 'were not present at the place where the communication originates': *FAPL*, para [203]. In contrast, although the judges were initially resistant to the suggestion that an exhibition of a physical artwork can constitute a 'communication to the public', they formed the view that some of Tsitra's arguments in relation to the trajectory of CJEU case law had merit and warranted further guidance from that Court.
27. The final set of questions related to the scope and application of the pastiche defence in Article 40 the Melboprian Copyright Act, as permitted by Article 5(3)(k) of the Information Society Directive. The defendants observed that although the CJEU had not provided any guidance on the meaning of 'pastiche' or the circumstances in which the pastiche exception may be applied, some general indications could be taken from the CJEU's judgment in *Deckmyn v Vandersteen* (C-201/13) [2014] ECDR 21 in relation to parody. The defendants argued that it was consistent with *Deckmyn* for pastiche to be given a broad definition, consistent with the term's everyday use, which covered two distinct types of use: (1) imitating the style of another work or genre; and (2) creating an assemblage (or medley) of a number of pre-existing works. In this regard, the defendants referred to the authority of the Intellectual Property Enterprise Court of England and Wales in *Shazam Productions Ltd v Only Fools The Dining Experience Ltd* [2022] EWHC 1379 (IPEC). They argued that it was not necessary for the work to be noticeably different from the source work or to be an expression of humour or mockery (as is the case for parody). They also identified a number of matters that they said should be relevant to (i) the need to strike a fair balance between the rights of those mentioned in Articles 2 and 3 of the Information Society Directive and the freedom of expression of the user of a protected work (see *Deckmyn*, para [27]) and (ii) the need for application of exceptions in Article 5 to satisfy the limbs of Article 5(5). This included that, when it comes to art, there can be a high degree of copying without any possibility of market substitution or harm to licensing markets. Having heard these submissions, the judges of the Copyright Court formed the view that a reference to the CJEU was essential to determine whether pastiche was an autonomous European concept, and if so, the meaning of the term, the circumstances in which a defence of pastiche would apply, and whether an entity such as the Arty-Zen could rely on the pastiche exception for a work created by an artist. One of the arguments presented by Tsitra was that the Arty-Zen's purpose was not pastiche; it was hosting an exhibition from which it hoped to sell artworks. Even if the artists could be said to have created their works for the purpose of pastiche (which Tsitra disputed), the Arty-Zen clearly had no such purpose.
28. Once the decision to make the copyright-related reference was taken, the other members of the Third Chamber again pressed the question they previously wanted to refer to the CJEU, concerning Article 19 TEU and Article 47 of the Charter: see para [19] above. They also questioned whether it is compatible with Article 267 TFEU for the President of a court, who is not himself a part of the judgment formation for the purposes of a particular decision, to veto a request for a preliminary ruling which the members of the judgment formation consider necessary to resolve the issue pending in front of them. The President was furious at the suggestion and again vetoed the addition of any further questions to the list to be referred to the CJEU. Not long after, Present Rouge went on holiday.

29. In the President's absence, the four remaining judges decided to add their original question concerning Article 19 TEU and Article 47 of the Charter to the reference to the CJEU, as well as the following question:

"Does Article 267 TFEU preclude a national rule permitting the President of a court, who is not himself a part of the judgment formation for the purposes of a particular decision, to veto a request for a preliminary ruling which the members of the judgment formation consider necessary to resolve the issue pending in front of them?"

30. The order for reference is dispatched with the addition of those questions to the CJEU.

Questions

1. Do Article 19 TEU, Article 47 of the Charter or any other provisions of EU law preclude a President of a court appointed in accordance with rules such as those in force in Melborp from sitting in a case in circumstances such as those of the present case?
2. Does Article 267 TFEU preclude a national rule permitting the President of a court, who is not himself a part of the judgment formation for the purposes of a particular decision, to veto a request for a preliminary ruling which the members of the judgment formation consider necessary to resolve the issue pending in front of them?
3. Is there an infringement of the film producer's exclusive right under article 2(d) of the Information Society Directive if a very short extract is taken from a film and used in the creation of another film?
4. Does the concept of a communication to the public in Article 3 of the Directive extend to the situation in which (i) a video is played in a publicly-accessible exhibition space and/or (ii) a sculpture is exhibited in a publicly-accessible exhibition space?
5. Is the concept of 'pastiche' an autonomous concept of EU law? If so, must a pastiche satisfy the following conditions or conform to the following characteristics:
 - imitates the style of another work or comprises an assemblage (medley) of a number of pre-existing works;
 - is an evident recombination, in terms of both (i) the author having the subjective intention to create a pastiche and (ii) the pastiche being perceptible to those viewing or listening to the work; and
 - cannot reasonably be ascribed to the author of the original work.

Must a work satisfy any other conditions or conform to other characteristics in order to be capable of being labelled as a pastiche?

6. What is meant by a 'use for the purpose of ... pastiche' in Article 5(3)(k) of the Directive? Can the pastiche exception extend to acts by a third party with works that were created 'for the purpose of pastiche', if the third party does not itself have an artistic purpose?

NB. Unless otherwise notified prior to the competition, the following order of questions shall apply:

Day 1: Questions 1-2 will be mooted.

Day 2: Questions 3-6 will be mooted.

Final: Judges will announce which questions they wish to be mooted when announcing the finalists (during lunch on Sunday).

Appendix 1: Extracts from Melbop's Act on Copyright and Related Rights

Article 2 Protected works

- (1) The works protected by copyright include, in particular:
 - ...
 - (d) artistic works, including fine art, works of architecture, and applied art;
 - (e) photographic works, including works produced by processes similar to photography;
 - (f) cinematographic works, including works produced by processes similar to cinematography; and
 - ...
- (2) Only works that are original, in the sense of being the author's own intellectual creation, are protected under paragraph (1), above.

Article 16 General

- (1) The author of a work has the exclusive right to do the following acts in Melbop in relation to his or her work:
 - (a) reproduce the work (see Article 17)
 - (b) perform the work in public (see Article 18)
 - (c) communicate the work to the public (see Article 19)
 - ...

Article 17 Right of reproduction

- (1) The author has the exclusive right to copy the work, in whole or part, whether on a temporary or permanent basis, and regardless of by which means of procedure, or in which quantity, they are made.

Article 18 Public performance

- (1) The author has the exclusive right to perform in public a literary, dramatic, choreographic, cinematographic or musical work. This includes performance using an apparatus.

Article 19 Right of communication to the public

- (1) The author has the exclusive right to (1) communicate his or her work to the public. The right of communication to the public includes:
 - (a) making the work available to the public; and
 - (b) broadcasting the work.
- (2) 'Making the work available to the public' means the right to make the work available to the public, either by wire or wireless means, in such a manner that members of the public may access it from a place and at a time individually chosen by them.
- ...
- (4) The communication of a work is deemed public if it is intended for a plurality of members of the public. Anyone who is not connected by a personal relationship with the person exploiting the work or with the other persons to whom the work is made perceivable or made available in non-material form is deemed to be a member of the public.

Article 40 Caricature, parody or pastiche

Once a work has been lawfully made available to the public, there shall be no infringement by a use for the purpose of

caricature, parody or pastiche, observing fair practice.

Article 78 Protections for first fixations of films

- (1) The producer of the first fixation of a film has the exclusive right to do the following acts in Melbop in relation to the whole or part of his or her film:
- (a) reproduce the film;
 - (b) plays the film in public;
 - (c) make the film available to the public; and
 - (d) broadcast the film.

Article 80 Limitations on rights of film producers

Article 78 shall not apply where the acts referred to in that section are carried out for one of the following purposes:

...

- (b) caricature, parody or pastiche, observing fair practice;

...



Central & Eastern European Moot Competition

2024 COMPETITION RULES

Contents

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1. Competition and important dates:

This 29th edition of the CEEMC takes place in Prague. It is co-hosted and co-organised by Charles University and the Prague Municipal Court.

The CEEMC competition began in 1995. Since then, it 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 moot in 2020 event and holding it online in 2021 (both due to the covid-19 pandemic), we were delighted to return to face-to-face mooting in Budapest in 2022, and then in Dubrovnik in 2023. Now Prague awaits us...

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, a team's written or oral pleadings cannot refer to any legal sources other than those contained in the bundle.

IMPORTANT DATES:

Teams must register online at the [CEEMC website](#) or by sending an e-mail to the [organising committee \(organisers@ceemc.co.uk\)](#). They must then pay the competition fees and submit written pleadings. The relevant dates for each step are given below:

Date for registering a competing team: 22nd January 2024

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.

Fee Payment deadline: 11th February 2024 (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](#)

Deadline for submitting written pleadings: 8th April 2024

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. Erasmus students) 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 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. 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.

The CEEMC's official language is English. It is the only language used in each of the stages described below.

STAGE 1: Submitting written pleadings

Each team must prepare written pleadings on the following basis:

- Each team prepares one set of written pleadings (dealing with *all* of the referred questions) 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.
- 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 on Day 1, 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 will act for the applicant or respondent) and the identity of your opponents in the mooting timetable. This will be provided at the opening ceremony on the Friday preceding Day 1 of the oral pleadings).

During Day 1 of the 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 that will be mooted on that day)
Pleadings for respondent:	Max 20 minutes (for dealing with all questions that will 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 exceeded, 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
<i>TOTAL</i>	<i>100</i>

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

Eight teams are selected from the Day 1 of oral pleadings to progress to Day 2 (Sunday). During Day 2, the qualifying teams moot different questions to those mooted on Day 1. Details of which questions will be mooted on Day 1 and Day 2 are indicated at the end of the moot question.

After Day 1 has finished, the CEEMC judges may decide that they also wish one/more of the Day 1 questions to be mooted again during Day 2. If this is the case, information will be provided to the 8 teams which progress to Day 2.

Each of the 8 teams competing in Day 2 will again have two moots (mooting once as applicant, once as respondent). However, a key difference from Day 1 is that, on Day 2, *each and every team member must speak (plead) during BOTH of the team's two moots* (i.e. if a team has 4 members, all 4 must speak when the team acts on behalf of the applicant and all 4 must speak when the team acts on behalf of the respondent).

At lunchtime on Day 2, after each of the 8 remaining teams has mooted twice, the judges will announce the two teams which will compete in the final.

STAGE 4: Final (2 selected teams only)

At lunchtime on Day 2 (Sunday), two teams are chosen (from the 8 teams which mooted 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 during the final. These may be a mixture of any of the questions mooted 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 a sub-part of one question, or saying very little during the 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)

No time extensions will be granted in the final.

Post-final: awards ceremony

Following the CEEMC final, the awards ceremony will be held. During this ceremony, each team member will receive a participation certificate 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 CEEMC fee for 2024 is **EUR 1,500** 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 **11 February 2024**.

** 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 €40 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 **11 February 2024**.

*** 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 your university prefers to pay by credit card, please contact us at: 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 receive all payments in full (net) in EUR currency.

6. The organiser: *Juris Angliae Scientia*

The CEEMC is organised by the British Law Centres of the English charity *Juris Angliae Scientia* (JAS). In addition to the CEEMC, JAS also organises a [Diploma in English Law & Legal Skills](#) (“DELLS”), which can be studied at a range of [locations](#) or 100% online. We also organise a [Commercial Law Diploma](#) (“CLD”) as a follow-on from DELLS.

If you think your University may be interested in British Law Centre visiting to teach our courses, please contact us at: s.terrett@britishlawcentre.co.uk.

For details of how to apply for the DELLS course, which begins each academic year in October, please visit: <https://www.britishlawcentre.co.uk/apply/>



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 26th April 2024

16.00-18.00 Registration of teams
18.00 Welcome Reception (inc. informal meeting with judges)

SATURDAY 27th April 2024

09.00 Official opening words by CEEMC Organisers and Judges

Round 1 of Competition

09.30 - 11.00 Group 1
11.15 - 12.45 Group 2

13.00 - 14.00 LUNCH

14.15 - 15.45 Group 3
16.00 - 17.30 Group 4

20.00 DINNER (Announcement of semi-finalists)

SUNDAY 28th April 2024

Round 2 of Competition

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

13.30 LUNCH BREAK (Announcement of finalists)

Round 3 of Competition

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

20.00 Celebration dinner, party and singing competition.

MONDAY 29th April 2024

Departure of teams.

***PART B. EU LEGISLATIVE
MATERIALS***

PREAMBLE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(List of plenipotentiaries not reproduced)

TITLE I: COMMON PROVISIONS

Article 1

(ex Article 1 TEU)

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

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

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

Article 2

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

Article 3

(ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.
3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.
It shall promote economic, social and territorial cohesion, and solidarity among Member States.
It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.
4. The Union shall establish an economic and monetary union whose currency is the euro.
5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.
6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.
2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State,

maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

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

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

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

Article 5

(ex Article 5 TEC)

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

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

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

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

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

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

Article 6

(ex Article 6 TEU)

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

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

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

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

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

Article 7

(ex Article 7 TEU)

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the

European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

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

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

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

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

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

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

Article 8

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

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

TITLE II: PROVISIONS ON DEMOCRATIC PRINCIPLES

Article 9

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

Article 10

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

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

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

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

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

Article 11

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.
4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

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

Article 12

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

- (a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;
- (b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;
- (c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty;
- (d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;
- (e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;
- (f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.

TITLE III: PROVISIONS ON THE INSTITUTIONS

Article 13

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

The Union's institutions shall be:

- the European Parliament,
- the European Council,
- the Council,
- the European Commission (hereinafter referred to as 'the Commission'),
- the Court of Justice of the European Union,
- the European Central Bank,
- the Court of Auditors.

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

3. The provisions relating to the European Central Bank and the Court of Auditors and detailed provisions on the other institutions are set out in the Treaty on the Functioning of the European Union.
4. The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity.

Article 14

1. The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.
2. The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.

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

3. The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.
4. The European Parliament shall elect its President and its officers from among its members.

Article 15

1. The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.
2. The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work.
3. The European Council shall meet twice every six months, convened by its President. When the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission. When the situation so requires, the President shall convene a special meeting of the European Council.
4. Except where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus.
5. The European Council shall elect its President, by a qualified majority, for a term of two and a half years, renewable once. In the event of an impediment or serious misconduct, the European Council can end the President's term of office in accordance with the same procedure.
6. The President of the European Council:
 - (a) shall chair it and drive forward its work;
 - (b) shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council;
 - (c) shall endeavour to facilitate cohesion and consensus within the European Council;
 - (d) shall present a report to the European Parliament after each of the meetings of the European Council.

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

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

Article 16

1. The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.
2. The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.
3. The Council shall act by a qualified majority except where the Treaties provide otherwise.
4. As from 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union.

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

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

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

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

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

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

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

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

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

Article 17

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

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

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

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

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

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

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

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

6. The President of the Commission shall:

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

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

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

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

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

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

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

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

Article 18

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

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

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

4. The High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union's external action. He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action. In exercising

these responsibilities within the Commission, and only for these responsibilities, the High Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3.

Article 19

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

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

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

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

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

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

- (a) rule on actions brought by a Member State, an institution or a natural or legal person;
 - (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
 - (c) rule in other cases provided for in the Treaties.
-

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

PREAMBLE

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

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

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

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

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

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

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

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

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

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

(List of plenipotentiaries not reproduced)

**PART ONE
PRINCIPLES**

Article 1

1. This Treaty organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences.
2. This Treaty and the Treaty on European Union constitute the Treaties on which the Union is founded. These two Treaties, which have the same legal value, shall be referred to as ‘the Treaties’.

**TITLE I
CATEGORIES AND AREAS OF UNION COMPETENCE**

Article 2

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.
2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.
3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.
4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.
5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

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

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

Article 3

1. The Union shall have exclusive competence in the following areas:
 - (a) customs union;
 - (b) the establishing of the competition rules necessary for the functioning of the internal market;
 - (c) monetary policy for the Member States whose currency is the euro;
 - (d) the conservation of marine biological resources under the common fisheries policy;
 - (e) common commercial policy.
2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Article 4

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.
2. Shared competence between the Union and the Member States applies in the following principal areas:
 - (a) internal market;
 - (b) social policy, for the aspects defined in this Treaty;

- (c) economic, social and territorial cohesion;
- (d) agriculture and fisheries, excluding the conservation of marine biological resources;
- (e) environment;
- (f) consumer protection;
- (g) transport;
- (h) trans-European networks;
- (i) energy;
- (j) area of freedom, security and justice;
- (k) common safety concerns in public health matters, for the aspects defined in this Treaty.

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

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

Article 5

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

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

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

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

Article 6

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

- (a) protection and improvement of human health;
- (b) industry;
- (c) culture;
- (d) tourism;
- (e) education, vocational training, youth and sport;

- (f) civil protection;
- (g) administrative cooperation.

TITLE II

PROVISIONS HAVING GENERAL APPLICATION

Article 7

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

Article 8

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

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

Article 9

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

Article 10

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

Article 11

(ex Article 6 TEC)

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

Article 12

(ex Article 153(2) TEC)

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

Article 13

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

Article 14

(ex Article 16 TEC)

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

Article 15

(ex Article 255 TEC)

1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.
2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.
3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

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

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

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

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

Article 16

(ex Article 286 TEC)

1. Everyone has the right to the protection of personal data concerning them.
2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

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

Article 17

1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
2. The Union equally respects the status under national law of philosophical and non-confessional organisations.
3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.

PART TWO

NON-DISCRIMINATION AND CITIZENSHIP OF THE UNION

Article 18

(ex Article 12 TEC)

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

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

Article 19

(ex Article 13 TEC)

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

Article 20

(ex Article 17 TEC)

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
 - (a) the right to move and reside freely within the territory of the Member States;

- (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
- (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
- (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

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

Article 21

(ex Article 18 TEC)

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.
2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.
3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

Article 22

(ex Article 19 TEC)

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.
2. Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

Article 23

(ex Article 20 TEC)

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

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

Article 24

(ex Article 21 TEC)

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

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

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

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

Article 25

(ex Article 22 TEC)

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

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

PART THREE

UNION POLICIES AND INTERNAL ACTIONS

TITLE I

THE INTERNAL MARKET

Article 26

(ex Article 14 TEC)

1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.
2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.
3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

Article 27

(ex Article 15 TEC)

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

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

TITLE V: AREA OF FREEDOM, SECURITY AND JUSTICE

CHAPTER 1

GENERAL PROVISIONS

Article 67

(ex Article 61 TEC and ex Article 29 TEU)

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.
2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.
3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.
4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

Article 68

The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice.

Article 69

National Parliaments ensure that the proposals and legislative initiatives submitted under Chapters 4 and 5 comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality.

Article 70

Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.

Article 71

(ex Article 36 TEU)

A standing committee shall be set up within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union. Without prejudice to Article 240, it shall facilitate coordination of the action of Member States' competent authorities. Representatives of the Union bodies, offices and agencies concerned may be involved in the proceedings of this committee. The European Parliament and national Parliaments shall be kept informed of the proceedings.

Article 72

(ex Article 64(1) TEC and ex Article 33 TEU)

This Title shall not affect 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 73

It shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security.

Article 74

(ex Article 66 TEC)

The Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission. It shall act on a Commission proposal, subject to Article 76, and after consulting the European Parliament.

Article 75

(ex Article 60 TEC)

Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph.

The acts referred to in this Article shall include necessary provisions on legal safeguards.

Article 76

The acts referred to in Chapters 4 and 5, together with the measures referred to in Article 74 which ensure administrative cooperation in the areas covered by these Chapters, shall be adopted:

- (a) on a proposal from the Commission, or
- (b) on the initiative of a quarter of the Member States.

CHAPTER 3

APPROXIMATION OF LAWS

Article 114

(ex Article 95 TEC)

1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

4. If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

9. By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure.

Article 115

(ex Article 94 TEC)

Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.

Article 116

(ex Article 96 TEC)

Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the internal market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.

If such consultation does not result in an agreement eliminating the distortion in question, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall issue the necessary directives. Any other appropriate measures provided for in the Treaties may be adopted.

Article 117

(ex Article 97 TEC)

1. Where there is a reason to fear that the adoption or amendment of a provision laid down by law, regulation or administrative action may cause distortion within the meaning of Article 116, a Member State desiring to proceed therewith shall consult the Commission. After consulting the Member States, the Commission shall recommend to the States concerned such measures as may be appropriate to avoid the distortion in question.

2. If a State desiring to introduce or amend its own provisions does not comply with the recommendation addressed to it by the Commission, other Member States shall not be required, pursuant to Article 116, to amend their own provisions in order to eliminate such distortion. If the Member State which has ignored the recommendation of the Commission causes distortion detrimental only to itself, the provisions of Article 116 shall not apply.

Article 118

In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.

The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament.

TITLE XIII

CULTURE

Article 167

(ex Article 151 TEC)

1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

- improvement of the knowledge and dissemination of the culture and history of the European peoples,
- conservation and safeguarding of cultural heritage of European significance,
- non-commercial cultural exchanges,
- artistic and literary creation, including in the audiovisual sector

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

4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.

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

- the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,
- the Council, on a proposal from the Commission, shall adopt recommendations.

[...]

PART FIVE

THE UNION'S EXTERNAL ACTION

TITLE I

GENERAL PROVISIONS ON THE UNION'S EXTERNAL ACTION

Article 205

The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union.

TITLE II

COMMON COMMERCIAL POLICY

Article 206

(ex Article 131 TEC)

By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.

Article 207

(ex Article 133 TEC)

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.

The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.

For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

The Council shall also act unanimously for the negotiation and conclusion of agreements:

(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;

(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.

6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

PART SIX
INSTITUTIONAL AND FINANCIAL PROVISIONS

TITLE I
INSTITUTIONAL PROVISIONS

CHAPTER 1
THE INSTITUTIONS

[...]

SECTION 5
THE COURT OF JUSTICE OF THE EUROPEAN UNION

Article 251

(ex Article 221 TEC)

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

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

Article 252

(ex Article 222 TEC)

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

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

Article 253

(ex Article 223 TEC)

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

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

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

Retiring Judges and Advocates-General may be reappointed.

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

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

Article 254

(ex Article 224 TEC)

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

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

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

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

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

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

Article 255

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

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

Article 256

(ex Article 225 TEC)

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

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

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

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

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

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

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

Article 257

(ex Article 225a TEC)

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The European Parliament and the Council shall act by means of regulations either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission.

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

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

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

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

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

Article 258

(ex Article 226 TEC)

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

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

Article 259

(ex Article 227 TEC)

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

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

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

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

Article 260

(ex Article 228 TEC)

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

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

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

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a

legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

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

Article 261

(ex Article 229 TEC)

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

Article 262

(ex Article 229a TEC)

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

Article 263

(ex Article 230 TEC)

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.

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

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

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

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

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

Article 264

(ex Article 231 TEC)

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

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

Article 265

(ex Article 232 TEC)

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

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

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

Article 266

(ex Article 233 TEC)

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

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

Article 267

(ex Article 234 TEC)

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

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

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

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

Article 268

(ex Article 235 TEC)

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

Article 269

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

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

Article 270

(ex Article 236 TEC)

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

Article 271

(ex Article 237 TEC)

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

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

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

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

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

Article 272

(ex Article 238 TEC)

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

Article 273

(ex Article 239 TEC)

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

Article 274

(ex Article 240 TEC)

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

Article 275

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

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

Article 276

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

Article 277

(ex Article 241 TEC)

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

Article 278

(ex Article 242 TEC)

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

Article 279

(ex Article 243 TEC)

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

Article 280

(ex Article 244 TEC)

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

Article 281

(ex Article 245 TEC)

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

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

[...]

CHAPTER 2

LEGAL ACTS OF THE UNION, ADOPTION PROCEDURES AND OTHER PROVISIONS

SECTION 1

THE LEGAL ACTS OF THE UNION

Article 288

(ex Article 249 TEC)

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

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

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

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

Recommendations and opinions shall have no binding force.

Article 289

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

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

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

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

Article 290

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

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

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

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

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

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

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

Article 291

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

2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.
3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.
4. The word 'implementing' shall be inserted in the title of implementing acts.

Article 292

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

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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

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

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

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

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

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

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

TITLE I: DIGNITY

Article 1

Human dignity

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

Article 2

Right to life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

Article 3

Right to the integrity of the person

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

- (a) the free and informed consent of the person concerned, according to the procedures laid down by law;
- (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;
- (c) the prohibition on making the human body and its parts as such a source of financial gain;
- (d) the prohibition of the reproductive cloning of human beings.

Article 4

Prohibition of torture and inhuman or degrading treatment or punishment

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

Article 5

Prohibition of slavery and forced labour

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

TITLE II: FREEDOMS

Article 6

Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7

Respect for private and family life

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

Article 8

Protection of personal data

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

Article 9

Right to marry and right to found a family

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

Article 10

Freedom of thought, conscience and religion

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

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

Article 11

Freedom of expression and information

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

Article 12

Freedom of assembly and of association

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

Article 13

Freedom of the arts and sciences

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

Article 14

Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Article 15

Freedom to choose an occupation and right to engage in work

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

Article 16

Freedom to conduct a business

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

Article 17

Right to property

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

2. Intellectual property shall be protected.

Article 18

Right to asylum

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

Article 19

Protection in the event of removal, expulsion or extradition

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

TITLE III: EQUALITY

Article 20

Equality before the law

Everyone is equal before the law.

Article 21

Non-discrimination

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

Article 22

Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23

Equality between women and men

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

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

Article 24

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

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

Article 25

The rights of the elderly

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

Article 26

Integration of persons with disabilities

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

TITLE IV: SOLIDARITY

Article 27

Workers' right to information and consultation within the undertaking

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

Article 28

Right of collective bargaining and action

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

Article 29

Right of access to placement services

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

Article 30

Protection in the event of unjustified dismissal

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

Article 31

Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

Article 32

Prohibition of child labour and protection of young people at work

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

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

Article 33

Family and professional life

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

Article 34

Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.
3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

Article 35

Health care

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

Article 36

Access to services of general economic interest

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

Article 37

Environmental protection

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

Article 38

Consumer protection

Union policies shall ensure a high level of consumer protection.

TITLE V: CITIZENS' RIGHTS

Article 39

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

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

Article 40

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

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

Article 41

Right to good administration

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

Article 42

Right of access to documents

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

Article 43

European Ombudsman

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

Article 44

Right to petition

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

Article 45

Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

Article 46

Diplomatic and consular protection

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

TITLE VI: JUSTICE

Article 47

Right to an effective remedy and to a fair trial

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

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

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

Article 48

Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 49

Principles of legality and proportionality of criminal offences and penalties

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

Article 50

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

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

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

Article 51

Field of application

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

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

Article 52

Scope and interpretation of rights and principles

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

Article 53

Level of protection

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

Article 54

Prohibition of abuse of rights

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

TITLE III
REFERENCES FOR A PRELIMINARY RULING

Chapter 1
GENERAL PROVISIONS

Article 93

Scope

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

- (a) in the cases covered by Article 23 of the Statute,
- (b) as regards references for interpretation which may be provided for by agreements to which the European Union or the Member States are parties.

Article 94

Content of the request for a preliminary ruling

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

- (a) a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;
- (b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;
- (c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

Article 95

Anonymity

1. Where anonymity has been granted by the referring court or tribunal, the Court shall respect that anonymity in the proceedings pending before it.
2. At the request of the referring court or tribunal, at the duly reasoned request of a party to the main proceedings or of its own motion, the Court may also, if it considers it necessary, render anonymous one or more persons or entities concerned by the case.

Article 96

Participation in preliminary ruling proceedings

1. Pursuant to Article 23 of the Statute, the following shall be authorised to submit observations to the Court:
 - (a) the parties to the main proceedings,
 - (b) the Member States,
 - (c) the European Commission,
 - (d) the institution which adopted the act the validity or interpretation of which is in dispute,

- (e) the States, other than the Member States, which are parties to the EEA Agreement, and also the EFTA Surveillance Authority, where a question concerning one of the fields of application of that Agreement is referred to the Court for a preliminary ruling,
- (f) non-Member States which are parties to an agreement relating to a specific subject-matter, concluded with the Council, where the agreement so provides and where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of that agreement.
2. Non-participation in the written part of the procedure does not preclude participation in the oral part of the procedure.

Article 97

Parties to the main proceedings

1. The parties to the main proceedings are those who are determined as such by the referring court or tribunal in accordance with national rules of procedure.
2. Where the referring court or tribunal informs the Court that a new party has been admitted to the main proceedings, when the proceedings before the Court are already pending, that party must accept the case as he finds it at the time when the Court was so informed. That party shall receive a copy of every procedural document already served on the interested persons referred to in Article 23 of the Statute.
3. As regards the representation and attendance of the parties to the main proceedings, the Court shall take account of the rules of procedure in force before the court or tribunal which made the reference. In the event of any doubt as to whether a person may under national law represent a party to the main proceedings, the Court may obtain information from the referring court or tribunal on the rules of procedure applicable.

TITLE III
PROCEDURE BEFORE THE COURT OF JUSTICE

Article 19

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

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

Other parties must be represented by a lawyer.

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

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

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

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

Article 20

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

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

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

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

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

DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

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 Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives.

(2) The European Council, meeting at Corfu on 24 and 25 June 1994, stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe. This requires, inter alia, the existence of an internal market for new products and services. Important Community legislation to ensure such a regulatory framework is already in place or its adoption is well under way. Copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content.

(3) The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

(5) Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.

(6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.

(7) The Community legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the functioning of the internal market need not be removed or prevented.

(8) The various social, societal and cultural implications of the information society require that account be taken of the specific features of the content of products and services.

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

(12) Adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action.

(13) A common search for, and consistent application at European level of, technical measures to protect works and other subject-matter and to provide the necessary information on rights are essential insofar as the ultimate aim of these measures is to give effect to the principles and guarantees laid down in law.

(14) This Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.

(15) The Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two new Treaties, the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty", dealing respectively with the protection of authors and the protection of performers and phonogram producers. Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called "digital agenda", and improve the means to fight piracy world-wide. The Community and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of the Treaties by the Community and the Member States is under way. This Directive also serves to implement a number of the new international obligations.

(16) Liability for activities in the network environment concerns not only copyright and related rights but also other areas, such as defamation, misleading advertising, or infringement of trademarks, and is addressed horizontally in 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), which clarifies and harmonises various legal issues relating to information society services including electronic commerce. This Directive should be implemented within a timescale similar to that for the implementation of the Directive on electronic commerce, since that Directive provides a harmonised framework of principles and provisions relevant inter alia to important parts of this Directive. This Directive is without prejudice to provisions relating to liability in that Directive.

(17) It is necessary, especially in the light of the requirements arising out of the digital environment, to ensure that collecting societies achieve a higher level of rationalisation and transparency with regard to compliance with competition rules.

(18) This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences.

(19) The moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.

(20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives 91/250/EEC(5), 92/100/EEC(6), 93/83/EEC(7), 93/98/EEC(8) and 96/9/EC(9), and it develops those principles and rules and places them in the context of the information society. The

provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

(21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the *acquis communautaire*. A broad definition of these acts is needed to ensure legal certainty within the internal market.

(22) The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.

(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

(24) The right to make available to the public subject-matter referred to in Article 3(2) should be understood as covering all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.

(25) The legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level. It should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.

(26) With regard to the making available in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned.

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.

(28) Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. This right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community. Rental and lending rights for authors have been established in Directive 92/100/EEC. The distribution right provided for in this Directive is without prejudice to the provisions relating to the rental and lending rights contained in Chapter I of that Directive.

(29) The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.

(30) The rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights.

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.

(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at

the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.

(33) The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.

(34) Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings.

(35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.

(36) The Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation.

(37) Existing national schemes on reprography, where they exist, do not create major barriers to the internal market. Member States should be allowed to provide for an exception or limitation in respect of reprography.

(38) Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders. Although differences between those remuneration schemes affect the functioning of the internal market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the information society. Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.

(39) When applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.

(40) Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter. This Directive should be without prejudice to the Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of Directive 92/100/EEC. Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.

(41) When applying the exception or limitation in respect of ephemeral recordings made by broadcasting organisations it is understood that a broadcaster's own facilities include those of a person acting on behalf of and under the responsibility of the broadcasting organisation.

(42) When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.

(43) It is in any case important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats.

(44) When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.

(45) The exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law.

(46) Recourse to mediation could help users and rightholders to settle disputes. The Commission, in cooperation with the Member States within the Contact Committee, should undertake a study to consider new legal ways of settling disputes concerning copyright and related rights.

(47) Technological development will allow rightholders to make use of technological measures designed to prevent or restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the sui generis right in databases. The danger, however, exists that illegal activities might be carried out in order to enable or facilitate the circumvention of the technical protection provided by these measures. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against circumvention of effective technological measures and against provision of devices and products or services to this effect.

(48) Such legal protection should be provided in respect of technological measures that effectively restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the sui generis right in databases without, however, preventing the normal operation of electronic equipment and its technological development. Such legal protection implies no obligation to design devices, products, components or services to correspond to technological measures, so long as such device, product, component or service does not otherwise fall under the prohibition of Article 6. Such legal protection should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection. In particular, this protection should not hinder research into cryptography.

(49) The legal protection of technological measures is without prejudice to the application of any national provisions which may prohibit the private possession of devices, products or components for the circumvention of technological measures.

(50) Such a harmonised legal protection does not affect the specific provisions on protection provided for by Directive 91/250/EEC. In particular, it should not apply to the protection of technological measures used in connection with computer programs, which is exclusively addressed in that Directive. It should neither inhibit nor prevent the development or use of any means of circumventing a technological measure that is necessary to enable acts to be undertaken in accordance with the terms of Article 5(3) or Article 6 of Directive 91/250/EEC. Articles 5 and 6 of that Directive exclusively determine exceptions to the exclusive rights applicable to computer programs.

(51) The legal protection of technological measures applies without prejudice to public policy, as reflected in Article 5, or public security. Member States should promote voluntary measures taken by rightholders, including the conclusion and implementation of agreements between rightholders and other parties concerned, to accommodate achieving the objectives of certain exceptions or limitations provided for in national law in accordance with this Directive. In the absence of such voluntary measures or agreements within a reasonable period of time, Member States should take appropriate measures to ensure that rightholders provide beneficiaries of such exceptions or limitations with appropriate means of benefiting from them, by modifying an implemented technological measure or by other means. However, in order to prevent abuse of such measures taken by rightholders, including within the framework of agreements, or taken by a Member State, any technological measures applied in implementation of such measures should enjoy legal protection.

(52) When implementing an exception or limitation for private copying in accordance with Article 5(2)(b), Member States should likewise promote the use of voluntary measures to accommodate achieving the objectives of such exception or limitation. If, within a reasonable period of time, no such voluntary measures to make reproduction for private use possible have been taken, Member States may take measures to enable beneficiaries of the exception or limitation concerned to benefit from it. Voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, as well as measures taken by Member States, do not prevent rightholders from using technological measures which are consistent with the exceptions or limitations on private copying in national law in accordance with Article 5(2)(b), taking account of the condition of fair compensation under that provision and the possible differentiation between various conditions of use in accordance with Article 5(5), such as controlling the number of reproductions. In order to prevent abuse of such measures, any technological measures applied in their implementation should enjoy legal protection.

(53) The protection of technological measures should ensure a secure environment for the provision of interactive on-demand services, in such a way that members of the public may access works or other subject-matter from a place and at a time individually chosen by them. Where such services are governed by contractual arrangements, the first and second subparagraphs of Article 6(4) should not apply. Non-interactive forms of online use should remain subject to those provisions.

(54) Important progress has been made in the international standardisation of technical systems of identification of works and protected subject-matter in digital format. In an increasingly networked environment, differences between technological measures could lead to an incompatibility of systems within the Community. Compatibility and interoperability of the different systems should be encouraged. It would be highly desirable to encourage the development of global systems.

(55) Technological development will facilitate the distribution of works, notably on networks, and this will entail the need for rightholders to identify better the work or other subject-matter, the author or any other rightholder, and to provide information about the terms and conditions of use of the work or other subject-matter in order to render easier the management of rights attached to them. Rightholders should be encouraged to use markings indicating, in addition to the information referred to above, inter alia their authorisation when putting works or other subject-matter on networks.

(56) There is, however, the danger that illegal activities might be carried out in order to remove or alter the electronic copyright-management information attached to it, or otherwise to distribute, import for distribution, broadcast, communicate to the public or make available to the public works or other protected subject-matter from which such information has been removed without authority. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against any of these activities.

(57) Any such rights-management information systems referred to above may, depending on their design, at the same time process personal data about the consumption patterns of protected subject-matter by individuals and allow for tracing of on-line behaviour. These technical means, in their technical functions, should incorporate privacy safeguards in accordance with 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 the free movement of such data⁽¹⁰⁾.

(58) Member States should provide for effective sanctions and remedies for infringements of rights and obligations as set out in this Directive. They should take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for should be effective, proportionate and dissuasive and should include the possibility of seeking damages and/or injunctive relief and, where appropriate, of applying for seizure of infringing material.

(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.

(60) The protection provided under this Directive should be without prejudice to national or Community legal provisions in other areas, such as industrial property, data protection, conditional access, access to public documents, and the rule of media exploitation chronology, which may affect the protection of copyright or related rights.

(61) In order to comply with the WIPO Performances and Phonograms Treaty, Directives 92/100/EEC and 93/98/EEC should be amended,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I: OBJECTIVE AND SCOPE

Article 1: Scope

1. This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.
2. Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect existing Community provisions relating to:
 - (a) the legal protection of computer programs;
 - (b) rental right, lending right and certain rights related to copyright in the field of intellectual property;
 - (c) copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission;
 - (d) the term of protection of copyright and certain related rights;
 - (e) the legal protection of databases.

CHAPTER II: RIGHTS AND EXCEPTIONS

Article 2: Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

Article 3: Right of communication to the public of works and right of making available to the public other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.
2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
 - (a) for performers, of fixations of their performances;
 - (b) for phonogram producers, of their phonograms;
 - (c) for the producers of the first fixations of films, of the original and copies of their films;
 - (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.
3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

Article 4: Distribution right

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.
2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.

Article 5: Exceptions and limitations

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary, or
- (b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

- (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;
- (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;
- (c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;
- (d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;
- (e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

- (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;
- (b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;
- (c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;
- (d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

- (e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;
 - (f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;
 - (g) use during religious celebrations or official celebrations organised by a public authority;
 - (h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;
 - (i) incidental inclusion of a work or other subject-matter in other material;
 - (j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;
 - (k) use for the purpose of caricature, parody or pastiche;
 - (l) use in connection with the demonstration or repair of equipment;
 - (m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;
 - (n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;
 - (o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.
4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.
5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

CHAPTER III: PROTECTION OF TECHNOLOGICAL MEASURES AND RIGHTS-MANAGEMENT INFORMATION

Article 6: Obligations as to technological measures

1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.
2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:
 - (a) are promoted, advertised or marketed for the purpose of circumvention of, or
 - (b) have only a limited commercially significant purpose or use other than to circumvent, or
 - (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,
 any effective technological measures.
3. For the purposes of this Directive, the expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is

controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

When this Article is applied in the context of Directives 92/100/EEC and 96/9/EC, this paragraph shall apply *mutatis mutandis*.

Article 7: Obligations concerning rights-management information

1. Member States shall provide for adequate legal protection against any person knowingly performing without authority any of the following acts:

(a) the removal or alteration of any electronic rights-management information;

(b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority,

if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

2. For the purposes of this Directive, the expression "rights-management information" means any information provided by rightholders which identifies the work or other subject-matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

The first subparagraph shall apply when any of these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subject-matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

CHAPTER IV: COMMON PROVISIONS

Article 8: Sanctions and remedies

1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an

injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

Article 9: Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract.

Article 10: Application over time

1. The provisions of this Directive shall apply in respect of all works and other subject-matter referred to in this Directive which are, on 22 December 2002, protected by the Member States' legislation in the field of copyright and related rights, or which meet the criteria for protection under the provisions of this Directive or the provisions referred to in Article 1(2).

2. This Directive shall apply without prejudice to any acts concluded and rights acquired before 22 December 2002.

Article 11: Technical adaptations

1. Directive 92/100/EEC is hereby amended as follows:

(a) Article 7 shall be deleted;

(b) Article 10(3) shall be replaced by the following: "3. The limitations shall only be applied in certain special cases which do not conflict with a normal exploitation of the subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."

2. Article 3(2) of Directive 93/98/EEC shall be replaced by the following: "2. The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram has been lawfully published within this period, the said rights shall expire 50 years from the date of the first lawful publication. If no lawful publication has taken place within the period mentioned in the first sentence, and if the phonogram has been lawfully communicated to the public within this period, the said rights shall expire 50 years from the date of the first lawful communication to the public.

However, where through the expiry of the term of protection granted pursuant to this paragraph in its version before amendment by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society⁽¹¹⁾ the rights of producers of phonograms are no longer protected on 22 December 2002, this paragraph shall not have the effect of protecting those rights anew."

Article 12: Final provisions

1. Not later than 22 December 2004 and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, inter alia, on the basis of specific information supplied by the Member States, it shall examine in particular the application of Articles 5, 6 and 8 in the light of the development of the digital market. In the case of Article 6, it shall examine in particular whether that Article confers a sufficient level of protection and whether acts which are permitted by law are being adversely affected by the use of effective technological measures. Where necessary, in particular to ensure the functioning of the internal market pursuant to Article 14 of the Treaty, it shall submit proposals for amendments to this Directive.

2. Protection of rights related to copyright under this Directive shall leave intact and shall in no way affect the protection of copyright.

3. A contact committee is hereby established. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and shall meet either on the initiative of the chairman or at the request of the delegation of a Member State.

4. The tasks of the committee shall be as follows:

(a) to examine the impact of this Directive on the functioning of the internal market, and to highlight any difficulties;

(b) to organise consultations on all questions deriving from the application of this Directive;

(c) to facilitate the exchange of information on relevant developments in legislation and case-law, as well as relevant economic, social, cultural and technological developments;

(d) to act as a forum for the assessment of the digital market in works and other items, including private copying and the use of technological measures.

Article 13: Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 22 December 2002. They shall forthwith inform the Commission thereof.

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

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

Article 14: Entry into force

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

Article 15: Addressees

This Directive is addressed to the Member States.

Done at Brussels, 22 May 2001.

For the European Parliament

The President

N. Fontaine

For the Council

The President

M. Winberg

(1) OJ C 108, 7.4.1998, p. 6 and

OJ C 180, 25.6.1999, p. 6.

(2) OJ C 407, 28.12.1998, p. 30.

(3) Opinion of the European Parliament of 10 February 1999 (OJ C 150, 28.5.1999, p. 171), Council Common Position of 28 September 2000 (OJ C 344, 1.12.2000, p. 1) and Decision of the European Parliament of 14 February 2001 (not yet published in the Official Journal). Council Decision of 9 April 2001.

(4) OJ L 178, 17.7.2000, p. 1.

(5) Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ L 122, 17.5.1991, p. 42). Directive as amended by Directive 93/98/EEC.

(6) Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 346, 27.11.1992, p. 61). Directive as amended by Directive 93/98/EEC.

(7) Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ L 248, 6.10.1993, p. 15).

(8) Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ L 290, 24.11.1993, p. 9).

(9) Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20).

(10) OJ L 281, 23.11.1995, p. 31.

(11) OJ L 167, 22.6.2001, p. 10.

**DIRECTIVE 2006/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006
on rental right and lending right and on certain rights related to copyright in the field of intellectual
property (codified version)**

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,

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

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽¹⁾,

Whereas:

- (1) Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property ⁽²⁾ has been substantially amended several times ⁽³⁾. In the interests of clarity and rationality the said Directive should be codified.
- (2) Rental and lending of copyright works and the subject matter of related rights protection is playing an increasingly important role in particular for authors, performers and producers of phonograms and films. Piracy is becoming an increasing threat.
- (3) The adequate protection of copyright works and subject matter of related rights protection by rental and lending rights as well as the protection of the subject matter of related rights protection by the fixation right, distribution right, right to broadcast and communication to the public can accordingly be considered as being of fundamental importance for the economic and cultural development of the Community.
- (4) Copyright and related rights protection must adapt to new economic developments such as new forms of exploitation.
- (5) The creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky. The possibility of securing that income and recouping that investment can be effectively guaranteed only through adequate legal protection of the rightholders concerned.
- (6) These creative, artistic and entrepreneurial activities are, to a large extent, activities of self-employed persons. The pursuit of such activities should be made easier by providing a harmonised legal protection within the Community. To the extent that these activities principally constitute services, their provision should equally be facilitated by a harmonised legal framework in the Community.
- (7) The legislation of the Member States should be approximated in such a way as not to conflict with the international conventions on which the copyright and related rights laws of many Member States are based.
- (8) The legal framework of the Community on the rental right and lending right and on certain rights related to copyright can be limited to establishing that Member States provide rights with respect to rental and lending for certain groups of rightholders and further to establishing the rights of fixation, distribution, broadcasting and communication to the public for certain groups of rightholders in the field of related rights protection.
- (9) It is necessary to define the concepts of rental and lending for the purposes of this Directive.
- (10) It is desirable, with a view to clarity, to exclude from rental and lending within the meaning of this Directive certain forms of making available, as for instance making available phonograms or films for the purpose of public performance or broadcasting, making available for the purpose of exhibition, or making available for on-the-spot reference use. Lending within the meaning of this Directive should not include making available between establishments which are accessible to the public.
- (11) Where lending by an establishment accessible to the public gives rise to a payment the amount of which does not go beyond what is necessary to cover the operating costs of the establishment, there is no direct or indirect economic or commercial advantage within the meaning of this Directive.
- (12) It is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must remain able to entrust the administration of this right to collecting societies representing them.
- (13) The equitable remuneration may be paid on the basis of one or several payments at any time on or after the conclusion of the contract. It should take account of the importance of the contribution of the authors and performers concerned to the phonogram or film.

- (14) It is also necessary to protect the rights at least of authors as regards public lending by providing for specific arrangements. However, any measures taken by way of derogation from the exclusive public lending right should comply in particular with Article 12 of the Treaty.
- (15) The provisions laid down in this Directive as to rights related to copyright should not prevent Member States from extending to those exclusive rights the presumption provided for in this Directive with regard to contracts concerning film production concluded individually or collectively by performers with a film producer. Furthermore, those provisions should not prevent Member States from providing for a rebuttable presumption of the authorisation of exploitation in respect of the exclusive rights of performers provided for in the relevant provisions of this Directive, in so far as such presumption is compatible with the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (hereinafter referred to as the Rome Convention).
- (16) Member States should be able to provide for more far-reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public.
- (17) The harmonised rental and lending rights and the harmonised protection in the field of rights related to copyright should not be exercised in a way which constitutes a disguised restriction on trade between Member States or in a way which is contrary to the rule of media exploitation chronology, as recognised in the judgment handed down in *Société Cinéthèque v. FNCF* ⁽⁴⁾.
- (18) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives as set out in Part B of Annex I,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I: RENTAL AND LENDING RIGHT

Article 1: Object of harmonisation

1. In accordance with the provisions of this Chapter, Member States shall provide, subject to Article 6, a right to authorise or prohibit the rental and lending of originals and copies of copyright works, and other subject matter as set out in Article 3(1).
2. The rights referred to in paragraph 1 shall not be exhausted by any sale or other act of distribution of originals and copies of copyright works and other subject matter as set out in Article 3(1).

Article 2: Definitions

1. For the purposes of this Directive the following definitions shall apply:
 - (a) 'rental' means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage;
 - (b) 'lending' means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public;
 - (c) 'film' means a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.
2. The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors.

Article 3: Rightholders and subject matter of rental and lending right

1. The exclusive right to authorise or prohibit rental and lending shall belong to the following:
 - (a) the author in respect of the original and copies of his work;
 - (b) the performer in respect of fixations of his performance;
 - (c) the phonogram producer in respect of his phonograms;
 - (d) the producer of the first fixation of a film in respect of the original and copies of his film.
2. This Directive shall not cover rental and lending rights in relation to buildings and to works of applied art.

3. The rights referred to in paragraph 1 may be transferred, assigned or subject to the granting of contractual licences.
4. Without prejudice to paragraph 6, when a contract concerning film production is concluded, individually or collectively, by performers with a film producer, the performer covered by this contract shall be presumed, subject to contractual clauses to the contrary, to have transferred his rental right, subject to Article 5.
5. Member States may provide for a similar presumption as set out in paragraph 4 with respect to authors.
6. Member States may provide that the signing of a contract concluded between a performer and a film producer concerning the production of a film has the effect of authorising rental, provided that such contract provides for an equitable remuneration within the meaning of Article 5. Member States may also provide that this paragraph shall apply *mutatis mutandis* to the rights included in Chapter II.

Article 4: Rental of computer programs

This Directive shall be without prejudice to Article 4(c) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs⁽⁵⁾.

Article 5: Unwaivable right to equitable remuneration

1. Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental.
2. The right to obtain an equitable remuneration for rental cannot be waived by authors or performers.
3. The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers.
4. Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.

Article 6: Derogation from the exclusive public lending right

1. Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.
2. Where Member States do not apply the exclusive lending right provided for in Article 1 as regards phonograms, films and computer programs, they shall introduce, at least for authors, a remuneration.
3. Member States may exempt certain categories of establishments from the payment of the remuneration referred to in paragraphs 1 and 2.

CHAPTER II: RIGHTS RELATED TO COPYRIGHT

Article 7: Fixation right

1. Member States shall provide for performers the exclusive right to authorise or prohibit the fixation of their performances.
2. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.
3. A cable distributor shall not have the right provided for in paragraph 2 where it merely retransmits by cable the broadcasts of broadcasting organisations.

Article 8: Broadcasting and communication to the public

1. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.

2. Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.

3. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

Article 9: Distribution right

1. Member States shall provide the exclusive right to make available to the public, by sale or otherwise, the objects indicated in points (a) to (d), including copies thereof, hereinafter 'the distribution right':

- (a) for performers, in respect of fixations of their performances;
- (b) for phonogram producers, in respect of their phonograms;
- (c) for producers of the first fixations of films, in respect of the original and copies of their films;
- (d) for broadcasting organisations, in respect of fixations of their broadcasts as set out in Article 7(2).

2. The distribution right shall not be exhausted within the Community in respect of an object as referred to in paragraph 1, except where the first sale in the Community of that object is made by the rightholder or with his consent.

3. The distribution right shall be without prejudice to the specific provisions of Chapter I, in particular Article 1(2).

4. The distribution right may be transferred, assigned or subject to the granting of contractual licences.

Article 10: Limitations to rights

1. Member States may provide for limitations to the rights referred to in this Chapter in respect of:

- (a) private use;
- (b) use of short excerpts in connection with the reporting of current events;
- (c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;
- (d) use solely for the purposes of teaching or scientific research.

2. Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organisations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works.

However, compulsory licences may be provided for only to the extent to which they are compatible with the Rome Convention.

3. The limitations referred to in paragraphs 1 and 2 shall be applied only in certain special cases which do not conflict with a normal exploitation of the subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.

CHAPTER III: COMMON PROVISIONS

Article 11: Application in time

1. This Directive shall apply in respect of all copyright works, performances, phonograms, broadcasts and first fixations of films referred to in this Directive which were, on 1 July 1994, still protected by the legislation of the Member States in the field of copyright and related rights or which met the criteria for protection under this Directive on that date.

2. This Directive shall apply without prejudice to any acts of exploitation performed before 1 July 1994.

3. Member States may provide that the rightholders are deemed to have given their authorisation to the rental or lending of an object referred to in points (a) to (d) of Article 3(1) which is proven to have been made available to third parties for this purpose or to have been acquired before 1 July 1994.

However, in particular where such an object is a digital recording, Member States may provide that rightholders shall have a right to obtain an adequate remuneration for the rental or lending of that object.

4. Member States need not apply the provisions of Article 2(2) to cinematographic or audiovisual works created before 1 July 1994.

5. This Directive shall, without prejudice to paragraph 3 and subject to paragraph 7, not affect any contracts concluded before 19 November 1992.

6. Member States may provide, subject to the provisions of paragraph 7, that when rightholders who acquire new rights under the national provisions adopted in implementation of this Directive have, before 1 July 1994, given their consent for exploitation, they shall be presumed to have transferred the new exclusive rights.

7. For contracts concluded before 1 July 1994, the unwaivable right to an equitable remuneration provided for in Article 5 shall apply only where authors or performers or those representing them have submitted a request to that effect before 1 January 1997. In the absence of agreement between rightholders concerning the level of remuneration, Member States may fix the level of equitable remuneration.

Article 12: Relation between copyright and related rights

Protection of copyright-related rights under this Directive shall leave intact and shall in no way affect the protection of copyright.

Article 13: Communication

Member States shall communicate to the Commission the main provisions of national law adopted in the field covered by this Directive.

Article 14: Repeal

Directive 92/100/EEC is hereby repealed, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives as set out in Part B of Annex I.

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

Article 15: Entry into force

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

Article 16: Addressees

This Directive is addressed to the Member States.
Done at Strasbourg, 12 December 2006.

For the European Parliament

The President

J. BORRELL FONTELLES

For the Council

The President

M. PEKKARINEN

⁽¹⁾ Opinion of the European Parliament delivered on 12 October 2006 (not yet published in the Official Journal).

⁽²⁾ [OJ L 346, 27.11.1992, p. 61](#). Directive as last amended by Directive 2001/29/EC of the European Parliament and of the Council ([OJ L 167, 22.6.2001, p. 10](#)).

⁽³⁾ See Annex I, Part A.

⁽⁴⁾ Joined Cases 60/84 and 61/84 [1985] ECR 2 605.

⁽⁵⁾ [OJ L 122, 17.5.1991, p. 42](#). Directive as amended by Directive 93/98/EEC ([OJ L 290, 24.11.1993, p. 9](#)).

PART A**Repealed Directive with its successive amendments**

Council Directive 92/100/EEC (OJ L 346, 27.11.1992, p. 61)	
Council Directive 93/98/EEC (OJ L 290, 24.11.1993, p. 9)	Article 11(2) only
Directive 2001/29/EC of the European Parliament and of the Council (OJ L 167, 22.6.2001, p. 10)	Article 11(1) only

PART B**List of time-limits for transposition into national law***(referred to in Article 14)*

Directive	Time-limit for transposition
92/100/EEC	1 July 1994
93/98/EEC	30 June 1995
2001/29/EC	21 December 2002

**ANNEX II
CORRELATION TABLE**

Directive 92/100/EEC	This Directive
Article 1(1)	Article 1(1)
Article 1(2)	Article 2(1), introductory words and point (a)
Article 1(3)	Article 2(1), point (b)
Article 1(4)	Article 1(2)
Article 2(1), introductory words	Article 3(1), introductory words
Article 2(1), first indent	Article 3(1)(a)
Article 2(1), second indent	Article 3(1)(b)
Article 2(1), third indent	Article 3(1)(c)
Article 2(1), fourth indent, first sentence	Article 3(1)(d)
Article 2(1), fourth indent, second sentence	Article 2(1), point (c)
Article 2(2)	Article 2 (2)
Article 2(3)	Article 3(2)
Article 2(4)	Article 3(3)
Article 2(5)	Article 3(4)
Article 2(6)	Article 3(5)

Article 2(7)	Article 3(6)
Article 3	Article 4
Article 4	Article 5
Article 5(1) to (3)	Article 6(1) to (3)
Article 5(4)	—
Article 6	Article 7
Article 8	Article 8
Article 9(1), introductory words and final words	Article 9(1), introductory words
Article 9(1), first indent	Article 9(1)(a)
Article 9(1), second indent	Article 9(1)(b)
Article 9(1), third indent	Article 9(1)(c)
Article 9(1), fourth indent	Article 9(1)(d)
Article 9(2), (3) and (4)	Article 9(2), (3) and (4)
Article 10(1)	Article 10(1)
Article 10(2), first sentence	Article 10(2), first subparagraph
Article 10(2), second sentence	Article 10(2), second subparagraph
Article 10(3)	Article 10(3)
Article 13(1) and (2)	Article 11(1) and (2)
Article 13(3), first sentence	Article 11(3), first subparagraph
Article 13(3), second sentence	Article 11(3), second subparagraph
Article 13(4)	Article 11(4)
Article 13(5)	—
Article 13(6)	Article 11(5)
Article 13(7)	Article 11(6)
Article 13(8)	—
Article 13(9)	Article 11(7)
Article 14	Article 12
Article 15(1)	—

Article 15(2)	Article 13
—	Article 14
—	Article 15
Article 16	Article 16
—	Annex I
—	Annex II

DIRECTIVE 2006/116/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006 on the term of protection of copyright and certain related rights (codified version)

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,

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 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights ⁽³⁾ has been substantially amended ⁽⁴⁾. In the interests of clarity and rationality the said Directive should be codified.
- (2) The Berne Convention for the protection of literary and artistic works and the International Convention for the protection of performers, producers of phonograms and broadcasting organisations (Rome Convention) lay down only minimum terms of protection of the rights they refer to, leaving the Contracting States free to grant longer terms. Certain Member States have exercised this entitlement. In addition, some Member States have not yet become party to the Rome Convention.
- (3) There are consequently differences between the national laws governing the terms of protection of copyright and related rights, which are liable to impede the free movement of goods and freedom to provide services and to distort competition in the common market. Therefore, with a view to the smooth operation of the internal market, the laws of the Member States should be harmonised so as to make terms of protection identical throughout the Community.
- (4) It is important to lay down not only the terms of protection as such, but also certain implementing arrangements, such as the date from which each term of protection is calculated.
- (5) The provisions of this Directive should not affect the application by the Member States of the provisions of Article 14 bis (2)(b), (c) and (d) and (3) of the Berne Convention.
- (6) The minimum term of protection laid down by the Berne Convention, namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants. The average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations.
- (7) Certain Member States have granted a term longer than 50 years after the death of the author in order to offset the effects of the world wars on the exploitation of authors' works.
- (8) For the protection of related rights certain Member States have introduced a term of 50 years after lawful publication or lawful communication to the public.
- (9) The Diplomatic Conference held in December 1996, under the auspices of the World Intellectual Property Organization (WIPO), led to the adoption of the WIPO Performances and Phonograms Treaty, which deals with the protection of performers and producers of phonograms. This Treaty took the form of a substantial up-date of the international protection of related rights.
- (10) Due regard for established rights is one of the general principles of law protected by the Community legal order. Therefore, the terms of protection of copyright and related rights established by Community law cannot have the effect of reducing the protection enjoyed by rightholders in the Community before the entry into force of Directive 93/98/EEC. In order to keep the effects of transitional measures to a minimum and to allow the internal market to function smoothly, those terms of protection should be applied for long periods.
- (11) The level of protection of copyright and related rights should be high, since those rights are fundamental to intellectual creation. Their protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole.
- (12) In order to establish a high level of protection which at the same time meets the requirements of the internal market and the need to establish a legal environment conducive to the harmonious development of literary and artistic creation in the Community, the term of protection for copyright should be harmonised at 70 years after the death of the author or 70 years after the work is lawfully made available to the public, and for related rights

at 50 years after the event which sets the term running.

- (13) Collections are protected according to Article 2(5) of the Berne Convention when, by reason of the selection and arrangement of their content, they constitute intellectual creations. Those works are protected as such, without prejudice to the copyright in each of the works forming part of such collections. Consequently, specific terms of protection may apply to works included in collections.
- (14) In all cases where one or more physical persons are identified as authors, the term of protection should be calculated after their death. The question of authorship of the whole or a part of a work is a question of fact which the national courts may have to decide.
- (15) Terms of protection should be calculated from the first day of January of the year following the relevant event, as they are in the Berne and Rome Conventions.
- (16) The protection of photographs in the Member States is the subject of varying regimes. A photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account. The protection of other photographs should be left to national law.
- (17) In order to avoid differences in the term of protection as regards related rights it is necessary to provide the same starting point for the calculation of the term throughout the Community. The performance, fixation, transmission, lawful publication, and lawful communication to the public, that is to say the means of making a subject of a related right perceptible in all appropriate ways to persons in general, should be taken into account for the calculation of the term of protection regardless of the country where this performance, fixation, transmission, lawful publication, or lawful communication to the public takes place.
- (18) The rights of broadcasting organisations in their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite, should not be perpetual. It is therefore necessary to have the term of protection running from the first transmission of a particular broadcast only. This provision is understood to avoid a new term running in cases where a broadcast is identical to a previous one.
- (19) The Member States should remain free to maintain or introduce other rights related to copyright in particular in relation to the protection of critical and scientific publications. In order to ensure transparency at Community level, it is however necessary for Member States which introduce new related rights to notify the Commission.
- (20) It should be made clear that this Directive does not apply to moral rights.
- (21) For works whose country of origin within the meaning of the Berne Convention is a third country and whose author is not a Community national, comparison of terms of protection should be applied, provided that the term accorded in the Community does not exceed the term laid down in this Directive.
- (22) Where a rightholder who is not a Community national qualifies for protection under an international agreement, the term of protection of related rights should be the same as that laid down in this Directive. However, this term should not exceed that fixed in the third country of which the rightholder is a national.
- (23) Comparison of terms should not result in Member States being brought into conflict with their international obligations.
- (24) Member States should remain free to adopt provisions on the interpretation, adaptation and further execution of contracts on the exploitation of protected works and other subject matter which were concluded before the extension of the term of protection resulting from this Directive.
- (25) Respect of acquired rights and legitimate expectations is part of the Community legal order. Member States may provide in particular that in certain circumstances the copyright and related rights which are revived pursuant to this Directive may not give rise to payments by persons who undertook in good faith the exploitation of the works at the time when such works lay within the public domain.
- (26) 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, as set out in Part B of Annex I,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Duration of authors' rights

1. The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made

available to the public.

2. In the case of a work of joint authorship, the term referred to in paragraph 1 shall be calculated from the death of the last surviving author.
3. In the case of anonymous or pseudonymous works, the term of protection shall run for 70 years after the work is lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, or if the author discloses his identity during the period referred to in the first sentence, the term of protection applicable shall be that laid down in paragraph 1.
4. Where a Member State provides for particular provisions on copyright in respect of collective works or for a legal person to be designated as the rightholder, the term of protection shall be calculated according to the provisions of paragraph 3, except if the natural persons who have created the work are identified as such in the versions of the work which are made available to the public. This paragraph is without prejudice to the rights of identified authors whose identifiable contributions are included in such works, to which contributions paragraph 1 or 2 shall apply.
5. Where a work is published in volumes, parts, instalments, issues or episodes and the term of protection runs from the time when the work was lawfully made available to the public, the term of protection shall run for each such item separately.
6. In the case of works for which the term of protection is not calculated from the death of the author or authors and which have not been lawfully made available to the public within 70 years from their creation, the protection shall terminate.

Article 2

Cinematographic or audiovisual works

1. The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States shall be free to designate other co-authors.
2. The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.

Article 3

Duration of related rights

1. The rights of performers shall expire 50 years after the date of the performance. However, if a fixation of the performance is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.
2. The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram has been lawfully published within this period, the said rights shall expire 50 years from the date of the first lawful publication. If no lawful publication has taken place within the period mentioned in the first sentence, and if the phonogram has been lawfully communicated to the public within this period, the said rights shall expire 50 years from the date of the first lawful communication to the public.

However, this paragraph shall not have the effect of protecting anew the rights of producers of phonograms where, through the expiry of the term of protection granted them pursuant to Article 3(2) of Directive 93/98/EEC in its version before amendment by Directive 2001/29/EEC, they were no longer protected on 22 December 2002.

3. The rights of producers of the first fixation of a film shall expire 50 years after the fixation is made. However, if the film is lawfully published or lawfully communicated to the public during this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier. The term 'film' shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.
4. The rights of broadcasting organisations shall expire 50 years after the first transmission of a broadcast, whether this broadcast is transmitted by wire or over the air, including by cable or satellite.

Article 4

Protection of previously unpublished works

Any person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public.

Article 5

Critical and scientific publications

Member States may protect critical and scientific publications of works which have come into the public domain. The maximum term of protection of such rights shall be 30 years from the time when the publication was first lawfully published.

Article 6

Protection of photographs

Photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs.

Article 7

Protection vis-à-vis third countries

1. Where the country of origin of a work, within the meaning of the Berne Convention, is a third country, and the author of the work is not a Community national, the term of protection granted by the Member States shall expire on the date of expiry of the protection granted in the country of origin of the work, but may not exceed the term laid down in Article 1.
2. The terms of protection laid down in Article 3 shall also apply in the case of rightholders who are not Community nationals, provided Member States grant them protection. However, without prejudice to the international obligations of the Member States, the term of protection granted by Member States shall expire no later than the date of expiry of the protection granted in the country of which the rightholder is a national and may not exceed the term laid down in Article 3.
3. Member States which, on 29 October 1993, in particular pursuant to their international obligations, granted a longer term of protection than that which would result from the provisions of paragraphs 1 and 2 may maintain this protection until the conclusion of international agreements on the term of protection of copyright or related rights.

Article 8

Calculation of terms

The terms laid down in this Directive shall be calculated from the first day of January of the year following the event which gives rise to them.

Article 9

Moral rights

This Directive shall be without prejudice to the provisions of the Member States regulating moral rights.

Article 10

Application in time

1. Where a term of protection which is longer than the corresponding term provided for by this Directive was already running in a Member State on 1 July 1995, this Directive shall not have the effect of shortening that term of protection in that Member State.
2. The terms of protection provided for in this Directive shall apply to all works and subject matter which were protected in at least one Member State on the date referred to in paragraph 1, pursuant to national provisions on copyright or related rights, or which meet the criteria for protection under [Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual

property]⁽⁵⁾.

3. This Directive shall be without prejudice to any acts of exploitation performed before the date referred to in paragraph 1. Member States shall adopt the necessary provisions to protect in particular acquired rights of third parties.

4. Member States need not apply the provisions of Article 2(1) to cinematographic or audiovisual works created before 1 July 1994.

Article 11

Notification and communication

1. Member States shall immediately notify the Commission of any governmental plan to grant new related rights, including the basic reasons for their introduction and the term of protection envisaged.

2. Member States shall communicate to the Commission the texts of the provisions of internal law which they adopt in the field governed by this Directive.

Article 12

Repeal

Directive 93/98/EEC is hereby repealed, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law, as set out in Part B of Annex I, of the Directives, and their application.

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

Article 13

Entry into force

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

Article 14

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, the 12 December 2006.

For the European Parliament

The President

J. BORRELL FONTELLES

For the Council

The President

M. PEKKARINEN

⁽¹⁾ Opinion of 26 October 2006 (not yet published in the Official Journal).

⁽²⁾ Opinion of the European Parliament of 12 October 2006 (not yet published in the Official Journal) and Council Decision of 30 November 2006.

⁽³⁾ [OJ L 290, 24.11.1993, p. 9](#). Directive as amended by Directive 2001/29/EC of the European Parliament and of the Council ([OJ L 167, 22.6.2001, p. 10](#)).

⁽⁴⁾ See Annex I, Part A.

⁽⁵⁾ [OJ L 346, 27.11.1992, p. 61](#). Directive as last amended by Directive 2001/29/EC.

ANNEX I

PART A

Repealed Directive with its amendment

Council Directive 93/98/EEC (OJ L 290, 24.11.1993, p. 9)	Article 11(2) only
Directive 2001/29/EC of the European Parliament and of the Council (OJ L 167, 22.6.2001, p. 10)	

PART B

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

(referred to in Article 12)

Directive	Time-limit for transposition	Date of application
93/98/EEC	1 July 1995 (Articles 1 to 11)	19 November 1993 (Article 12) 1 July 1997 at the latest as regards Article 2(1) (Article 10(5))
2001/29/EC	22 December 2002	

ANNEX II
Correlation Table

Directive 93/98/EEC	This Directive
Articles 1 to 9	Articles 1 to 9
Article 10(1) to (4)	Article 10(1) to (4)
Article 10(5)	—
Article 11	—
Article 12	Article 11(1)
Article 13(1), first subparagraph	—
Article 13(1), second subparagraph	—
Article 13(1), third subparagraph	Article 11(2)
Article 13(2)	—
—	Article 12
—	Article 13
Article 14	Article 14
—	Annex I
—	Annex II

DIRECTIVE (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (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 Article 53(1) and Articles 62 and 114 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 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 ordinary legislative procedure ⁽³⁾,

Whereas:

(1) The Treaty on European Union (TEU) provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Further harmonisation of the laws of the Member States on copyright and related rights should contribute to the achievement of those objectives.

(2) The directives that have been adopted in the area of copyright and related rights contribute to the functioning of the internal market, provide for a high level of protection for rightholders, facilitate the clearance of rights, and create a framework in which the exploitation of works and other protected subject matter can take place. That harmonised legal framework contributes to the proper functioning of the internal market, and stimulates innovation, creativity, investment and production of new content, also in the digital environment, in order to avoid the fragmentation of the internal market. The protection provided by that legal framework also contributes to the Union's objective of respecting and promoting cultural diversity, while at the same time bringing European common cultural heritage to the fore. Article 167(4) of the Treaty on the Functioning of the European Union requires the Union to take cultural aspects into account in its action.

(3) Rapid technological developments continue to transform the way works and other subject matter are created, produced, distributed and exploited. New business models and new actors continue to emerge. Relevant legislation needs to be future-proof so as not to restrict technological development. The objectives and the principles laid down by the Union copyright framework remain sound. However, legal uncertainty remains, for both rightholders and users, as regards certain uses, including cross-border uses, of works and other subject matter in the digital environment. As stated in the Commission Communication of 9 December 2015 entitled 'Towards a modern, more European copyright framework', in some areas it is necessary to adapt and supplement the existing Union copyright framework, while keeping a high level of protection of copyright and related rights. This Directive provides for rules to adapt certain exceptions and limitations to copyright and related rights to digital and cross-border environments, as well as for measures to facilitate certain licensing practices, in particular, but not only, as regards the dissemination of out-of-commerce works and other subject matter and the online availability of audiovisual works on video-on-demand platforms, with a view to ensuring wider access to content. It also contains rules to facilitate the use of content in the public domain. In order to achieve a well-functioning and fair marketplace for copyright, there should also be rules on rights in publications, on the use of works or other subject matter by online service providers storing and giving access to user-uploaded content, on the transparency of authors' and performers' contracts, on authors' and performers' remuneration, as well as a mechanism for the revocation of rights that authors and performers have transferred on an exclusive basis.

[...]

(70) The steps taken by online content-sharing service providers in cooperation with rightholders should be without prejudice to the application of exceptions or limitations to copyright, including, in particular, those which guarantee the freedom of expression of users. Users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. That is

particularly important for the purposes of striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union ('the Charter'), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property. Those exceptions and limitations should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union. It is important to ensure that online content-sharing service providers operate an effective complaint and redress mechanism to support use for such specific purposes.

[text deleted]

TITLE I:

GENERAL PROVISIONS

Article 1

Subject matter and scope

1. This Directive lays down rules which aim to harmonise further Union law applicable to copyright and related rights in the framework of the internal market, taking into account, in particular, digital and cross-border uses of protected content. It also lays down rules on exceptions and limitations to copyright and related rights, on the facilitation of licences, as well as rules which aim to ensure a well-functioning marketplace for the exploitation of works and other subject matter.

2. Except in the cases referred to in Article 24, this Directive shall leave intact and shall in no way affect existing rules laid down in the directives currently in force in this area, in particular Directives 96/9/EC, 2000/31/EC, 2001/29/EC, 2006/115/EC, 2009/24/EC, 2012/28/EU and 2014/26/EU.

Article 2

Definitions

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

(1) 'research organisation' means a university, including its libraries, a research institute or any other entity, the primary goal of which is to conduct scientific research or to carry out educational activities involving also the conduct of scientific research:

- (a) on a not-for-profit basis or by reinvesting all the profits in its scientific research; or
- (b) pursuant to a public interest mission recognised by a Member State;

in such a way that the access to the results generated by such scientific research cannot be enjoyed on a preferential basis by an undertaking that exercises a decisive influence upon such organisation;

(2) 'text and data mining' means any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations;

(3) 'cultural heritage institution' means a publicly accessible library or museum, an archive or a film or audio heritage institution;

(4) 'press publication' means a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter, and which:

- (a) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine;
- (b) has the purpose of providing the general public with information related to news or other topics; and
- (c) is published in any media under the initiative, editorial responsibility and control of a service provider.

Periodicals that are published for scientific or academic purposes, such as scientific journals, are not press publications for the purposes of this Directive;

(5) 'information society service' means a service within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535;

(6) 'online content-sharing service provider' means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.

Providers of services, such as not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use, are not 'online content-sharing service providers' within the meaning of this Directive.

TITLE II

MEASURES TO ADAPT EXCEPTIONS AND LIMITATIONS TO THE DIGITAL AND CROSS-BORDER ENVIRONMENT

Article 3

Text and data mining for the purposes of scientific research

1. Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, and Article 15(1) of this Directive for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access.

2. Copies of works or other subject matter made in compliance with paragraph 1 shall be stored with an appropriate level of security and may be retained for the purposes of scientific research, including for the verification of research results.

3. Rightholders shall be allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.

4. Member States shall encourage rightholders, research organisations and cultural heritage institutions to define commonly agreed best practices concerning the application of the obligation and of the measures referred to in paragraphs 2 and 3 respectively.

Article 4

Exception or limitation for text and data mining

1. Member States shall provide for an exception or limitation to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) and (b) of Directive 2009/24/EC and Article 15(1) of this Directive for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of text and data mining.

2. Reproductions and extractions made pursuant to paragraph 1 may be retained for as long as is necessary for the purposes of text and data mining.

3. The exception or limitation provided for in paragraph 1 shall apply on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their rightholders in an appropriate manner, such as machine-readable means in the case of content made publicly available online.

4. This Article shall not affect the application of Article 3 of this Directive.

Article 5

Use of works and other subject matter in digital and cross-border teaching activities

1. Member States shall provide for an exception or limitation to the rights provided for in Article 5(a), (b), (d) and (e) and Article 7(1) of Directive 96/9/EC, Articles 2 and 3 of Directive 2001/29/EC, Article 4(1) of Directive 2009/24/EC and Article 15(1) of this Directive in order to allow the digital use of works and other subject matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, on condition that such use:

(a) takes place under the responsibility of an educational establishment, on its premises or at other venues, or through a secure electronic environment accessible only by the educational establishment's pupils or students and teaching staff; and

(b) is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible.

2. Notwithstanding Article 7(1), Member States may provide that the exception or limitation adopted pursuant to paragraph 1 does not apply or does not apply as regards specific uses or types of works or other subject matter, such as material that is primarily intended for the educational market or sheet music, to the extent that suitable licences authorising the acts referred to in paragraph 1 of this Article and covering the needs and specificities of educational establishments are easily available on the market.

Member States that decide to avail of the first subparagraph of this paragraph shall take the necessary measures to ensure that the licences authorising the acts referred to in paragraph 1 of this Article are available and visible in an appropriate manner for educational establishments.

3. The use of works and other subject matter for the sole purpose of illustration for teaching through secure electronic environments undertaken in compliance with the provisions of national law adopted pursuant to this Article shall be deemed to occur solely in the Member State where the educational establishment is established.

4. Member States may provide for fair compensation for rightholders for the use of their works or other subject matter pursuant to paragraph 1.

Article 6

Preservation of cultural heritage

Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) of Directive 2009/24/EC and Article 15(1) of this Directive, in order to allow cultural heritage institutions to make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for purposes of preservation of such works or other subject matter and to the extent necessary for such preservation.

Article 7

Common provisions

1. Any contractual provision contrary to the exceptions provided for in Articles 3, 5 and 6 shall be unenforceable.

2. Article 5(5) of Directive 2001/29/EC shall apply to the exceptions and limitations provided for under this Title. The first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply to Articles 3 to 6 of this Directive.

TITLE III

MEASURES TO IMPROVE LICENSING PRACTICES AND ENSURE WIDER ACCESS TO CONTENT

CHAPTER 1

Out-of-commerce works and other subject matter

Use of out-of-commerce works and other subject matter by cultural heritage institutions

1. Member States shall provide that a collective management organisation, in accordance with its mandates from rightholders, may conclude a non-exclusive licence for non-commercial purposes with a cultural heritage institution for the reproduction, distribution, communication to the public or making available to the public of out-of-commerce works or other subject matter that are permanently in the collection of the institution, irrespective of whether all rightholders covered by the licence have mandated the collective management organisation, on condition that:

(a) the collective management organisation is, on the basis of its mandates, sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights that are the subject of the licence; and

(b) all rightholders are guaranteed equal treatment in relation to the terms of the licence.

2. Member States shall provide for an exception or limitation to the rights provided for in Article 5(a), (b), (d) and (e) and Article 7(1) of Directive 96/9/EC, Articles 2 and 3 of Directive 2001/29/EC, Article 4(1) of Directive 2009/24/EC, and Article 15(1) of this Directive, in order to allow cultural heritage institutions to make available, for non-commercial purposes, out-of-commerce works or other subject matter that are permanently in their collections, on condition that:

(a) the name of the author or any other identifiable rightholder is indicated, unless this turns out to be impossible; and

(b) such works or other subject matter are made available on non-commercial websites.

3. Member States shall provide that the exception or limitation provided for in paragraph 2 only applies to types of works or other subject matter for which no collective management organisation that fulfils the condition set out in point (a) of paragraph 1 exists.

4. Member States shall provide that all rightholders may, at any time, easily and effectively, exclude their works or other subject matter from the licensing mechanism set out in paragraph 1 or from the application of the exception or limitation provided for in paragraph 2, either in general or in specific cases, including after the conclusion of a licence or after the beginning of the use concerned.

5. A work or other subject matter shall be deemed to be out of commerce when it can be presumed in good faith that the whole work or other subject matter is not available to the public through customary channels of commerce, after a reasonable effort has been made to determine whether it is available to the public.

Member States may provide for specific requirements, such as a cut-off date, to determine whether works and other subject matter can be licensed in accordance with paragraph 1 or used under the exception or limitation provided for in paragraph 2. Such requirements shall not extend beyond what is necessary and reasonable, and shall not preclude being able to determine that a set of works or other subject matter as a whole is out of commerce, when it is reasonable to presume that all works or other subject matter are out of commerce.

6. Member States shall provide that the licences referred to in paragraph 1 are to be sought from a collective management organisation that is representative for the Member State where the cultural heritage institution is established.

7. This Article shall not apply to sets of out-of-commerce works or other subject matter if, on the basis of the reasonable effort referred to in paragraph 5, there is evidence that such sets predominantly consist of:

(a) works or other subject matter, other than cinematographic or audiovisual works, first published or, in the absence of publication, first broadcast in a third country;

(b) cinematographic or audiovisual works, of which the producers have their headquarters or habitual residence in a third country; or

(c) works or other subject matter of third country nationals, where after a reasonable effort no Member State or third country could be determined pursuant to points (a) and (b).

By way of derogation from the first subparagraph, this Article shall apply where the collective management

organisation is sufficiently representative, within the meaning of point (a) of paragraph 1, of rightholders of the relevant third country.

Article 9

Cross-border uses

1. Member States shall ensure that licences granted in accordance with Article 8 may allow the use of out-of-commerce works or other subject matter by cultural heritage institutions in any Member State.
2. The uses of works and other subject matter under the exception or limitation provided for in Article 8(2) shall be deemed to occur solely in the Member State where the cultural heritage institution undertaking that use is established.

Article 10

Publicity measures

1. Member States shall ensure that information from cultural heritage institutions, collective management organisations or relevant public authorities, for the purposes of the identification of the out-of-commerce works or other subject matter, covered by a licence granted in accordance with Article 8(1), or used under the exception or limitation provided for in Article 8(2), as well as information about the options available to rightholders as referred to in Article 8(4), and, as soon as it is available and where relevant, information on the parties to the licence, the territories covered and the uses, is made permanently, easily and effectively accessible on a public single online portal from at least six months before the works or other subject matter are distributed, communicated to the public or made available to the public in accordance with the licence or under the exception or limitation.

The portal shall be established and managed by the European Union Intellectual Property Office in accordance with Regulation (EU) No 386/2012.

2. Member States shall provide that, if necessary for the general awareness of rightholders, additional appropriate publicity measures are taken regarding the ability of collective management organisations to license works or other subject matter in accordance with Article 8, the licences granted, the uses under the exception or limitation provided for in Article 8(2) and the options available to rightholders as referred to in Article 8(4).

The appropriate publicity measures referred to in the first subparagraph of this paragraph shall be taken in the Member State where the licence is sought in accordance with Article 8(1) or, for uses under the exception or limitation provided for in Article 8(2), in the Member State where the cultural heritage institution is established. If there is evidence, such as the origin of the works or other subject matter, to suggest that the awareness of rightholders could be more efficiently raised in other Member States or third countries, such publicity measures shall also cover those Member States and third countries.

[text deleted]

CHAPTER 4

Works of visual art in the public domain

Article 14

Works of visual art in the public domain

Member States shall provide that, when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation.

TITLE IV

MEASURES TO ACHIEVE A WELL-FUNCTIONING MARKETPLACE FOR COPYRIGHT

CHAPTER 1

Rights in publications

Article 15

Protection of press publications concerning online uses

1. Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the online use of their press publications by information society service providers.

The rights provided for in the first subparagraph shall not apply to private or non-commercial uses of press publications by individual users.

The protection granted under the first subparagraph shall not apply to acts of hyperlinking.

The rights provided for in the first subparagraph shall not apply in respect of the use of individual words or very short extracts of a press publication.

2. The rights provided for in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject matter incorporated in a press publication. The rights provided for in paragraph 1 shall not be invoked against those authors and other rightholders and, in particular, shall not deprive them of their right to exploit their works and other subject matter independently from the press publication in which they are incorporated.

When a work or other subject matter is incorporated in a press publication on the basis of a non-exclusive licence, the rights provided for in paragraph 1 shall not be invoked to prohibit the use by other authorised users. The rights provided for in paragraph 1 shall not be invoked to prohibit the use of works or other subject matter for which protection has expired.

3. Articles 5 to 8 of Directive 2001/29/EC, Directive 2012/28/EU and Directive (EU) 2017/1564 of the European Parliament of the Council ⁽¹⁹⁾ shall apply mutatis mutandis in respect of the rights provided for in paragraph 1 of this Article.

4. The rights provided for in paragraph 1 shall expire two years after the press publication is published. That term shall be calculated from 1 January of the year following the date on which that press publication is published.

Paragraph 1 shall not apply to press publications first published before 6 June 2019.

5. Member States shall provide that authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.

Article 16

Claims to fair compensation

Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or licence constitutes a sufficient legal basis for the publisher to be entitled to a share of the compensation for the use of the work made under an exception or limitation to the transferred or licensed right.

The first paragraph shall be without prejudice to existing and future arrangements in Member States concerning public lending rights.

CHAPTER 2

Certain uses of protected content by online services

Article 17

Use of protected content by online content-sharing service providers

1. Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.

An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter.

2. Member States shall provide that, where an online content-sharing service provider obtains an authorisation, for instance by concluding a licensing agreement, that authorisation shall also cover acts carried out by users of the services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does not generate significant revenues.

3. When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article.

The first subparagraph of this paragraph shall not affect the possible application of Article 14(1) of Directive 2000/31/EC to those service providers for purposes falling outside the scope of this Directive.

4. If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have:

(a) made best efforts to obtain an authorisation, and

(b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event

(c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).

5. In determining whether the service provider has complied with its obligations under paragraph 4, and in light of the principle of proportionality, the following elements, among others, shall be taken into account:

(a) the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and

(b) the availability of suitable and effective means and their cost for service providers.

6. Member States shall provide that, in respect of new online content-sharing service providers the services of which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million, calculated in accordance with Commission Recommendation 2003/361/EC ⁽²⁰⁾, the conditions under the liability regime set out in paragraph 4 are limited to compliance with point (a) of paragraph 4 and to acting expeditiously, upon receiving a sufficiently substantiated notice, to disable access to the notified works or other subject matter or to remove those works or other subject matter from their websites.

Where the average number of monthly unique visitors of such service providers exceeds 5 million, calculated on the basis of the previous calendar year, they shall also demonstrate that they have made best efforts to prevent further uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information.

7. The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.

Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:

- (a) quotation, criticism, review;
- (b) use for the purpose of caricature, parody or pastiche.

PART C. CJEU JURISPRUDENCE

JUDGMENT OF THE COURT (Grand Chamber)

16 December 2008 (*)

(Transfer of a company seat to a Member State other than the Member State of incorporation – Application for amendment of the entry regarding the company seat in the commercial register – Refusal – Appeal against a decision of a court entrusted with maintaining the commercial register – Article 234 EC – Reference for a preliminary ruling – Admissibility – Definition of ‘court or tribunal’ – Definition of ‘a court or tribunal against whose decisions there is no judicial remedy under national law’ – Appeal against a decision making a reference for a preliminary ruling – Jurisdiction of appellate courts to order revocation of such a decision – Freedom of establishment – Articles 43 EC and 48 EC)

In **Case C-210/06**,

REFERENCE for a preliminary ruling under Article 234 EC from the Szegedi Ítéltábla (Hungary), made by decision of 20 April 2006, received at the Court on 5 May 2006, in the proceedings in the case of

Cartesio Oktató és Szolgáltató bt,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans (Rapporteur), A. Rosas, K. Lenaerts, A. Ó Caoimh and J.-C. Bonichot, Presidents of Chambers, K. Schiemann, J. Makarczyk, P. Kūris, E. Juhász, L. Bay Larsen and P. Lindh, Judges,

Advocate General: M. Poiares Maduro,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 10 July 2007,

after considering the observations submitted on behalf of:

- CARTESIO Oktató és Szolgáltató bt, by G. Zettwitz and P. Metzinger, ügyvédek,
 - the Hungarian Government, by J. Fazekas and P. Szabó, acting as Agents,
 - the Czech Government, by T. Boček, acting as Agent,
 - Ireland, by D. O’Hagan, acting as Agent, A. Collins SC and N. Travers BL,
 - the Netherlands Government, by H.G. Sevenster and M. de Grave, acting as Agents,
 - the Polish Government, by E. Ośniecka-Tamecka, acting as Agent,
 - the Slovenian Government, by M. Remic, acting as Agent,
 - the United Kingdom Government, by T. Harris, acting as Agent, and J. Stratford, Barrister,
 - the Commission of the European Communities, by G. Braun and V. Kreuzschitz, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 22 May 2008,

gives the following

Judgment

[text deleted]

This reference for a preliminary ruling concerns the interpretation of Articles 43 EC, 48 EC and 234 EC.

- 2 The reference was made in the context of proceedings brought by CARTESIO Oktató és Szolgáltató bt (‘Cartesio’), a limited partnership established in Baja (Hungary), against the decision rejecting its application for registration in the commercial register of the transfer of its company seat to Italy.

National legal context

The law relating to civil procedure

- 3 Article 10(2) of Law No III of 1952 on civil procedure (a Polgári perrendtartásról szóló 1952. évi III. törvény: 'the Law on civil procedure') states:

'At second instance: ...

(b) appeals arising from cases dealt with by regional courts or courts of Budapest shall be heard by appeal courts.'
- 4 Article 155/A of the Law on civil procedure provides that:

'(1) The court may ask the Court of Justice of the European Communities for a preliminary ruling in accordance with the rules laid down in the Treaty establishing the European Community.

(2) The court shall make the reference for a preliminary ruling by order and shall stay the proceedings ...

(3) An appeal may be brought against a decision to make a reference for a preliminary ruling. An appeal cannot be brought against a decision dismissing a request for a reference for a preliminary ruling. ...'
- 5 Under Article 233(1) of the Law on civil procedure:

'Save as otherwise provided, appeal proceedings may be brought against the decisions of courts of first instance...'
- 6 Article 233/A of that law provides that:

'An appeal may be brought against orders made at second instance in respect of which a right of appeal exists under the rules applicable to proceedings at first instance ...'
- 7 Article 249/A of the Law on civil procedure states that:

'Appeal proceedings may also be brought against a decision made at second instance dismissing a request for a reference for a preliminary ruling (Article 155/A).'
- 8 Article 270 of the Law on civil procedure is worded as follows:

'(1) Save as otherwise provided, the Legfelsőbb Bíróság [Supreme Court] shall hear appeals on points of law. The general rules shall apply mutatis mutandis.

(2) The parties, interveners and persons affected by the decision may, in respect of the part of that decision which refers to them, bring an appeal on a point of law before the Legfelsőbb Bíróság against final judgments and orders which bring proceedings an end, pleading infringement of the law. ...'
- 9 Article 271(1) of the Law on civil procedure provides that:

'No appeal shall lie:

(a) against decisions which have become final at first instance, except in cases which are permitted by law;

(b) where one party has failed to exercise the right to bring an appeal and the court of second instance, hearing the appeal brought by the other party, confirms the decision at first instance; ...'
- 10 Under Article 273(3) of that law:

'The institution of appeal proceedings shall not have suspensory effect but, where a party so requests, the Legfelsőbb Bíróság may exceptionally suspend enforcement of the judgment ...'

Company law

- 11 Article 1(1) of Law No CXLIV of 1997 on commercial companies (a gazdasági társaságokról szóló 1997. évi CXLIV. törvény) provides that:

'This Law shall govern the incorporation, organisation and functioning of commercial companies which have their seat in Hungary; the rights, duties and responsibilities of the founders and members (shareholders) of those companies; and the conversion, merger and demerger of commercial companies ... and their liquidation.'

- 12 Under Article 11 of that law:

'The articles of association (the instrument of incorporation, the statutes of the company) shall specify:

(a) the name and seat of the commercial company ...'

- 13 Article 1(1) of Law No CXLV of 1997 on the commercial register, company advertising and legal procedures in commercial registration matters (a cégnyilvántartásról, a cégnyilvánosságról és a bírósági cégeljárásról szóló 1997. évi CXLV. Törvény; 'the Law on the commercial register') provides that:

'A company is a commercial organisation ... or other legal entity of a commercial nature ... which, save where a law or government order provides otherwise, is incorporated through its registration in the commercial register for the purpose of carrying on a commercial activity for financial gain ...'

- 14 Under Article 2(1) of that law:

'The legal entities referred to in Article 1 may be entered in the commercial register only if their registration is possible or compulsory under [Hungarian] law.'

- 15 Article 11 of the Law on the commercial register provides that:

'(1) The regional courts or the courts of Budapest, acting as commercial courts, shall register companies in the commercial registers which they are responsible for maintaining ...

(2) ... the courts within the jurisdiction of which a company has its seat shall have jurisdiction to register that company and to deal with any proceedings concerning such companies provided for by statute. ...'

- 16 Article 12(1) of that law provides that:

'The information on companies referred to in this Law shall be entered in the commercial register. For all companies, the register shall specify: ...

(d) the company seat ...'

- 17 Under Article 16(1) of the Law on the commercial register:

'The seat ... shall be the place where [the company's] central administration is situated ...'

- 18 Article 29(1) of that law provides that:

'Save as otherwise provided, any application for registration of amendments to information registered in relation to companies must be presented to the commercial court within 30 days of the event giving rise to the amendment.'

- 19 Article 34(1) of the Law provides that:

'Every transfer of a company seat to the jurisdiction of another court responsible for maintaining the commercial register must, by reason of the change entailed, be submitted to the court with jurisdiction in respect of the former seat. After examining the applications for amendment of the information in the register prior to the change of company seat, the latter court shall endorse the transfer.'

Private international law

20 Article 18 of Decree-Law No 13 of 1979 on private international law rules (a nemzetközi magánjogról szóló 1979. évi 13. törvényerejű rendelet) provides that:

'(1) The legal capacity of a legal person, its commercial status, the rights derived from its personality and the legal relationships between its members shall be determined in accordance with its personal law.

(2) The personal law of a legal person shall be the law of the State in the territory of which it is registered.

(3) If a legal person has been lawfully registered in accordance with the laws of several States or if, under the rules applicable in the place where the seat designated in its articles of association is situated, registration is not required, its personal law shall be that applicable in the State of the seat.

(4) If a legal person has no seat designated in its articles of association or has seats in several States, and, in accordance with the law of one of those States, registration is not required, its personal law shall be the law of the State in which its central administration is situated.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

21 Cartesio was formed on 20 May 2004 as a 'betéti társaság' (limited partnership) under Hungarian law. Its seat was established in Baja (Hungary). Cartesio was registered in the commercial register on 11 June 2004.

22 Cartesio has two partners both of whom are natural persons resident in Hungary and holding Hungarian nationality: a limited partner, whose only commitment is to invest capital, and an unlimited partner, with unlimited liability for the company's debts. Cartesio is active, inter alia, in the field of human resources, secretarial activities, translation, teaching and training.

23 On 11 November 2005, Cartesio filed an application with the Bács-Kiskun Megyei Bíróság (Regional Court, Bács-Kiskun), sitting as a cégbíróság (commercial court), for registration of the transfer of its seat to Gallarate (Italy) and, in consequence, for amendment of the entry regarding Cartesio's company seat in the commercial register.

24 By decision of 24 January 2006, that application was rejected on the ground that the Hungarian law in force did not allow a company incorporated in Hungary to transfer its seat abroad while continuing to be subject to Hungarian law as its personal law.

25 Cartesio lodged an appeal against that decision with the Szegedi Ítéltábla (Regional Court of Appeal, Szeged).

26 Relying on the judgment in Case C-411/03 *SEVIC Systems* [2005] ECR I-10805, Cartesio claimed before the Szegedi Ítéltábla that, to the extent that Hungarian law draws a distinction between commercial companies according to the Member State in which they have their seat, that law is contrary to Articles 43 EC and 48 EC. It follows from those articles that Hungarian law cannot require Hungarian companies to choose to establish their seat in Hungary.

27 Cartesio also maintained that the Szegedi Ítéltábla was required to refer that question for a preliminary ruling, since it constitutes a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law.

28 The Szegedi Ítéltábla points out that, under Hungarian law, proceedings before the courts responsible for maintaining the commercial register and before courts hearing appeals against decisions of the commercial register courts are not *inter partes*. It therefore wishes to know whether it may be classified as a 'court or tribunal' within the meaning of Article 234 EC.

- 29 Moreover, if the answer to this question is in the affirmative, the Szegedi Ítéltábla is of the view that it is still unclear whether, for the purposes of the third paragraph of Article 234 EC, it should be classified as a court or tribunal against whose decisions there is no judicial remedy under national law.
- 30 It states in that regard that although, according to Hungarian law, its decisions on appeal are final and enforceable, they may nevertheless be the subject of an extraordinary appeal – an appeal on a point of law – before the Legfelsőbb Bíróság.
- 31 However, as the purpose of an appeal on a point of law is to ensure the consistency of case-law, the possibility of bringing such an appeal is limited, in particular by the condition governing the admissibility of pleas, which is linked to the obligation to allege a breach of law.
- 32 The Szegedi Ítéltábla further notes that, in Hungarian academic legal writing and case-law, questions have been raised as to the compatibility with Article 234 EC of the provisions laid down in Articles 155/A and 249/A of the Law on civil procedure concerning appeals against decisions by which a question is referred to the Court of Justice for a preliminary ruling.
- 33 In that regard, the Szegedi Ítéltábla points out that those provisions might result in an appellate court preventing a court which has decided to make a reference to the Court from doing so, even though an interpretation by the Court of a provision of Community law is needed to resolve the dispute in the main proceedings.
- 34 As regards the merits of the case before it, the Szegedi Ítéltábla, referring to the judgment in Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, notes that the freedom of establishment laid down in Articles 43 EC and 48 EC does not include the right, for a company incorporated under the legislation of a Member State and registered therein, to transfer its central administration, and thus its principal place of business, to another Member State whilst retaining its legal personality and nationality of origin, should the competent authorities object to this.
- 35 However, according to the Szegedi Ítéltábla, this principle may have been further refined in the later case-law of the Court.
- 36 In that regard, the Szegedi Ítéltábla points out that, according to the case-law of the Court, all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment constitute a restriction on that freedom, and it refers in that regard, inter alia, to Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraphs 11 and 12).
- 37 The Szegedi Ítéltábla moreover points out that, in *SEVIC Systems*, the Court ruled that Articles 43 EC and 48 EC preclude registration in the national commercial register of the merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company from being refused in general in a Member State where one of the two companies is established in another Member State, whereas such registration is possible, on compliance with certain conditions, where the two companies participating in the merger are both established in the territory of the first Member State.
- 38 Moreover, it is settled case-law of the Court that national laws cannot differentiate between companies according to the nationality of the person seeking their registration in the commercial register.
- 39 Lastly, the Szegedi Ítéltábla states that Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) (OJ 1985 L 199, p. 1) and Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ 2001 L 294, p. 1) lay down, for the forms of Community undertaking which they introduce, more flexible and less costly provisions which enable those undertakings to transfer their seat or establishment from one Member State to another without first going into liquidation.
- 40 In those circumstances, on the view that resolution of the dispute before it depended on the interpretation of Community law, the Szegedi Ítéltábla decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

- (1) Is a court of second instance which has to give a decision on an appeal against a decision of a commercial court (cégbírószág) in proceedings to amend a registration [of a company] entitled to make a reference for a preliminary ruling under Article 234 [EC], where neither the action before the commercial court nor the appeal procedure is *inter partes*?
- (2) In so far as an appeal court is included in the concept of a “court or tribunal which is entitled to make a reference for a preliminary ruling” under Article 234 [EC], must that court be regarded as a court against whose decisions there is no judicial remedy, which has an obligation, under Article 234 [EC], to submit questions on the interpretation of Community law to the Court of Justice of the European Communities?
- (3) Does a national measure which, in accordance with domestic law, confers a right to bring an appeal against an order making a reference for a preliminary ruling limit the power of the Hungarian courts to refer questions for a preliminary ruling or could it limit that power – derived directly from Article 234 [EC] – if, in appeal proceedings, the national superior court may amend the order, render the request for a preliminary ruling inoperative and order the court which issued the order for reference to resume the national proceedings which had been suspended?
- (4) (a) If a company, [incorporated] in Hungary under Hungarian company law and entered in the Hungarian commercial register, wishes to transfer its seat to another Member State of the European Union, is the regulation of this field within the scope of Community law or, in the absence of the harmonisation of laws, is national law exclusively applicable?
- (b) May a Hungarian company request transfer of its seat to another Member State of the European Union relying directly on Community law (Articles 43 [EC] and 48 [EC])? If the answer is affirmative, may the transfer of the seat be made subject to any kind of condition or authorisation by the Member State of origin or the host Member State?
- (c) May Articles 43 [EC] and 48 [EC] be interpreted as meaning that national rules or national practices which differentiate between commercial companies with respect to the exercise of their rights, according to the Member State in which their seat is situated, are incompatible with Community law?
- [(d)] May Articles 43 [EC] and 48 [EC] be interpreted as meaning that, in accordance with those articles, national rules or practices which prevent a Hungarian company from transferring its seat to another Member State of the European Union are incompatible with Community law?’

The questions referred for a preliminary ruling

The first question

54 By this question, the Court is essentially asked whether a court such as the referring court, hearing an appeal against a decision of a lower court, responsible for maintaining the commercial register, rejecting an application for amendment of information entered in that register, must be classified as a court or tribunal which is entitled to make a reference for a preliminary ruling under Article 234 EC, regardless of the fact that neither the decision of the lower court nor the consideration by the referring court of the appeal against that decision takes place in the context of *inter partes* proceedings.

55 In that regard, it should be borne in mind that, according to settled case-law, in order to determine whether the body making a reference is a ‘court or tribunal’ for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, *inter alia*, Case C-96/04 *Standesamt Stadt Niebüll* [2006] ECR I-3561, paragraph 12 and the case-law cited).

56 With regard to the *inter partes* nature of the proceedings before the national court, Article 234 EC does not make reference to the Court subject to those proceedings being *inter partes*. None the less, it follows from that article that a national court may make a reference to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see to that effect, *inter alia*, Case C-182/00 *Lutz and Others* [2002] ECR I-547, paragraph 13 and the case-law cited).

57 Thus, where a court responsible for maintaining a register makes an administrative decision without being required to resolve a legal dispute, it cannot be regarded as exercising a judicial function. Such is the case, for example, where it decides an application for registration of a company in proceedings which do not have as their object the annulment of a measure which allegedly adversely affects the applicant (see to that effect, *inter alia*, *Lutz and Others*, paragraph 14 and the case-law cited).

58 In contrast, a court hearing an appeal which has been brought against a decision of a lower court responsible for maintaining a register, rejecting such an application, and which seeks the setting-aside of that decision, which allegedly adversely affects the rights of the applicant, is called upon to give judgment in a dispute and is exercising a judicial function.

59 Accordingly, in such a case, the appellate court must, in principle, be regarded as a court or tribunal within the meaning of Article 234 EC, with jurisdiction to refer a question to the Court for a preliminary ruling (see for similar situations, *inter alia*, Case C-300/01 *Salzmann* [2003] ECR I-4899; *SEVIC Systems*; and Case C-117/06 *Möllendorf and Others* [2007] ECR I-8361).

60 It is apparent from the court file that, in the main proceedings, the referring court is sitting in an appellate capacity in an action for the setting-aside of a decision by which a lower court, responsible for maintaining the commercial register, rejected an application by a company for registration of the transfer of its seat, requiring the amendment of an entry in that register.

61 Accordingly, in the main proceedings, the referring court is hearing a dispute and is exercising a judicial function, regardless of the fact that the proceedings before that court are not *inter partes*.

62 Consequently, in the light of the case-law cited in paragraphs 55 and 56 above, the referring court must be regarded as a court or tribunal for the purposes of Article 234 EC.

63 In the light of the foregoing, the answer to the first question must be that a court such as the referring court, hearing an appeal against a decision of a lower court, responsible for maintaining the commercial register, rejecting an application for amendment of information entered in that register, must be classified as a court or tribunal which is entitled to make a reference for a preliminary ruling under Article 234 EC, regardless of the fact that neither the decision of the lower court nor the consideration of the appeal by the referring court takes place in the context of *inter partes* proceedings.

The second question

64 By this question, the Court is essentially being asked whether a court such as the referring court, whose decisions in disputes such as that in the main proceedings may be appealed on points of law, falls to be classified as a court or tribunal against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC.

Admissibility

65 The Commission of the European Communities contends that this question is inadmissible as it is manifestly irrelevant to the resolution of the dispute in the main proceedings, since the order for reference has already been submitted to the Court, rendering any examination of whether there is an obligation to make a reference devoid of interest.

66 That objection must be rejected.

67 According to settled case-law, there is a presumption of relevance in favour of questions on the interpretation of Community law referred by a national court, and it is a matter for the national court to define, and not for the Court to verify, in which factual and legislative context they operate. The Court declines to rule on a reference for a preliminary ruling from a national court only where it is quite obvious that the interpretation of Community law that is sought is unrelated to the actual facts of the main action or to 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 that effect, Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22 and the case-law cited).

68 As stated in paragraph 27 above, Cartesio claimed before the referring court that that court was required to make a reference to the Court for a preliminary ruling, since it fell to be classified as a court or tribunal against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC.

69 As the referring court had doubts concerning that plea, it decided to refer a question on that issue to the Court for a preliminary ruling.

70 It would be contrary to the spirit of cooperation which must guide all relations between national courts and the Court of Justice, and contrary also to the requirements of procedural economy, to require a national court first to seek a preliminary ruling on the sole question whether that court is one of those referred to in the third paragraph of Article 234 EC, before, where appropriate, having to formulate – subsequently and by a second reference for a preliminary ruling – the questions concerning the provisions of Community law relating to the substance of the dispute before it.

71 Moreover, the Court has already replied to a question relating to the characteristics of national courts in the light of the third paragraph of Article 234 EC in a context offering certain similarities with that of the present reference for a preliminary ruling, without the admissibility of that question being disputed (Case C-99/00 *Lyckeskog* [2002] ECR I-4839).

72 In those circumstances, it does not appear – at least not *prima facie* – that the interpretation of Community law sought is unrelated to the actual facts of the main action or to its purpose.

73 Accordingly, the presumption of relevance in favour of references for a preliminary ruling is not, as regards the present question, rebutted by the objection put forward by the Commission (see, *inter alia*, *van der Weerd and Others*, paragraphs 22 and 23).

74 It follows that the second question is admissible.

Substance

75 The issue raised by this question is thus whether the referring court falls to be classified as ‘a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law’, within the meaning of the third paragraph of Article 234 EC. It is clear from the order for reference that this question is raised in view of the fact, referred to in paragraphs 30 and 31 above, that, although Hungarian law provides that decisions delivered on appeal by the referring court may be the subject of an extraordinary appeal – in other words, an appeal on a point of law before the Legfelsőbb Bíróság, the purpose of which is to ensure the consistency of the case-law – the possibilities of bringing such an appeal are limited, in particular, by the condition governing the admissibility of pleas, which is linked to the obligation to allege a breach of law, and in view of the fact, also pointed out in the order for reference, that under Hungarian law an appeal on a point of law does not, in principle, have the effect of suspending enforcement of the decision delivered on appeal.

76 The Court has already held that decisions of a national appellate court which can be challenged by the parties before a supreme court are not decisions of ‘a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law’ within the meaning of the third paragraph of Article 234 EC. The fact that the examination of the merits of such challenges is conditional upon a preliminary declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy (*Lyckeskog*, paragraph 16).

77 That is true *a fortiori* in the case of a procedural system such as that under which the case before the referring court must be decided, since that system makes no provision for a preliminary declaration by the supreme court that the appeal is admissible and, instead, merely imposes restrictions with regard, in particular, to the nature of the pleas which may be raised before such a court, which must allege a breach of law.

78 In common with the lack of suspensory effect of appeals on a point of law before the Legfelsőbb Bíróság, such restrictions do not have the effect of depriving the parties in a case before a court whose decisions are amenable to an appeal on a point of law of the possibility of exercising effectively their right to appeal the decision handed down by that court in a dispute such as that in the main proceedings. It does not follow, therefore, from those restrictions or from the lack of suspensory effect that that court falls to be classified as a court handing down a decision against which there is no judicial remedy.

79 In the light of the foregoing, the answer to the second question must be that a court such as the referring court, whose decisions in disputes such as that in the main proceedings may be appealed on points of law, cannot be classified as a court or tribunal against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC.

The third question

Admissibility

80 Ireland argues that this question is hypothetical, hence inadmissible, since no appeal on a point of law has been brought against the order for reference and, in consequence, an answer to that question would be of no use to the referring court.

81 The Commission also asks the Court to declare that it is not appropriate to give a reply to the third question because, given that the order for reference has the authority of *res judicata* and has reached the Court, that question is hypothetical.

82 Those objections cannot be upheld.

83 As was pointed out in paragraph 67 above, the presumption of relevance enjoyed by references for a preliminary ruling may, in certain circumstances, be rebutted, in particular where the Court holds that the problem is hypothetical.

84 Ireland and the Commission maintain that the problem raised by this question – the possible incompatibility with the second paragraph of Article 234 EC of national rules governing appeals against a decision making a reference to the Court – is hypothetical, since, in fact, the order for reference has not been appealed against and now has the authority of *res judicata*.

85 However, neither that decision nor the file sent to the Court permits the inference that there has been no appeal against that decision or that there can no longer be any appeal against it.

86 In the light of the settled case-law cited in paragraph 67 above, since, in such a situation of uncertainty, responsibility for defining and verifying the factual and legislative context in which the question referred arises lies with the national court, the presumption of relevance which this question enjoys has not been rebutted.

87 It follows that the third question is admissible.

Substance

88 Article 234 EC gives national courts the right – and, where appropriate, imposes on them the obligation – to make a reference for a preliminary ruling, as soon as the national court perceives either of its own motion or at the request of the parties that the substance of the dispute raises one of the points referred to in the first paragraph of Article 234 EC. It follows that national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of Community law, or consideration of their validity, necessitating a decision on their part (Case 166/73 *Rheinmühlen-Düsseldorf* [1974] ECR 33, paragraph 3).

89 It is also clear from the case-law of the Court that, in the case of a court or tribunal against whose decisions there is a judicial remedy under national law, Article 234 EC does not preclude decisions of such a court by which questions are referred to the Court for a preliminary ruling from remaining subject to the remedies normally available under national law. Nevertheless, in the interests of clarity and legal certainty, the Court must abide by the decision to refer, which must have its full effect so long as it has not been revoked (Case 146/73 *Rheinmühlen-Düsseldorf* [1974] ECR 139, paragraph 3).

90 Moreover, the Court has already held that the system established by Article 234 EC with a view to ensuring that Community law is interpreted uniformly throughout the Member States instituted direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties (Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 41).

91 The system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary (*Kempter*, paragraph 42).

92 It is clear from the order for reference that, under Hungarian law, a separate appeal may be brought against a decision making a reference to the Court for a preliminary ruling, although the main proceedings remain pending in their entirety before the referring court, proceedings being stayed until the Court gives a ruling. The appellate court thus seised has, under Hungarian law, power to vary that decision, to set aside the reference for a preliminary ruling and to order the first court to resume the domestic law proceedings.

93 As is clear from the case-law cited in paragraphs 88 and 89 above, concerning a national court or tribunal against whose decisions there is a judicial remedy under national law, Article 234 EC does not preclude a decision of such a court, making a reference to the Court, from remaining subject to the remedies normally available under national law. Nevertheless, the outcome of such an appeal cannot limit the jurisdiction conferred by Article 234 EC on that court to make a reference to the Court if it considers that a case pending before it raises questions on the interpretation of provisions of Community law necessitating a ruling by the Court.

94 It should be pointed out, moreover, that the Court has already held that, in a situation where a case is pending, for the second time, before a court sitting at first instance after a judgment originally delivered by that court has been quashed by a supreme court, the court at first instance remains free to refer questions to the Court pursuant to Article 234 EC, regardless of the existence of a rule of national law whereby a court is bound on points of law by the rulings of a superior court (*Case 146/73 Rheinmühlen-Düsseldorf*).

95 Where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the autonomous jurisdiction which Article 234 EC confers on the referring court to make a reference to the Court would be called into question, if – by varying the order for reference, by setting it aside and by ordering the referring court to resume the proceedings – the appellate court could prevent the referring court from exercising the right, conferred on it by the EC Treaty, to make a reference to the Court.

96 In accordance with Article 234 EC, the assessment of the relevance and necessity of the question referred for a preliminary ruling is, in principle, the responsibility of the referring court alone, subject to the limited verification made by the Court in accordance with the case-law cited in paragraph 67 above. Thus, it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it.

97 It follows that, in a situation such as that in the case before the referring court, the Court must – also in the interests of clarity and legal certainty – abide by the decision to make a reference for a preliminary ruling, which must have its full effect so long as it has not been revoked or amended by the referring court, such revocation or amendment being matters on which that court alone is able to take a decision.

98 In the light of the foregoing, the answer to the third question must be that, where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred by that provision of the Treaty on any national court or tribunal to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.

[text deleted]

On those grounds, the Court (Grand Chamber) hereby rules:

1. A court such as the referring court, hearing an appeal against a decision of a lower court, responsible for maintaining the commercial register, rejecting an application for amendment of information entered in that register, must be classified as a court or tribunal which is entitled to make a reference for a preliminary ruling

under Article 234 EC, regardless of the fact that neither the decision of the lower court nor the consideration of the appeal by the referring court takes place in the context of *inter partes* proceedings.

2. A court such as the referring court, whose decisions in disputes such as that in the main proceedings may be appealed on points of law, cannot be classified as a court or tribunal against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC.

3. Where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred on any national court or tribunal by that provision of the Treaty to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.

4. As Community law now stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.

[Signatures]

ORDER OF THE COURT (Second Chamber)

24 March 2009 (*)

(Appeal against a judgment making a reference for a preliminary ruling – Where the appeal court itself adjudicates the dispute in the main proceedings – No need to reply)

In **Case C-525/06**,

REFERENCE for a preliminary ruling under Article 234 EC from the rechtbank van koophandel te Hasselt (Belgium), made by decision of 15 December 2006, received at the Court on 22 December 2006, in the proceedings

De Nationale Loterij NV

v

Customer Service Agency BVBA,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, K. Schiemann (Rapporteur), P. Küris, L. Bay Larsen and C. Toader, Judges,

Advocate General: Y. Bot,

Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

- 1 This reference for a preliminary ruling concerns the interpretation of Article 49 EC.
- 2 The reference was made in the course of proceedings brought by De Nationale Loterij NV ('the Nationale Loterij') against Customer Service Agency BVBA ('Customer Service Agency'), seeking (i) a declaration that Customer Service Agency's activities, consisting in the recruitment of people to participate, as a group and individually, in Euro Millions – a type of lottery organised at European level – are contrary to honest trading practices and in breach of the statutory monopoly granted to the Nationale Loterij with regard to the organisation of public lotteries and (ii) an order directing Customer Service Agency to cease those activities immediately.
- 3 The rechtbank van koophandel te Hasselt, uncertain as to the compatibility with Community law of the Belgian rules concerning gambling which it was required to apply – in particular, the Law on the rationalisation of the operation and administration of the Nationale Loterij (Wet tot rationalisering van de werking en het beheer van de Nationale Loterij) of 19 April 2002 (*Belgisch Staatsblad*, 4 May 2002, p. 18828) – and especially as to the compatibility with Article 49 EC of the Nationale Loterij's statutory monopoly for the organisation of public lotteries, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
 - '1. Is Article 49 of the EC Treaty to be interpreted as meaning that restrictive national provisions, such as Article 37 of the Law of 19 April 2002, which obstruct the access to the market of an undertaking wishing to sell for profit group participation forms in Euro Millions, are still permitted having regard to the public interest (prevention of squandering through gaming), in the knowledge that:

(a) the Nationale Loterij, which acquired a statutory monopoly from the Belgian State and pays a monopoly rent for it and which has the objective of channelling man's inherent compulsion to gamble, regularly advertises participation in Euro Millions thereby in reality strengthening that compulsion;

(b) the regular advertising by Nationale Loterij and its sales methods have a foreclosure effect, in which the Nationale Loterij is induced to maximise turnover (financial reasons) rather than channel the citizens' inherent compulsion to gamble;

(c) less obstructive measures, such as restriction of possible stakes and winnings, would better achieve the objective pursued, namely the channelling of the inherent compulsion to gamble?

2. Is a restrictive national provision such as Article 37 of the Law of 19 April 2002, which prevents the access to the market of an undertaking intending to sell, for profit, group participation forms in Euro Millions, contrary to the freedom to provide services (Article 49 EC) where the defendant itself does not organise a lottery but in fact seeks to organise, for profit, merely participation as a group in Euro Millions via the Nationale Loterij's own participation forms?'

4 Subsequent to the reference to the Court, the Nationale Loterij brought an appeal against the order for reference before the hof van beroep te Antwerpen (Court of Appeal, Antwerp).

5 By judgment of 8 November 2007, the hof van beroep te Antwerpen reversed the order for reference and ordered Customer Service Agency, on grounds of non-compliance with the national rules, to cease its activities on pain of a penalty of EUR 5 000 per infringement established. In its judgment, the hof van beroep te Antwerpen held that the court ruling at first instance was fully entitled to raise the question of the compatibility of the national rules with Article 49 EC. However, according to the hof van beroep te Antwerpen, the answer to that question was clear and, in consequence, it was not necessary to make a reference to the Court for a preliminary ruling. After examining the national rules in the light of Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, it held that those rules were compatible with Community law.

6 It is clear from the case-law of the Court that, in the case of a court or tribunal against whose decisions there is a judicial remedy under national law, Article 234 EC does not preclude decisions of such a court by which questions are referred to the Court for a preliminary ruling from remaining subject to the remedies normally available under national law (Case 146/73 *Rheinmühlen-Düsseldorf* [1974] ECR 139, paragraph 3, and Case C-210/06 *Cartesio* [2008] ECR I-0000, paragraph 89).

7 Furthermore, the interpretation of Article 234 EC in paragraph 98 of the judgment in *Cartesio* is not relevant in the main proceedings in the present case. In *Cartesio*, the Court had to consider rules of national law, relating to the right of appeal against a decision making a reference for a preliminary ruling, under which the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal. The Court went on in paragraph 98 of that judgment to hold that the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred by that provision of the Treaty on any national court or tribunal to make a reference to the Court for a preliminary ruling cannot be called into question by the application of such rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings. Such an interpretation cannot be applied to the main proceedings in the present case because the dispute is no longer pending before the referring court.

8 In fact, the hof van beroep te Antwerpen itself adjudicated the dispute between the parties to the main proceedings, thereby assuming responsibility for ensuring compliance with Community law.

9 It must therefore be held that there is no longer any dispute before the referring court.

10 As the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (see, inter alia, Case C-225/02 *García Blanco* [2005] ECR I-523, paragraph 28), a reply to the questions referred is no longer necessary.

11 Thus, in the present case, even though the referring court – whose responsibility it is, in principle, to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to

withdraw it (see, to that effect, *Cartesio*, paragraph 96) – has not withdrawn the reference for a preliminary ruling, it must be held that there is no need to reply to that reference.

12 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 orders:

There is no need to reply to the reference for a preliminary ruling in Case C-525/06.

[Signatures]

JUDGMENT OF THE COURT (Grand Chamber)

27 February 2018 [*](#)

(Reference for a preliminary ruling — Article 19(1) TEU — Legal remedies — Effective judicial protection — Judicial independence — Charter of Fundamental Rights of the European Union — Article 47 — Reduction of remuneration in the national public administration — Budgetary austerity measures)

In **Case C-64/16**,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 7 January 2016, received at the Court on 5 February 2016, in the proceedings

Associação Sindical dos Juizes Portugueses

v

Tribunal de Contas,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, L. Bay Larsen, T. von Danwitz, J.L. da Cruz Vilaça, A. Rosas, E. Levits (Rapporteur) and C.G. Fernlund, Presidents of Chambers, C. Toader, M. Safjan, D. Šváby, M. Berger, A. Prechal, E. Jarašiūnas and E. Regan, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 February 2017,

after considering the observations submitted on behalf of:

- the Associação Sindical dos Juizes Portugueses, by M. Rodrigues, advogado,
- the Portuguese Government, by L. Inez Fernandes, M. Figueiredo, M. Rebelo, F. Almeida and V. Silva, acting as Agents,
- the European Commission, by L. Flynn and M. França, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between the Associação Sindical dos Juizes Portugueses (Trade Union of Portuguese Judges, 'the ASJP') and the Tribunal de Contas (Court of Auditors, Portugal) concerning the temporary reduction in the amount of remuneration paid to that court's members, in the context of the Portuguese State's budgetary policy guidelines.

Legal context

EU law

3 Article 2 TEU reads as follows:

'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.'

4 Article 19(1) and (2) TEU provides:

'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 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 ...'

Portuguese law

5 Lei n.º 75/2014 — Estabelece os mecanismos das reduções remuneratórias temporárias e as condições da sua reversão (Law No 75/2014 putting in place the mechanisms for the temporary reduction of remuneration and the conditions governing their reversibility) of 12 September 2014 (*Diário da República*, 1st Series, No 176, of 12 September 2014, p. 4896, 'Law No 75/2014'), determines, in accordance with Article 1(1) thereof, the temporary application of the mechanism for reducing remuneration in the public sector.

6 Article 2 of Law No 75/2014 is worded as follows:

'1 — Gross monthly income greater than EUR 1 500 of persons referred to in paragraph 9, whether already employed on that date or taking up their functions thereafter, in any capacity, shall be reduced as follows:

(a) by 3.5% of the total amount of remuneration greater than EUR 1 500 and less than EUR 2 000;

(b) by 3.5% of the amount of EUR 2 000 plus 16% of the amount of the total remuneration greater than EUR 2 000, coming to an overall reduction of between 3.5% and 10% in respect of remuneration equal to or greater than EUR 2 000 and up to EUR 4 165;

(c) by 10% of the total amount of remuneration greater than EUR 4 165.

...

9 — This Law shall apply to the following office-holders and other employees:

(a) the President of the Republic;

(b) the President of the Assembleia da República [National Assembly];

(c) the Prime Minister;

- (d) Deputies of the Assembleia da República;
- (e) Members of the Government;
- (f) Judges of the Tribunal Constitucional [Constitutional Court], Judges of the Tribunal de Contas [Court of Auditors], the Attorney General of the Republic, judges and public prosecutors, judges of administrative and tax tribunals and district judges;
- (g) Representatives of the Republic for the Autonomous Regions;
- (h) Deputies of the assembleias legislativas das regiões autónomas [Parliaments of the Autonomous Regions];
- (i) Members of the Regional Governments;
- (j) locally elected persons;
- (k) members of other bodies provided for in the Constitution not referred to in the preceding paragraphs and members of bodies in charge of independent administrative bodies, namely those working for the Assembleia da República;
- (l) members and employees of cabinets, management bodies and support offices, office-holders and bodies referred to in the preceding paragraphs, the President and Vice-President of the Supreme Council of the Judiciary, the President and Vice-President of the Supreme Council of Administrative and Tax Tribunals, the President of the Supremo Tribunal de Justiça [Supreme Court], the President and Judges of the Tribunal Constitucional [Constitutional Court], the President of the Supremo Tribunal Administrativo [Supreme Administrative Court], the President of the Tribunal de Contas [Court of Auditors], the Provedor de Justiça [Ombudsman] and the Attorney General of the Republic;
- (m) soldiers of the armed forces and the National Republican Guard (GNR), including military judges and military experts in the Public Prosecutor's Office, and of other armed forces;
- (n) managerial staff of the Presidency of the Republic and the Assembleia da República and other supporting staff of the constitutional bodies, other departments and bodies of the central, regional and local State administration and staff performing other duties which are treated as equivalent for the purposes of remuneration;
- (o) public administrators or those treated as equivalent thereto, members of executive, deliberative, consultative or supervisory bodies or any other statutory body subject to general or special rules, legal persons governed by public law whose independence arises from their involvement in the regulation, supervision or control of public undertakings whose capital is wholly or mainly in public ownership, public undertakings the operation of which is entrusted to a third undertaking and entities forming part of the regional and municipal business sector, public foundations and any other public entity;
- (p) employees performing public duties with the Presidency of the Republic, the Assembleia da República or in other constitutional bodies, and those performing public duties irrespective of the details of the employment relationship governed by public law, including employees undergoing retraining and on special leave;
- (q) employees of public institutions subject to a special regime and legal persons governed by public law which are independent as a result of their involvement in regulatory, supervisory or monitoring activities, including employees of independent regulatory entities;
- (r) employees of public undertakings whose capital is wholly or mainly in public ownership, public undertakings and entities forming part of the regional and municipal business sector;
- (s) employees and management of public foundations governed by public law and public foundations governed by private law and public establishments not covered by the preceding paragraphs;
- (t) reserve staff, staff who have taken early retirement or are on stand-by, who are not in service, who receive benefits indexed to the salaries of active staff.

...

15 — The rules laid down in this article shall be mandatory and take precedence over all other provisions, whether special or exceptional, or otherwise, and over collective regulatory agreements and contracts of employment, and may not be derogated from or amended by any of the above.'

7 Lei n.º 159-A/2015 — Extinção da redução remuneratória na Administração Pública (Law No 159-A/2015 abolishing the reduction of remuneration in the public administration) of 30 December 2015 (*Diário da República*, 1st Series, No 254, of 30 December 2015, p. 10006-(4), 'Law No 159-A/2015'), gradually brought to an end, as from 1 January 2016, the measures to reduce remuneration set out in Law No 75/2014.

8 Article 1 of Law No 159-A/2015 provides:

'This law shall bring to an end the reduction of remuneration provided for in Law [No 75/2014], in the terms set out in the following article.'

9 Article 2 of Law No 159-A/2015 states:

'The reduction of remuneration provided for in Law [No 75/2014] shall be progressively eliminated during 2016, at quarterly intervals, as follows:

- (a) reversibility of 40% for remuneration paid as from 1 January 2016;
- (b) reversibility of 60% for remuneration paid as from 1 April 2016;
- (c) reversibility of 80% for remuneration paid as from 1 July 2016;
- (d) total elimination of the reduction in remuneration as from 1 October 2016.'

10 According to the lei n.º 98/97 de Organização e Processo do Tribunal de Contas (Law No 98/97 on the organisation and procedure of the Court of Auditors), of 26 August 1997 (*Diário da República*, Series I-A, No 196, of 26 August 1997), that court monitors, in particular, the receipt of EU own resources and the use of financial resources from the European Union, and may act in that field, in accordance with Article 5(1)(h) of that law, in cooperation with the relevant EU bodies. As provided for in Articles 44 and 96 of that law, that court also rules on questions concerning the prior review (*vista*) of the validity of the measures, contracts or other instruments giving rise to public expenditure or debts, in particular in the context of public procurement procedures.

The dispute in the main proceedings and the question referred for a preliminary ruling

11 By Law No 75/2014, the Portuguese legislature temporarily reduced, as from October 2014, the remuneration of a series of office holders and employees performing duties in the public sector. In accordance with administrative 'salary management' measures adopted on the basis of that law, the remuneration of the judges of the Tribunal de Contas (Court of Auditors) was reduced.

12 The ASJP, acting on behalf of members of the Tribunal de Contas (Court of Auditors), brought a special administrative action before the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) seeking the annulment of those administrative measures relating to the month of October 2014 and the months following, an order that the defendant repay the sums withheld from salaries, plus default interest at the statutory rate, and a declaration that the persons concerned were entitled to receive their salaries in full.

13 In support of that action, the ASJP argues that the salary-reduction measures infringe 'the principle of judicial independence' enshrined not only in the Portuguese Constitution but also in EU law, in the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.

14 According to the referring court, the measures for the temporary reduction in the amount of public sector remuneration are based on mandatory requirements for reducing the Portuguese State's excessive budget deficit during the year 2011. It considers that those measures were adopted in the framework of EU law or, at least, are European in origin, on the ground that those requirements were imposed on the Portuguese Government by EU decisions granting, in particular, financial assistance to that Member State.

15 In that regard, the referring court observes that the discretion which the Portuguese State has in implementing its budgetary policy guidelines, acknowledged by the EU institutions, does not relieve it, however, of its obligation to respect the general principles of EU law, which include the principle of judicial independence, applicable both to Courts of the European Union and national courts.

16 According to the referring court, the effective judicial protection of the rights stemming from the EU legal order is ensured, under the second subparagraph of Article 19(1) TEU, primarily by the national courts. The latter must implement that protection in accordance with the principles of independence and impartiality set out in Article 47 of the Charter.

17 The referring court states, in that regard, that the independence of judicial bodies depends on the guarantees that attach to their members' status, including in terms of remuneration.

18 In those circumstances the Supremo Tribunal Administrativo (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In view of the mandatory requirements of eliminating the excessive budget deficit and of financial assistance regulated by ... rules [of EU law], must the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU, in Article 47 of the [Charter] and in the case-law of the Court of Justice, be interpreted as meaning that it precludes the measures to reduce remuneration that are applied to the judiciary in Portugal, where they are imposed unilaterally and on an ongoing basis by other constitutional authorities and bodies, as is the consequence of Article 2 of Law [No 75/2014]?'

Consideration of the question referred

Admissibility

19 The European Commission contends that the referring court has not set out, in its order, the reasons for choosing the provisions of EU law which it seeks to have interpreted.

20 In that regard, it should be borne in mind that it follows from the spirit of cooperation which must prevail in the operation of the preliminary reference procedure that it is essential that the national court sets out in its order for reference the precise reasons why it considers that a reply to its questions concerning the interpretation of certain provisions of EU law is necessary to enable it to give judgment (see, to that effect, judgment of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 47 and the case-law cited).

21 In the present case, the order for reference contains sufficient information to enable the Court to understand the reasons why the referring court seeks an interpretation of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter for the needs of the main proceedings.

22 The Portuguese Government, for its part, contends that the request for a preliminary ruling is inadmissible, on the ground that on 1 October 2016 Law No 159-A/2015 totally abolished the salary reduction which from 1 October 2014 had affected persons performing duties in the public sector. It argues, therefore, that any claim that there was an alleged infringement of the principle of judicial independence on account of that salary reduction has become devoid of purpose.

23 In that regard, it should be noted that the Court may refuse to rule on a question referred by a national court in particular where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose or where the problem is hypothetical (see, in particular, judgment of 21 December 2016, *Associazione Italia Nostra Onlus*, C-444/15, EU:C:2016:978, paragraph 36 and the case-law cited).

24 In the present case, as the Advocate General observed in point 32 of his Opinion, the dispute before the referring court in the main proceedings concerns the annulment of the administrative measures under which the remuneration of members of the Tribunal de Contas (Court of Auditors) was reduced and the reinstatement of the sums withheld pursuant to Law No 75/2014.

25 It is apparent from the file submitted to the Court that the amounts withheld from the remuneration of the persons concerned during the period from October 2014 to October 2016 have not been repaid to them. Consequently, since the main proceedings have not become devoid of purpose, that plea of inadmissibility must be rejected.

26 It follows from the foregoing that the request for a preliminary ruling is admissible.

Substance

27 By its question, the referring court seeks, in essence, to ascertain whether the second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence precludes general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of a Member State's judiciary.

28 Since the applicant in the main proceedings is acting solely on behalf of the members of the Tribunal de Contas (Court of Auditors), in order to answer that question it is necessary to take into account only the situation of that court's members.

29 First of all, the Court of Justice points out that as regards the material scope of the second subparagraph of Article 19(1) TEU, that provision relates to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter.

30 According to Article 2 TEU, the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU (see, to that effect, Opinion 2/13 (Accession of the European Union to the ECHR), of 18 December 2014, EU:C:2014:2454, paragraph 168).

31 The European Union is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 91 and 94 and the case-law cited).

32 Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals (see, to that effect, Opinion 1/09 (Agreement creating a Unified Patent Litigation System), of 8 March 2011, EU:C:2011:123, paragraph 66; judgments of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 90, and of 28 April 2015, *T & L Sugars and Sidul Açúcares v Commission*, C-456/13 P, EU:C:2015:284, paragraph 45).

33 Consequently, national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is observed (see, to that effect, Opinion 1/09 (Agreement creating a Unified Patent Litigation System), of 8 March 2011, EU:C:2011:123, paragraph 69, and judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 99).

34 The Member States are therefore obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law (see, to that effect, Opinion 1/09 (Agreement creating a Unified Patent Litigation System), of 8 March 2011, EU:C:2011:123, paragraph 68). In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 100 and 101 and the case-law cited).

35 The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common

to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (see, to that effect, judgments of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, paragraph 37, and of 22 December 2010, *DEB*, C-279/09, EU:C:2010:811, paragraphs 29 to 33).

36 The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law (see, to that effect, judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 73 and the case-law cited).

37 It follows that every Member State must ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection.

38 In that regard, the Court notes that the factors to be taken into account in assessing whether a body is a ‘court or tribunal’ include, inter alia, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (judgment of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraph 27 and the case-law cited).

39 In the present case, it must be noted that, according to the information before the Court which it is for the referring court to verify, questions relating to EU own resources and the use of financial resources from the European Union may be brought before the Tribunal de Contas (Court of Auditors), pursuant to Law No 98/97 cited in paragraph 10 above. Such questions may concern the application or interpretation of EU law (see, in particular, judgment of 26 May 2016, *Județul Neamț and Județul Bacău*, C-260/14 and C-261/14, EU:C:2016:360). The same is also true of questions concerning the prior review (*visto*) of the validity of the measures, contracts or other instruments giving rise to public expenditure or debts, inter alia, in the context of public procurement procedures, which may also be brought before that court pursuant to Law No 98/97.

40 Consequently, to the extent that the Tribunal de Contas (Court of Auditors) may rule, as a ‘court or tribunal’, within the meaning referred to in paragraph 38 above, on questions concerning the application or interpretation of EU law, which it is for the referring court to verify, the Member State concerned must ensure that that court meets the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU.

41 In order for that protection to be ensured, maintaining such a court or tribunal’s independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to the access to an ‘independent’ tribunal as one of the requirements linked to the fundamental right to an effective remedy.

42 The guarantee of independence, which is inherent in the task of adjudication (see, to that effect, judgments of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 49; of 14 June 2017, *Online Games and Others*, C-685/15, EU:C:2017:452, paragraph 60; and of 13 December 2017, *El Hassani*, C-403/16, EU:C:2017:960, paragraph 40), is required not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice, as provided for in the third subparagraph of Article 19(2) TEU, but also at the level of the Member States as regards national courts.

43 The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that, in accordance with the settled case-law referred to in paragraph 38 above, that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence.

44 The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (see, to that effect, judgments of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 51, and of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraph 37 and the case-law cited).

45 Like the protection against removal from office of the members of the body concerned (see, in particular, judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 51), the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence.

46 In the present case, it should be noted that, as is apparent from the information provided by the referring court, the salary-reduction measures at issue in the main proceedings were adopted because of mandatory requirements linked to eliminating the Portuguese State's excessive budget deficit and in the context of an EU programme of financial assistance to Portugal.

47 Those salary-reduction measures provided for a limited reduction of the amount of remuneration, up to a percentage varying in accordance with the level of remuneration.

48 The measures were applied not only to the members of the Tribunal de Contas (Court of Auditors), but, more widely, to various public office holders and employees performing duties in the public sector, including the representatives of the legislature, the executive and the judiciary.

49 Those measures cannot, therefore, be perceived as being specifically adopted in respect of the members of the Tribunal de Contas (Court of Auditors). They are, on the contrary, in the nature of general measures seeking a contribution from all members of the national public administration to the austerity effort dictated by the mandatory requirements for reducing the Portuguese State's excessive budget deficit.

50 Lastly, as is apparent from the title of Law No 75/2014 and the actual wording of Article 1(1) thereof, the salary-reduction measures introduced by that Law, and that entered into force on 1 October 2014, were temporary in nature. In accordance with a process for the gradual abolition of those measures which took place during 2016, Law No 159-A/2015 brought the reduction of remuneration definitively to an end on 1 October 2016.

51 In those circumstances, the salary-reduction measures at issue in the main proceedings cannot be considered to impair the independence of the members of the Tribunal de Contas (Court of Auditors).

52 In the light of all the foregoing considerations, the answer to the question raised is that the second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence does not preclude general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of the Tribunal de Contas (Court of Auditors).

Costs

53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

The second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence does not preclude general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of the Tribunal de Contas (Court of Auditors, Portugal).

[Signatures]

JUDGMENT OF THE COURT (Grand Chamber)

5 November 2019 (*)

(Failure of a Member State to fulfil obligations — Second subparagraph of Article 19(1) TEU — Rule of law — Effective judicial protection in the fields covered by EU law — Principles of the irremovability of judges and judicial independence — Lowering of the retirement age of judges of the ordinary Polish courts — Possibility of continuing to carry out the duties of judge beyond the newly set age, by authorisation of the Minister for Justice — Article 157 TFEU — Directive 2006/54/EC — Articles 5(a) and 9(1)(f) — Prohibition of discrimination based on sex in matters of pay, employment and occupation — Establishment of different retirement ages for men and women holding the position of judge of the ordinary Polish courts or of the Sąd Najwyższy (Supreme Court, Poland) or that of public prosecutor in Poland)

In **Case C-192/18**,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 15 March 2018,

European Commission, represented by A. Szymtkowska, K. Banks, C. Valero and H. Krämer, acting as Agents,

applicant,

v

Republic of Poland, represented by B. Majczyna, K. Majcher and S. Żyrek, acting as Agents, and W. Gontarski, adwokat,

defendant,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Prechal (Rapporteur), M. Vilaras, E. Regan, P.G. Xuereb and L.S. Rossi, Presidents of Chambers, E. Juhász, M. Ilešič, J. Malenovský, L. Bay Larsen, D. Šváby and K. Jürimäe, Judges,

Advocate General: E. Tanchev,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 8 April 2019,

after hearing the Opinion of the Advocate General at the sitting on 20 June 2019,

gives the following

Judgment

1 By its application, the European Commission requests the Court to declare:

– first, that, in establishing, by Article 13(1) to (3) of the ustawa o zmianie ustawy — Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the system of ordinary courts and certain other laws) of 12 July 2017 (Dz. U. 2017, item 1452; ‘the Amending Law of 12 July 2017’), a different retirement age for men and women who are judges in the ordinary Polish courts and the Sąd Najwyższy (Supreme Court, Poland) or are public prosecutors in Poland, the Republic of Poland has failed to fulfil its obligations under Article 157 TFEU and Articles 5(a) and 9(1)(f) 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

– second, that, in lowering, by Article 13(1) of the Amending Law of 12 July 2017, the retirement age applicable to judges of the ordinary Polish courts and in granting the Minister for Justice (Poland) the right to decide whether to authorise extension of the period of active service as a judge, pursuant to Article 1(26)(b) and (c) of that law, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

Legal context

EU law

The EU Treaty

2 Article 2 TEU reads as follows:

'The [European] 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.'

3 Article 19(1) TEU provides:

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.'

The FEU Treaty

4 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. ...

3. The European Parliament and the Council [of the European Union], 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.'

The Charter

5 Title VI of the Charter, headed 'Justice', includes Article 47, headed 'Right to an effective remedy and to a fair trial', which provides:

'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. ...

...'

6 Article 51 of the Charter states:

'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.'

Directive 2006/54

7 Recitals 14 and 22 of Directive 2006/54 state:

'(14) Although the concept of pay within the meaning of Article [157 TFEU] 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 28 September 1994, *Beune* (C-7/93, EU:C:1994:350), and of 12 September 2002, *Niemi* (C-351/00, EU:C:2002:480)], 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. ...

(22) In accordance with Article [157(4) TFEU], 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.'

8 As set out in 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.

...'

9 Article 2(1) of Directive 2006/54 states:

'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;

...

(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 [(O) 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.'

10 Headed 'Positive action', Article 3 of Directive 2006/54 provides:

'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.'

11 Chapter 2, headed 'Equal treatment in occupational social security schemes', of Title II of Directive 2006/54 contains inter alia Articles 5, 7 and 9.

12 Article 5 of Directive 2006/54 states:

'... 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; ...'

13 Headed 'Material scope', Article 7 of Directive 2006/54 provides:

'1. This chapter applies to:

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

(iii) old age, including early retirement, ...

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.'

14 As set out in Article 9 of Directive 2006/54, headed 'Examples of discrimination':

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

(f) fixing different retirement ages; ...'

Polish law

The Law on the ordinary courts

15 Article 69(1) and (3) of the ustawa — Prawo o ustroju sądów powszechnych (Law on the system of ordinary courts) of 27 July 2001 (Dz. U. No 98, item 1070; 'the Law on the ordinary courts') was worded as follows:

1. A judge shall retire upon reaching 67 years of age ... unless, no later than 6 months before reaching that age, he submits a statement to the Minister for Justice indicating his wish to continue in his post and presents a certificate, issued in accordance with the rules specified for candidates applying for a judicial post, confirming that his health is no impediment to performing the duties of a judge. ...

3. In the event that a judge submits the statement and presents the certificate referred to in paragraph 1, that judge may continue in his post only until he reaches 70 years of age. ...'

16 Article 69(1) of the Law on the ordinary courts was amended, first of all, by the ustawa o zmianie ustawy o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych oraz niektórych innych ustaw (Law amending the Law on retirement pensions and other pensions payable from the Social Security Fund and certain other laws) of 16 November 2016 (Dz. U. 2017, item 38; 'the Law of 16 November 2016'), which lowered the retirement age of both female and male judges to 65 years. That amendment was to enter into force on 1 October 2017.

17 However, before that amendment even entered into force, Article 69(1) was further amended by Article 13(1) of the Amending Law of 12 July 2017, an enactment which entered into force on 1 October 2017. As a result of that amendment, a judge's retirement age was set at 60 years for women and 65 years for men.

18 Article 1(26)(b) and (c) of the Amending Law of 12 July 2017 also inserted a new paragraph 1b in Article 69 of the Law on the ordinary courts and amended Article 69(3) thereof.

19 As a result of the amendments referred to in the previous two paragraphs, Article 69 provided:

'1. A judge shall retire upon reaching 60 years of age, in the case of women, or upon reaching 65 years of age, in the case of men, unless, no later than 6 months and no earlier than 12 months before reaching that age, he or she submits a statement to the Minister for Justice indicating his or her wish to continue in his or her post and presents a certificate, issued in accordance with the rules specified for candidates applying for a judicial post, confirming that his or her health is no impediment to performing the duties of a judge. ...

1b. The Minister for Justice may consent to a judge continuing in his or her post, having regard to the rational use of the staff of the ordinary courts and the needs resulting from the workload of individual courts. In a situation where the procedure connected with the judge continuing in his or her post has still not come to an end after he or she has reached the age referred to in paragraph 1, the judge shall remain in post until such time as that procedure has come to an end. ...

3. In the event that the Minister for Justice gives the consent referred to in paragraph 1b, a judge may continue in his or her post only until he reaches 70 years of age. ...'

20 As set out in Article 91 of the Law on the ordinary courts:

'1. The level of remuneration for judges occupying equivalent judicial posts shall be differentiated according to the length of service or the functions performed: ...

1c. The basic salary for a judge in a given year shall be based on the average remuneration in the second quarter of the previous year, published in the official gazette of the Republic of Poland (*Monitor Polski*)

2. The basic salary for a judge shall be expressed in grades, the level of which shall be determined through the application of multipliers to the basis for determining the basic salary referred to in paragraph 1c. The basic salary grades for individual judicial posts and the multipliers used to determine the level of the basic salary for judges in individual grades are set out in the annex to this Law.

7. In addition, remuneration for judges shall be differentiated by a seniority allowance amounting, as from the sixth year of service, to 5% of the basic salary and increasing each year by 1% until it reaches 20% of the basic salary....'

21 Article 91a of the Law on the ordinary courts provides:

'1. A judge assuming a position at a [sąd rejonowy (district court, Poland)] shall be entitled to the grade 1 basic salary. A judge assuming a position at a [sąd okręgowy (regional court, Poland)] shall be entitled to the grade 4 basic salary and if, while occupying a lower position, he was already receiving a grade 4 or grade 5 salary, he shall be entitled to the grade 5 or grade 6 basic salary, respectively. A judge assuming a position at a [sąd apelacyjny (court of appeal, Poland)] shall be entitled to the grade 7 basic salary and if, while occupying a lower position, he was already receiving a grade 7 or grade 8 salary, he shall be entitled to the grade 8 or grade 9 basic salary, respectively. ...

...

3. The basic salary for a judge shall be established at the next highest grade after the completion of 5 years' service in a given judicial post.

4. The length of service as a trainee judge shall be added to the length of service as a district court judge....'

22 Article 13(1) of the Amending Law of 12 July 2017 amended Article 100(1) of the Law on the ordinary courts and inserted Article 100(4a) and (4b). Following those amendments, Article 100 provided:

'1. A judge who has been retired in the event of changes to the system of the courts or changes to the boundaries of judicial districts shall be entitled, until reaching the age of 60 years, in the case of women, and 65 years, in the case of men, to emoluments in the amount of remuneration received in the post most recently occupied.

2. A judge who has retired or who has been retired on the grounds of age, illness or loss of strength shall be entitled to emoluments in the amount of 75% of the basic salary and length-of-service allowance received in the post most recently occupied.

3. The emoluments referred to in paragraphs 1 and 2 shall be increased in accordance with changes to the amount of the basic salary for serving judges. ...

4a. In the situation referred to in paragraph 1, a retired judge shall receive a one-off payment upon reaching the age of 60 years, in the case of women, and 65 years, in the case of men.

4b. A judge who has returned to the post he previously occupied or a post equivalent to that previously occupied, in accordance with Article 71c(4) or Article 74(1a), shall, in the event of retirement or being retired, be entitled to a one-off payment in an amount consisting in the difference between the amount of the payment calculated on the day of retirement or being retired and the amount of the payment already paid. In the situation referred to in paragraph 1, the judge shall be entitled to the payment upon reaching the age of 60 years, in the case of women, and 65 years, in the case of men.'

The Law on the Public Prosecutor's Office

23 Article 127(1) of the *ustawa Prawo o prokuraturze* (Law on the Public Prosecutor's Office) of 28 January 2016 (Dz. U. 2016, item 177) states:

'Unless otherwise provided for in this Law, the provisions of Articles 69 to 71, ... Articles 99 to 102 ... of the Law [on the ordinary courts] shall apply, *mutatis mutandis*, to public prosecutors. ...'

24 As set out in Article 124 of the Law on the Public Prosecutor's Office:

'1. The amount of remuneration for public prosecutors occupying equivalent public prosecutors' posts shall be differentiated according to the length of service or the functions performed. ...

2. The basic salary for public prosecutors shall be expressed in grades, the level of which shall be determined through the application of multipliers to the basis for determining the basic salary for public prosecutors.

3. A public prosecutor assuming a position in:

- a [prokuratura rejonowa (district public prosecutor's office, Poland)] shall be entitled to the grade 1 basic salary;
- a [prokuratura okręgowa (regional public prosecutor's office, Poland)] shall be entitled to the grade 4 basic salary and if, while occupying a lower position, he was already receiving a grade 4 or grade 5 salary, he shall be entitled to the grade 5 or grade 6 basic salary, respectively;
 - a [prokuratura regionalna (supra-regional public prosecutor's office, Poland)] shall be entitled to the grade 7 basic salary and if, while occupying a lower position, he was already receiving a grade 7 or grade 8 salary, he shall be entitled to the grade 8 or grade 9 basic salary, respectively. ...

5. The basic salary for a public prosecutor shall be established at the next highest grade after the completion of 5 years' service in a given public prosecutor's post.

6. The length of service as a trainee public prosecutor shall be added to the length of service as a public prosecutor in a [prokuratura rejonowa (district public prosecutor's office)]. ...

11. A public prosecutor shall be entitled to a seniority allowance amounting, as from the sixth year of service, to 5% of the basic salary currently received by the public prosecutor and increasing by 1% for each subsequent year of service until it reaches 20% of the basic salary. After 20 years' service the allowance shall be paid, regardless of the length of service beyond that period, in the amount of 20% of the basic salary currently received by the public prosecutor. ...'

25 Article 13(3) of the Amending Law of 12 July 2017 amended certain other provisions of the Law on the Public Prosecutor's Office, inserting in particular references to the new retirement ages for public prosecutors, that is to say, 60 years for women and 65 years for men.

The 2002 Law on the Supreme Court

26 Article 30(1) of the *ustawa o Sądzie Najwyższym* (Law on the Supreme Court) of 23 November 2002 (Dz. U. 2002, No 240, item 2052; 'the 2002 Law on the Supreme Court') set the retirement age for judges of the Sąd Najwyższy (Supreme Court) at 70 years. Article 30(2) provided, however, that judges who so requested could retire after reaching the age of 67 years.

27 Article 30(2) of the 2002 Law on the Supreme Court was amended, initially, by the Law of 16 November 2016 which lowered the age at which such a request could be made to 65 years. However, before that amendment even entered into force, that provision was amended again, by Article 13(2) of the Amending Law of 12 July 2017. As thus amended, Article 30(2) of the 2002 Law on the Supreme Court provided:

'A judge of [the Sąd Najwyższy (Supreme Court)] who so requests shall retire:

(1) after reaching the age of 60 years, in the case of a woman, or 65 years, in the case of a man. ...'

28 Articles 42 and 43 of the 2002 Law on the Supreme Court stated:

'Article 42. ...

§ 4. The remuneration of a judge of [the Sąd Najwyższy (Supreme Court)] shall be set at the standard grade or the promotion grade. The promotion grade shall be 115% of the standard grade.

§ 5. A judge of [the Sąd Najwyższy (Supreme Court)], on entering the service, shall receive a standard grade basic salary. After 7 years' service, the basic salary for that judge shall increase to the promotion grade. ...

Article 43. A judge of [the Sąd Najwyższy (Supreme Court)] shall be entitled to a seniority allowance increasing the basic salary every year by 1%, but not exceeding 20% of that salary. The period of service on which the amount of the allowance depends shall also include the period of service or the employment relationship preceding his appointment to a judicial post at [the Sąd Najwyższy (Supreme Court)], as well as periods of professional practice as a lawyer, legal adviser or notary.'

29 Article 50 of the 2002 Law on the Supreme Court was worded as follows:

'A retired judge of [the Sąd Najwyższy (Supreme Court)] shall be entitled to emoluments in the amount of 75% of the basic salary and length-of-service allowance received in the post most recently occupied. Those emoluments shall be increased at the same time as, and in an amount corresponding to, changes in the basic salary of serving judges of [the Sąd Najwyższy (Supreme Court)].'

30 The 2002 Law on the Supreme Court was repealed and replaced by the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. 2018, item 5; 'the Law of 8 December 2017'), which entered into force on 3 April 2018.

Pre-litigation procedure

31 Since the Commission took the view that, as a result of the adoption of Article 1(26)(b) and (c) and Article 13(1) to (3) of the Amending Law of 12 July 2017, the Republic of Poland had failed to fulfil its obligations under (i) Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54 and (ii) the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, on 28 July 2017 it sent a letter of formal notice to the Republic of Poland. The latter replied by letter dated 31 August 2017 in which it denied any infringement of EU law.

32 On 12 September 2017, the Commission issued a reasoned opinion in which it maintained that the national provisions referred to in the previous paragraph infringed those provisions of EU law. Consequently, it called on the Republic of Poland to take the measures necessary to comply with the reasoned opinion within 1 month of receipt thereof. The Republic of Poland responded to the reasoned opinion by letter dated 12 October 2017 in which it denied the alleged infringements.

33 In those circumstances, the Commission decided to bring the present action.

[text deleted]

Continued existence of the purpose of the proceedings

41 The Republic of Poland contended in its rejoinder and at the hearing that the present action for failure to fulfil obligations is now devoid of purpose as a result of the entry into force, on 23 May 2018, of the ustawa o zmianie ustawy — Prawo o ustroju sądów powszechnych, ustawy o Krajowej Radzie Sądownictwa oraz ustawy o Sądzie

Najwyższym (Law amending the [Law on the ordinary courts], the Law on the National Council of the Judiciary and the [Law of 8 December 2017] of 12 April 2018 (Dz. U. 2018, item 848, 'the Law of 12 April 2018').

42 As regards the first complaint, alleging infringement of Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54, the Republic of Poland submits that Article 1(4) of the Law of 12 April 2018 amended Article 13(1) and (3) of the Amending Law of 12 July 2017 by repealing the distinctions between men and women relating to the retirement age of judges of the ordinary Polish courts and public prosecutors in Poland, which the Commission contests. The provisions relating to the retirement age of judges of the Sąd Najwyższy (Supreme Court) had, in the meantime, been replaced by those contained in the Law of 8 December 2017.

43 So far as concerns the second complaint, alleging infringement of the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, the Republic of Poland submits that, as a result of the amendments made to Article 13(1) and Article 1(26)(b) and (c) of the Amending Law of 12 July 2017 by Article 1(4) of the Law of 12 April 2018, Article 69(1b) of the Law on the ordinary courts henceforth provides that it falls to the National Council of the Judiciary (Poland) and no longer to the Minister for Justice to authorise judges of the ordinary Polish courts to continue to carry out their duties beyond the age of 65 years. By virtue of those amendments, the National Council of the Judiciary is also called upon to adopt its decisions in that regard in the light of criteria that differ from those which applied hitherto as regards decisions of the Minister for Justice.

44 The Commission, for its part, stated at the hearing that it was maintaining its action.

45 Without there even being any need to examine whether or not the legislative amendments thereby relied upon by the Republic of Poland are capable of having brought the alleged failures to fulfil obligations to an end, in whole or in part, it is sufficient to note, as is clear from settled case-law, that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (judgment of 6 November 2012, *Commission v Hungary*, C-286/12, EU:C:2012:687, paragraph 41 and the case-law cited).

46 In the present case, it is common ground that, on the date on which the period laid down by the Commission in its reasoned opinion expired, the national provisions which the Commission is challenging by the present action were still in force. It follows that the Court should adjudicate on the action.

The first complaint

[text deleted]

77 In the present case, it is not in dispute that, inasmuch as Article 13(1) to (3) of the Amending Law of 12 July 2017 sets the retirement age of judges of the ordinary courts and of public prosecutors, respectively, at 60 years for women and 65 years for men, and permits any early retirement of judges of the Sąd Najwyższy (Supreme Court) from the age of 65 years for men and 60 years for women, it fixes different retirement ages on the basis of sex.

78 In so doing, those provisions introduce directly discriminatory conditions based on sex into the pension schemes in question, in particular as regards the time when the persons concerned may have actual access to the advantages provided for by those schemes, and they therefore fail to comply both with Article 157 TFEU and with Article 5(1) of Directive 2006/54, in particular Article 5(1)(a), read in conjunction with Article 9(1)(f) of the directive.

79 In the third place, as regards the Republic of Poland's argument that the setting, for retirement, of such age conditions that differ according to sex is justified by the objective of eliminating discrimination against women, it is clear from settled case-law that that argument cannot succeed.

80 Even though Article 157(4) TFEU authorises the Member States to maintain or adopt measures providing for specific advantages in order to prevent or compensate for disadvantages in professional careers, with a view to ensuring full equality between men and women in working life, it cannot be inferred that that provision permits the setting of such age conditions that differ according to sex. The national measures covered by that provision must, in any event, contribute to helping women to conduct their professional life on an equal footing with men (see, to that effect, judgments of 29 November 2001, *Griesmar*, C-366/99, EU:C:2001:648, paragraph 64, and of 13 November 2008, *Commission v Italy*, C-46/07, not published, EU:C:2008:618, paragraph 57).

81 The setting, for retirement, of an age condition that differs according to sex does not offset the disadvantages to which the careers of female public servants are exposed by helping those women in their professional life and by providing a remedy for the problems which they may encounter in the course of their professional career (judgment of 13 November 2008, *Commission v Italy*, C-46/07, not published, EU:C:2008:618, paragraph 58).

82 For the reasons set out in the previous two paragraphs, nor can such a measure be authorised on the basis of Article 3 of Directive 2006/54. As is apparent from the very wording of that provision and recital 22 of the directive, the measures to which that provision refers are solely those that Article 157(4) TFEU itself authorises.

83 In the fourth place, as regards the transitional measures relied on by the Republic of Poland in its rejoinder and at the hearing, it is sufficient to note that those measures in any event, as the Republic of Poland itself acknowledges, were capable of benefiting only female judges and public prosecutors who reached the age of 60 years before 30 April 2018. It thus follows from the foregoing that, on the relevant date for determining whether the present action is well founded, namely, as pointed out in paragraphs 45 and 46 of the present judgment, the date on which the period laid down in the reasoned opinion expired, the discrimination based on sex that the Commission criticises remained intact.

84 In the light of the foregoing considerations, the Commission's first complaint, alleging infringement of Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54, must be upheld.

The second complaint

Scope of the complaint

85 At the hearing, the Commission explained that, by its second complaint, it seeks, in essence, a declaration that the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter, has been infringed. According to the Commission, the concept of 'effective legal protection' in the second subparagraph of Article 19(1) TEU must in fact be interpreted while having regard to the content of Article 47 of the Charter and, in particular, to the guarantees inherent in the right, laid down in the latter provision, to an effective remedy, so that the first of those provisions entails that preservation of the independence of bodies such as the ordinary Polish courts, which are entrusted, inter alia, with the task of interpreting and applying EU law, must be guaranteed.

86 For the purpose of ruling on the present complaint, it is therefore necessary to examine whether the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

Arguments of the parties

87 Relying, in particular, on the judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117), the Commission contends that, in order for the Republic of Poland to comply with the obligation imposed on it by the second subparagraph of Article 19(1) TEU to establish a system of legal remedies ensuring effective judicial review in the fields covered by EU law, it is required, inter alia, to ensure that the national bodies which, like the ordinary Polish courts, may rule on questions relating to the application or interpretation of EU law meet the requirement of judicial independence, that requirement forming part of the essence of the fundamental right to a fair trial as resulting in particular from the second paragraph of Article 47 of the Charter.

88 According to the Commission, in lowering, by Article 13(1) of the Amending Law of 12 July 2017, the retirement age applicable to judges of the ordinary Polish courts to 65 years for men and 60 years for women while granting the Minister for Justice the right to decide whether to authorise extension of the period of active service as a judge to the age of 70 years, pursuant to Article 1(26)(b) and (c) of that law, the Republic of Poland has infringed the obligation referred to in the previous paragraph.

89 In that regard, the Commission submits that the criteria on the basis of which the Minister for Justice is called upon to adopt his decision are too vague and that the provisions at issue, furthermore, oblige him neither to grant authorisation, on the basis of those criteria, for the judge concerned to continue to carry out his duties nor to state reasons for his decision in the light of those criteria — a decision which, moreover, is not amenable to judicial review. Nor do those provisions specify the period within which or for how long the Minister for Justice's decision must be taken or whether, in certain circumstances, it may or must be renewed.

90 According to the Commission, in view of the discretion thus vested in the Minister for Justice, the prospect of having to apply to him for authorisation to continue to carry out duties as a judge and, once such an application has

been made, the wait for the minister's decision for an unspecified period are liable to place the judge concerned under pressure of such a kind as to lead him to submit to any wishes of the executive so far as concerns the cases before him, including where he finds it necessary to interpret and apply provisions of EU law. The provisions at issue thus undermine the personal and operational independence of serving judges.

91 In the Commission's submission, those provisions also undermine the irremovability of the judges concerned. The Commission emphasises, in this regard, that its complaint concerns not the measure lowering the judges' retirement age in itself, but the fact that that reduction was accompanied here by the grant of such discretion to the Minister for Justice. According to the Commission, the judges must be protected against any decision arbitrarily denying them the right to continue to carry out their judicial duties, not only in the case of formal loss of their status resulting, for example, from dismissal, but also when the issue is whether to extend the carrying out of such duties beyond their retirement age, where they themselves wish to continue to act as a judge and their state of health so permits.

92 In that context, the Commission maintains that the argument put forward by the Republic of Poland that the provisions at issue had the aim of bringing the retirement age of judges of the ordinary Polish courts into line with the general retirement age applicable to workers is unfounded, as an infringement of the principle of judicial independence brooks no justification. In any event, the general pension scheme, unlike the contested scheme applicable to judges of the ordinary Polish courts, entails not the automatic retirement of workers, but only the right, and not the obligation, for them to stop working. Furthermore, it is apparent from the white paper of 8 March 2018 published by the Polish Government, which was devoted to reform of the Polish courts, that the aim of lowering the retirement age of judges was in particular to remove certain categories of judges.

93 The Republic of Poland submits, first, that national rules such as those contested by the Commission in its action relate to the organisation and proper operation of the national system of justice, which do not fall within EU law or the competence of the European Union, but within the exclusive competence and the procedural autonomy of the Member States. Such national rules cannot therefore be reviewed in the light of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter without extending excessively the scope of those provisions of EU law, which are intended to apply only in situations governed by EU law.

94 In the present instance, there is, in particular, no situation in which EU law is being implemented, within the meaning of Article 51(1) of the Charter. It follows, moreover, from Article 6(1) TEU and Article 51(2) of the Charter that the Charter does not extend the field of application of EU law beyond the powers of the European Union or establish any new power or task for the European Union. The second subparagraph of Article 19(1) TEU lays down only a general obligation to adopt the necessary measures to ensure effective legal protection in the fields covered by EU law, and does not confer on the European Union competence so far as concerns adoption of the institutional rules relating to the judiciary, in particular those relating to the retirement age of judges, which do not display any real links with EU law.

95 Second, the Republic of Poland disputes that the irremovability of judges has been undermined in any way as irremovability concerns only serving judges and the national legislation at issue relates to judges who have already reached the statutory retirement age. Once retired, judges retain their status as a judge and acquire the right to a retirement pension which is markedly higher than the retirement benefits provided for by the general social security scheme. In the present instance, bringing the retirement age of judges into line with the retirement age under the general pension scheme applicable to workers cannot, moreover, be regarded as arbitrary or unjustified.

96 Third, it follows from the statutory criteria on the basis of which the Minister for Justice has to adopt his decision on any extension of the period for which a judge carries out his duties beyond the normal retirement age that a refusal to extend is acceptable only where refusal is justified by a small workload of the judge concerned in the court where he holds a post and the need to reassign that post to another court with a higher workload. Such a measure is legitimate in the light, in particular, of the fact that it is impossible, save in exceptional circumstances, to transfer judges to another court without their consent.

97 In any event, the fear that serving judges may, over a period of 6 to 12 months, be tempted to give rulings favourable to the executive, on account of uncertainty as to the decision which will be adopted regarding the possible extension of the period for which they carry out their duties, is unfounded. It is mistaken to believe that a judge may, after having acted as a judge for so many years, feel pressure linked to the fact that his duties may not be extended for a further few years. Nor does the guarantee of judicial independence necessarily entail a complete absence of relations between the executive and the judiciary. Thus, the renewal of the term of office of a judge of the Court of Justice of the European Union also itself depends upon the assessment of the government of the Member State of the judge concerned.

Findings of the Court

– Applicability and scope of the second subparagraph of Article 19(1) TEU

98 First of all, it should be pointed out that Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and the judicial protection that individuals derive from EU law to national courts and tribunals and to the Court of Justice (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 50 and the case-law cited, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 47).

99 In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure for individuals compliance with their right to effective judicial protection in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields (judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 34 and the case-law cited, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 48).

100 The principle of the effective judicial protection of individuals' rights under EU law, thus referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 35 and the case-law cited, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 49).

101 As regards the material scope of the second subparagraph of Article 19(1) TEU, that provision refers to the 'fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter (judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 29, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 50).

102 Furthermore, although, as the Republic of Poland points out, the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU (judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 40, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 52 and the case-law cited).

103 In that regard, every Member State must, under the second subparagraph of Article 19(1) TEU, in particular ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, are liable to rule, in that capacity, on the application or interpretation of EU law, meet the requirements of effective judicial protection (see, to that effect, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 55 and the case-law cited).

104 In the present case, it is not in dispute that the ordinary Polish courts may, in that capacity, be called upon to rule on questions relating to the application or interpretation of EU law and that, as 'courts or tribunals' within the meaning of EU law, they come within the Polish judicial system in the 'fields covered by Union law', within the meaning of the second subparagraph of Article 19(1) TEU, so that those courts must meet the requirements of effective judicial protection.

105 To ensure that such ordinary courts are in a position to offer such protection, maintaining their independence is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy (see, to that effect, judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 53 and the case-law cited, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 57).

106 That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraphs 48 and 63, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 58).

107 In the light of the foregoing, the national rules which are the subject of the second complaint set out by the Commission in its action may be reviewed in the light of the second subparagraph of Article 19(1) TEU and it should accordingly be examined whether, as the Commission contends, the Republic of Poland has infringed that provision.

- **The complaint**

108 The requirement that courts be independent, a requirement which the Member States must — under the second subparagraph of Article 19(1) TEU — ensure is observed in respect of national courts which, like the ordinary Polish courts, are called upon to rule on issues relating to the interpretation and application of EU law, has two aspects to it (see, to that effect, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 71).

109 The first aspect, which is external in nature, requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 44 and the case-law cited, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 72).

110 The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 65 and the case-law cited, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 73).

111 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 66 and the case-law cited, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 74).

112 As is also clear from settled case-law, the necessary freedom of judges from all external intervention or pressure requires certain guarantees appropriate for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 64 and the case-law cited, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 75).

113 The principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Thus it is widely accepted that judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed (judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 76).

114 In that latter respect, it is apparent, more specifically, from the Court's case-law that the requirement of independence means that the rules governing the disciplinary regime and, accordingly, any dismissal of those who have the task of adjudicating in a dispute must provide the necessary guarantees in order to prevent any risk of that

disciplinary regime being used as a system of political control of the content of judicial decisions. Thus, rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 67, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 77).

115 Having regard to the cardinal importance of the principle of irremovability, an exception thereto is thus acceptable only if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the courts concerned to external factors and their neutrality with respect to the interests before them (see, to that effect, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 79).

116 In the present case, as explained both at the hearing and in its written pleadings, by its second complaint the Commission does not seek to criticise the measure lowering the retirement age of judges of the ordinary Polish courts in itself. This complaint is essentially directed at the mechanism with which that measure was coupled, under which the Minister for Justice has the right to authorise judges of those courts to continue actively to carry out judicial duties beyond the retirement age, as lowered. In the Commission's submission, in the light of its characteristics that mechanism undermines the independence of the judges concerned in that it does not enable it to be guaranteed that they will carry out their duties wholly autonomously and be protected against external intervention or pressure. Furthermore, the combination of the measure and the mechanism undermines their irremovability.

117 In that regard, it should be noted, as a preliminary point, that the mechanism thus criticised by the Commission deals not with the process for the appointment of candidates to carry out judicial duties, but with the possibility, for serving judges who thus enjoy the guarantees inherent in carrying out those duties, to continue to carry them out beyond the normal retirement age, and that that mechanism accordingly concerns the conditions under which their careers progress and end (see, by analogy, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 109).

118 Furthermore, although it is for the Member States alone to decide whether or not they will authorise such an extension to the period of judicial activity beyond the normal retirement age, the fact remains that, where those Member States choose to adopt such a mechanism, they are required to ensure that the conditions and the procedure to which such an extension is subject are not such as to undermine the principle of judicial independence (judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 110).

119 As regards the need, noted in paragraphs 109 to 111 of the present judgment, to ensure that courts can exercise their functions wholly autonomously, objectively and without any interest in the outcome of the proceedings, while being protected against external intervention or pressure liable to impair the independent judgement of their members and to influence their decisions, it is true that the fact that an organ, such as the Minister for Justice, is entrusted with the power to decide whether or not to grant any extension to the period of judicial activity beyond the normal retirement age is not sufficient in itself to conclude that the principle of judicial independence has been undermined. However, it is necessary to ensure that the substantive conditions and detailed procedural rules governing the adoption of such decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them (see, by analogy, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 111).

120 To that end, it is necessary, in particular, that those conditions and procedural rules are designed in such a way that those judges are protected from potential temptations to give in to external intervention or pressure that is liable to jeopardise their independence. Such procedural rules must thus, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned (judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 112 and the case-law cited).

121 In the present case, the conditions and the detailed procedural rules which the contested national provisions impose in relation to the possibility that judges of the ordinary Polish courts continue to carry out their duties beyond the new retirement age do not satisfy those requirements.

122 First of all, Article 69(1b) of the Law on the ordinary courts provides that the Minister for Justice may decide whether or not to authorise such continuation on the basis of certain criteria. However, those criteria are too vague and unverifiable and, moreover, as the Republic of Poland conceded at the hearing, the minister's decision is not required to state reasons, inter alia by reference to those criteria. Nor can such a decision be challenged in court proceedings (see, to that effect, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 114).

123 Next, under Article 69(1) of the Law on the ordinary courts, the request for extension of the period for which judicial duties are carried out must be made by the judges concerned no earlier than 12 months and no later than 6 months before reaching the normal retirement age. Furthermore, as maintained by the Commission in its written pleadings and at the hearing without its being disputed by the Republic of Poland, that provision does not lay down a period within which the Minister for Justice must adopt his decision in that regard. That provision, in conjunction with Article 69(1b) of the Law on the ordinary courts which provides that, where a judge reaches the normal retirement age before the procedure for extending the period of judicial duties has ended, the person concerned is to remain in post until that procedure has come to an end, is such as to prolong the period of uncertainty for the judge concerned. It follows from the foregoing that the length of the period for which the judges are thus liable to continue to wait for the decision of the Minister for Justice once the extension has been requested, likewise, ultimately falls within the minister's discretion.

124 Having regard to the foregoing, it must be found that the power held in the present instance by the Minister for Justice for the purpose of deciding whether or not to authorise judges of the ordinary Polish courts to continue to carry out their duties, from the age of 60 to 70 years in the case of women and the age of 65 to 70 years in the case of men, is such as to give rise to reasonable doubts, inter alia in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests that may be the subject of argument before them (see, by analogy, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 118).

125 Furthermore, that power fails to comply with the principle of irremovability, which is inherent in judicial independence (judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 96).

126 In that regard, it is to be noted that that power was conferred on the Minister for Justice in the more general context of a reform that resulted in the lowering of the normal retirement age of, amongst others, judges of the ordinary Polish courts.

127 First, having regard, in particular, to certain preparatory documents relating to the reform at issue, the combination of the two measures referred to in the previous paragraph is such as to create, in the minds of individuals, reasonable doubts regarding the fact that the new system might actually have been intended to enable the Minister for Justice, acting in his discretion, to remove, once the newly set normal retirement age was reached, certain groups of judges serving in the ordinary Polish courts while retaining others of those judges in post (see, by analogy, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 85).

128 Second, it should be pointed out that the period for which judges of the ordinary Polish courts carry out judicial duties that thus falls within the pure discretion of the Minister for Justice is considerable since it amounts to the final 10 years of performance of such duties in a female judge's career and the final 5 years of their performance in a male judge's career.

129 Third, it is to be recalled that, under Article 69(1b) of the Law on the ordinary courts, where a judge reaches the normal retirement age before the procedure for extending the period of judicial duties has ended, he or she is to remain in post until that procedure has come to an end. In such a situation, any decision of the Minister for Justice in the negative — which moreover, as already noted in paragraph 123 of the present judgment, is not subject to any time limit — is thus adopted after the judge concerned has been retained in post, as the case may be for a relatively long period of uncertainty, beyond the normal retirement age.

130 In the light of the considerations set out in paragraphs 126 to 129 of the present judgment, it must be found that, as the requirements noted in paragraphs 113 to 115 of the present judgment are not complied with, the combination of the measure lowering the normal retirement age to 60 years for women and 65 years for men and of the discretion vested in the present instance in the Minister for Justice for the purpose of granting or refusing authorisation for judges

of the ordinary Polish courts to continue to carry out their duties, from the age of 60 to 70 years in the case of women and 65 to 70 years in the case of men, fails to comply with the principle of irremovability.

131 The finding made in the previous paragraph is affected neither by the fact, relied on by the Republic of Poland, that the judges who are not authorised to continue to carry out their duties retain the title of judge or that they continue to enjoy immunity and high emoluments once they have been retired nor by its formal argument that the judges concerned can no longer benefit from the guarantee that they cannot be removed, on the ground that they have already reached the new statutory retirement age. In the latter regard, it has, moreover, already been pointed out, in paragraph 129 of the present judgment, that, as is apparent from Article 69(1b) of the Law on the ordinary courts, the Minister for Justice's decision on whether to extend the period for which the persons concerned carry out their judicial duties may be adopted at a time when they have been retained in post beyond that new normal retirement age.

132 Finally, the Republic of Poland's argument concerning a similarity between the national provisions thus challenged and the procedure applicable at the time of any renewal of the term of office of a judge of the Court of Justice of the European Union cannot succeed.

133 Unlike national judges who are appointed until they reach the statutory retirement age, the appointment of judges within the Court of Justice occurs, as provided for in Article 253 TFEU, for a six-year fixed term. Moreover, under that article, a new appointment to such a post held by a judge whose term of office is coming to an end requires, as was the case in respect of the initial appointment of that judge, the common accord of the Governments of the Member States, after consultation of the panel provided for in Article 255 TFEU (see, to that effect, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 121).

134 The conditions thus set by the Treaties cannot modify the scope of the obligations imposed on the Member States pursuant to the second subparagraph of Article 19(1) TEU (judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 122).

135 In the light of all the foregoing, the Commission's second complaint, alleging infringement of the second subparagraph of Article 19(1) TEU, must be upheld.

136 The Commission's action must therefore be upheld in its entirety, with the result that it should be declared:

- first, that, in establishing, by Article 13(1) to (3) of the Amending Law of 12 July 2017, a different retirement age for men and women who are judges in the ordinary Polish courts and the Sąd Najwyższy (Supreme Court) or are public prosecutors in Poland, the Republic of Poland has failed to fulfil its obligations under Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54, and
- second, that, in granting, pursuant to Article 1(26)(b) and (c) of the Amending Law of 12 July 2017, the Minister for Justice the right to decide whether or not to authorise judges of the ordinary Polish courts to continue to carry out their duties beyond the new retirement age of those judges, as lowered by Article 13(1) of that law, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

Costs

137 Under Article 138(1) 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 Commission has applied for costs and the Republic of Poland has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

1. Declares that, in establishing, by Article 13(1) to (3) of the ustawa o zmianie ustawy — Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the system of ordinary courts and certain other laws) of 12 July 2017, a different retirement age for men and women who are judges in the ordinary Polish courts and the Sąd Najwyższy (Supreme Court, Poland) or are public prosecutors in Poland, the Republic of Poland has failed to fulfil its obligations under Article 157 TFEU and Articles 5(a) and 9(1)(f) 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;

2. Declares that, in granting, pursuant to Article 1(26)(b) and (c) of the Law amending the Law on the system of ordinary courts and certain other laws of 12 July 2017, the Minister for Justice (Poland) the right to decide whether or not to authorise judges of the ordinary Polish courts to continue to carry out their duties beyond the new retirement age of those judges, as lowered by Article 13(1) of that law, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU;

3. Orders the Republic of Poland to pay the costs.

[Signatures]

OPINION OF ADVOCATE GENERAL TANCHEV

delivered on 24 September 2019⁽¹⁾

Joined Cases C-558/18 and C-563/18

Miasto Łowicz

v

Skarb Państwa — Wojewoda Łódzki (C-558/18),

joined parties:

Prokurator Generalny zastępowany przez Prokuraturę Krajową (initially Prokuratura Regionalna w Łodzi),

Rzecznik Praw Obywatelskich

(Request for a preliminary ruling from the Sąd Okręgowy w Łodzi (District Court, Łódź, Poland))

and

Prokurator Generalny zastępowany przez Prokuraturę Krajową (initially Prokuratura Okręgowa w Płocku)

v

VX,

WW,

XV (C-563/18)

(Request for a preliminary ruling from the Sąd Okręgowy w Warszawie (District Court, Warsaw, Poland))

(Reference for a preliminary ruling — Article 267 TFEU — Admissibility of the questions — Rule of law — Article 2 TEU — Article 19(1) TEU — Principle of effective judicial protection — Principle of judicial independence — National measures establishing regime for disciplinary proceedings against judges)

I. Introduction

1. The present cases are the fourth in a series of Opinions I have written ⁽²⁾ relating to the reform of the Polish justice system instituted by measures adopted in 2017 and which form part of the Commission's reasoned proposal, issued under Article 7(1) TEU, regarding the rule of law in Poland. ⁽³⁾ The changes to the law of this Member State impacting on the independence of the Polish judiciary have attracted considerable international criticism, ⁽⁴⁾ and are also the subject of a number of cases which have been brought before the Court.⁽⁵⁾

2. In the present cases, the Sąd Okręgowy w Łodzi (District Court, Łódź, Poland) and the Sąd Okręgowy w Warszawie (District Court, Warsaw, Poland) seek guidance from the Court as to whether the new regime for disciplinary proceedings against judges in Poland meets the requirements of judicial independence under the second subparagraph of Article 19(1) TEU. This is in view, inter alia, of the fact that, according to the orders for reference, the Minister for Justice has gained influence over the initiation and conduct of disciplinary proceedings against judges, and the legislative authorities have gained influence over the composition of the Krajowa Rada Sądownictwa (National Council of the Judiciary), the body responsible for selecting the group of judges who are eligible for appointment to the Disciplinary Chamber of the Supreme Court which examines disciplinary cases involving judges.

3. In addition to this, the referring courts express, in the orders for reference, fear of retribution if they do not adjudicate in favour of the State, an apprehension which stems from abuse of the disciplinary process under the new regime. It is also significant that judges of the referring courts indicated that they were called to account for their decisions to submit the present requests for a preliminary ruling by way of investigation procedures which were initiated after those requests were made, even though disciplinary proceedings against those judges were not formally commenced.

4. I have reached the conclusion that the requests for a preliminary ruling in the present cases are inadmissible because the Court cannot issue advisory opinions on general or hypothetical problems under Article 267 TFEU.

5. More specifically, there is insufficient explanation in the orders for reference, which are not supplemented to the degree necessary in the case file, about the link between the Member State measures at issue and the relevant provisions of EU law, namely, the second subparagraph of Article 19(1) TEU which protects against structural breaches of judicial independence, (6) given that it obliges the Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. (7)

6. In other words, the requirements concerning the content of requests for preliminary rulings set out in Article 94 of the Court's Rules of Procedure, which the Court has repeatedly held must be scrupulously observed, (8) have not been met. Those requirements also appear in the Court's Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings. (9)

II. Legal framework

A. EU law

7. The second subparagraph of Article 19(1) TEU states:

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

B. Polish law

1. The 2017 Law on the Supreme Court

8. Article 3 of the Ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, headings 5, 650, 771, 847, 848, 1045 and 1443) ('2017 Law on the Supreme Court'), which entered into force on 3 April 2018, provides that the Supreme Court is divided into several chambers, including the Disciplinary Chamber.

9. Article 27 of the 2017 Law on the Supreme Court states:

'1. The following cases shall fall within the jurisdiction of the Disciplinary Chamber:

(1) disciplinary proceedings;

(a) involving Supreme Court judges;

(b) examined by the Supreme Court in connection with disciplinary proceedings under the following laws: ...

- ustawa z dnia 21 sierpnia 1997 r. — Prawo o ustroju sądów wojskowych [(Dz. U. of 2017, headings 2243 and 2265 and of 2018, headings 3 and 5) (the Law of 21 August 1997 on the system of military courts)]; ...

- ustawa z dnia 27 lipca 2001 r. — Prawo o ustroju sądów powszechnych [the Law of 27 July 2001 on the system of the ordinary courts]; ...

2. The Disciplinary Chamber shall consist of:

(1) the First Division;

(2) the Second Division.

3. The First Division shall examine, in particular, cases involving:

- (1) Supreme Court judges;
- (2) judges and public prosecutors concerning disciplinary offences having the characteristics of deliberate crimes prosecuted by public indictment and the offences set out in the application referred to in Article 97(3).

4. The Second Division shall examine, in particular:

- (1) appeals against the rulings of disciplinary courts of first instance in cases involving judges and public prosecutors and the decisions and orders which preclude a judgment from being issued;
- (2) appeals in cassation against disciplinary rulings;
- (3) appeals against resolutions of the National Council of the Judiciary.'

10. Article 29 of the 2017 Law on the Supreme Court provides:

'Judges shall be appointed to the Supreme Court by the President of the Republic of Poland acting on a proposal from the National Council of the Judiciary.'

2. *The Law on the National Council of the Judiciary ('the NCJ')*

11. According to Article 3 of the Ustawa o Krajowej Radzie Sądownictwa (Law on the National Council of the Judiciary) of 12 May 2011 (Dz. U. of 2018, headings 389, 848 and 1045) ('Law on the NCJ'):

'2. In addition, the Council shall carry out other tasks as laid down by law, in particular:

- (4) it shall elect the disciplinary officer for ordinary court judges and assistant judges, and the disciplinary officer for military court judges.'

12. Article 7 of the Law on the NCJ states:

'The First President of the Supreme Court, the President of the Supreme Administrative Court and the Minister for Justice shall be members of the Council for as long as they perform those functions.'

13. Article 8 of the Law on the NCJ states:

'1. A person appointed by the President of the Republic of Poland shall perform his functions within the Council for an unspecified term of office and may be dismissed at any time.

2. The mandate of the person appointed by the President shall expire at the latest 3 months after the end of the President's term of office or after his vacating the office of President of the Republic of Poland.'

14. Article 9 of the Law on the NCJ states:

'1. The Sejm [lower chamber of the Polish Parliament] shall elect from among the deputies four members of the Council for a period of 4 years.

2. The Senat [upper chamber of the Polish Parliament] shall elect from among the senators two members of the Council for a period of 4 years.

3. The members of the Council elected by the Sejm and the Senat shall perform their functions until such time as new members are elected.'

15. Article 9a of the Law on the NCJ provides:

'1. The Sejm shall elect from among the judges of the Supreme Court, ordinary courts, administrative courts and military courts 15 members of the Council for a joint 4-year term of office.'

2. When carrying out the election referred to in paragraph 1, the Sejm shall, as far as possible, take into account the need for representation within the Council of judges from different types and levels of courts.

3. The joint term of office of new members of the Council elected from among the judges shall begin on the day following the day of their election. The members of the Council appointed for the previous term of office shall perform their functions until the day on which the joint term of office of the new members of the Council begins.'

16. According to Article 11a of the Law on the NCJ:

'2. The entities entitled to propose candidates for membership of the Council shall include a group of at least: (1) 2 000 citizens of the Republic of Poland who are 18 years of age or over, have full legal capacity and enjoy full public rights; (2) 25 judges, excluding retired judges.'

17. Article 11d of the Law on the NCJ further provides:

'1. The Marshal of the Sejm shall request that the deputies' clubs designate, within 7 days, candidates for membership of the Council.

2. A deputies' club shall designate a maximum of nine candidates for membership of the Council from among the judges whose names have been submitted pursuant to the procedure laid down in Article 11a.

3. If the total number of candidates designated by the deputies' clubs is lower than 15, the Presidium of the Sejm shall designate candidates from among the names submitted pursuant to the procedure laid down in Article 11a, such that the resulting number of candidates is 15.

4. The competent committee of the Sejm shall compile the list of candidates by electing, from among the candidates designated in accordance with paragraphs 2 and 3, 15 candidates for membership of the Council, with the proviso that the list shall include at least one candidate designated by each deputies' club operating within 60 days of the first session of the Sejm during the parliamentary term in which the election is carried out, provided that that candidate was designated by the club according to the procedure of designation referred to in paragraph 2.

5. The Sejm shall elect members of the Council for a joint 4-year term of office at the next session of the Sejm, by a majority of three fifths of the votes cast in the presence of at least half of the statutory number of deputies, voting for the list of candidates referred to in paragraph 4.

6. If members of the Council are not elected according to the procedure laid down in paragraph 5, the Sejm shall elect members of the Council by an absolute majority of the votes cast in the presence of at least half of the statutory number of deputies, voting for the list of candidates referred to in paragraph 4. ...'

3. *The Law on the ordinary courts*

18. Article 22a of the Ustawa — Prawo o ustroju sądów powszechnych (Law on the system of the ordinary courts) of 27 July 2001 (Dz. U. of 2018, headings 23, 3, 5, 106, 138, 771, 848, 1000, 1045 and 1443) ('Law on the ordinary courts') states:

'5. A judge or assistant judge whose allocated activities have been changed in a manner resulting in a change in the scope of his duties, in particular where this involves a transfer to another court division, may appeal to the [NCJ] within 7 days of the date of being informed of the new scope of his duties. He shall not be entitled to appeal in the event of:

(1) a transfer to a division which examines cases in the same area;

(2) an entrusting of duties to that judge or assistant judge in the same division in accordance with the rules applicable to other judges, and in particular where allocation to a section or to another form of specialisation is revoked.

6. The appeal referred to in paragraph 5 shall be lodged through the president of the court who has carried out the allocation of activities which is the subject of the appeal. The president of that court shall forward the appeal to the [NCJ] within 14 days of its receipt together with a statement of his position in the case. The [NCJ] shall adopt a resolution upholding or dismissing the judge's appeal, taking into account the considerations referred to in paragraph 1. A resolution of the [NCJ] on the appeal referred to in paragraph 5 shall not require justification. The resolution of the [NCJ]

cannot be appealed. Until the resolution is adopted, the judge or assistant judge shall continue to perform his existing duties.'

19. Article 82c of the Law on the ordinary courts states:

'A judge shall be obliged to carry out the activities concerned with the duties of a disciplinary court judge at an appellate court which have been entrusted to him.'

20. Article 107 of the Law on the ordinary courts states:

'1. A judge shall be liable to disciplinary action for professional misconduct, including obvious and gross violations of the law and compromising the dignity of his office (disciplinary offences).

2. A judge shall also be liable to disciplinary action for his conduct before assuming his post where this resulted in negligent performance of the State office held at the time or made him unfit for judicial office.'

21. Article 109a of the Law on the ordinary courts states:

'1. The final decision of the disciplinary court shall be made public.

2. The disciplinary court may refrain from publishing that decision where this is unnecessary for achieving the purposes of the disciplinary proceedings or where this is necessary in order to protect legitimate private interests. ...'

22. Article 110 of the Law on the ordinary courts states:

'1. In disciplinary cases involving judges, the following shall adjudicate:

(1) at first instance:

(a) disciplinary courts at appellate courts, composed of three judges;

(b) the Supreme Court, composed of two judges from the Disciplinary Chamber and one lay Supreme Court judge, in cases of disciplinary offences having the characteristics of deliberate crimes prosecuted by public indictment or deliberate tax crimes or cases in which the Supreme Court has submitted a request for the examination of a disciplinary case together with an indication of the misconduct;

(2) at second instance — the Supreme Court composed of two judges from the Disciplinary Chamber and one lay Supreme Court judge.'

23. Article 110a of the Law on the ordinary courts states:

'1. The Minister for Justice shall, after consulting the [NCJ], entrust the duties of a disciplinary court judge at an appellate court to an ordinary court judge who has served as a judge for at least 10 years.'

24. Article 112 of the Law on the ordinary courts states:

'3. A Disciplinary Officer for Ordinary Court Judges and two Deputy Disciplinary Officers for Ordinary Court Judges shall be appointed by the Minister for Justice for four-year terms of office.'

25. Article 112b of the Law on the ordinary courts provides:

'1. The Minister for Justice may appoint a Disciplinary Officer of the Minister for Justice to conduct a specific case concerning a judge. The appointment of a Disciplinary Officer of the Minister for Justice shall preclude another disciplinary officer from acting in the case.

2. The Disciplinary Officer of the Minister for Justice shall be appointed from among the ordinary court judges or the Supreme Court judges. In the case of disciplinary offences having the characteristics of deliberate crimes prosecuted by public indictment, the Disciplinary Officer of the Minister for Justice may also be appointed from among the public prosecutors indicated by the Public Prosecutor General. In justified cases, in particular in the case of the death of the

Disciplinary Officer of the Minister for Justice or long-term obstacles to his performing his functions, the Minister for Justice shall appoint in his place another judge or, in the case of a disciplinary offence having the characteristics of a deliberate crime prosecuted by public indictment, a judge or public prosecutor.

3. The Disciplinary Officer of the Minister for Justice may initiate proceedings at the request of the Minister for Justice or join ongoing proceedings.

4. The appointment of the Disciplinary Officer of the Minister for Justice is equivalent to a request to initiate investigative or disciplinary proceedings.'

26. Article 114 of the Law on the ordinary courts provides:

'1. A disciplinary officer shall carry out investigative activities at the request of the Minister for Justice, the president of an appellate court or the president of a district court, the college of an appellate court or the college of a district court, the [NCJ] or on his own initiative, after the preliminary establishment of the circumstances which is required in order to determine whether a disciplinary offence has been committed. Investigative activities should be carried out within 30 days of the first actions taken by the disciplinary officer. ...

9. If the disciplinary officer finds no grounds for initiating disciplinary proceedings when called upon to do so by the competent body, he shall issue a decision refusing to do so. A copy of the decision shall be delivered to the body which submitted the request for proceedings to be initiated, the college of the appropriate district or appellate court, and the accused. A copy of the decision shall also be delivered to the Minister for Justice, who may file an objection within 30 days. The filing of an objection is equivalent to an obligation to initiate disciplinary proceedings, and instructions from the Minister for Justice concerning the further course of proceedings shall be binding on the disciplinary officer.

10. If, in disciplinary proceedings, grounds have not been provided for the submission of an application requesting the disciplinary court to examine a disciplinary case, the disciplinary officer shall issue a decision to close the disciplinary proceedings.

11. The accused, the body which submitted the request for disciplinary proceedings to be initiated and the competent college may appeal to a disciplinary court within 7 days of the date of being served with the decision referred to in paragraph 10.'

27. Article 115a of the Law on the ordinary courts states:

'1. An unjustified failure to appear on the part of the notified accused, or his defence counsel, shall not prevent the examination of the case.

2. If it is not possible to examine the case on the ground of the justified absence of the accused and he does not have defence counsel, the disciplinary court shall designate him defence counsel of its own motion, determining the deadline for the defence counsel to familiarise himself with the case file.

3. The disciplinary court shall conduct proceedings despite the justified absence of the notified accused or his defence counsel, unless this is contrary to the interests of the disciplinary proceedings being conducted.'

28. Article 115b of the Law on the ordinary courts states:

'1. Where the disciplinary court considers, on the basis of the evidence collected by the disciplinary officer, that the circumstances of the offence and the guilt of the accused are not in doubt, and that imposing the penalties provided for in subparagraphs (1) to (3) of Article 109(1) will be sufficient, it may issue a penalty order.

2. A penalty order shall be issued by a disciplinary court consisting of a single judge.

3. A penalty referred to in subparagraph (2a) of Article 109(1) which is imposed by a penalty order shall range from 5% to 10% of the basic salary for a period of 6 months to 1 year.'

29. Article 115c of the Law on the ordinary courts states:

'Evidence obtained for the purposes of criminal proceedings as set out in Articles 168b, 237 or 237a of the Kodeks postępowania karnego [Polish Code of Criminal Procedure], or obtained as a result of the use of operational surveillance, may be used in disciplinary proceedings.'

30. Article 125 of the Law on the ordinary courts states:

The [NCJ], the First President of the Supreme Court and the Minister for Justice may request the reopening of disciplinary proceedings.'

31. Article 126(1) of the Law on the ordinary courts states:

The reopening of disciplinary proceedings to the detriment of the accused may take place if the discontinuation of the proceedings or the issuing of the decision took place unlawfully or if, within 5 years of the discontinuation of the proceedings or the issuing of the decision, new facts or items of evidence come to light which could justify a conviction or a harsher penalty.'

32. Article 129 of the Law on the ordinary courts states:

1. The disciplinary court may suspend a judge against whom disciplinary proceedings or incapacity proceedings have been initiated from his duties and may also do so if it adopts a resolution permitting the judge to be held criminally liable.

2. If the disciplinary court adopts a resolution permitting a judge to be held criminally liable for a deliberate crime prosecuted by public indictment, it shall suspend the judge from his duties automatically.

3. The disciplinary court, when suspending a judge from his duties, shall reduce the amount of his salary by between 25% and 50% for the duration of that suspension; this does not concern persons in relation to whom incapacity proceedings have been initiated.

3a. If the disciplinary court adopts a resolution permitting a retired judge to be held criminally liable for a deliberate crime prosecuted by public indictment, it shall reduce the amount of his remuneration by between 25% and 50% for the duration of the disciplinary proceedings.

4. If disciplinary proceedings have been dismissed or have ended in acquittal, compensation shall be paid in full in respect of all the components of remuneration or emoluments.'

III. Facts, main proceedings and questions referred

33. Case C-558/18 concerns an action brought by the City of Łowicz, Poland ('the municipality') against the State Treasury represented by the Governor of Łódź Province, Poland ('the State Treasury') before the Sąd Okręgowy w Łodzi, Wydział I Cywilny (District Court, Łódź, First Civil Division).

34. According to the order for reference, the action involves the application of Article 49 of the Ustawa dochodach jednostek samorządu terytorialnego (Law on the income of local government units) of 13 November 2003 (Dz. U. of 2017, headings 1453, 2203, 2260, and of 2018, heading 317). The municipality claims that, for the years 2005 to 2015, it received insufficient subsidies for the performance of tasks delegated by the central government, and seeks payment of 2 357 148 Polish zlotys (PLN) to cover those costs. The referring court indicates that it is likely that the judgment in the case will be unfavourable to the State Treasury. This has caused the referring court to experience a real fear that, in the event that a particular decision is taken in the case, disciplinary proceedings will be initiated against the members of the formation ruling in that case.

35. Case C-563/18 concerns a criminal action brought by the Prokurator Generalny zastępowany przez Prokuratorę Krajową (initially Prokuratura Okręgowa w Płocku) (General Prosecutor represented by the National Prosecutor's Office, Poland [initially District Public Prosecutor's Office in Płock, Poland]) against VX, WW and XV ('the defendants') before the Sąd Okręgowy w Warszawie w VIII Wydziale Karnym (District Court, Warsaw, Eighth Criminal Division) chaired by Judge Igor Tuleya.

36. According to the order for reference, the main proceedings concern the inquiry of the Prokurator Generalny zastępowany przez Prokuratorę Krajową (initially Prokuratura Okręgowa w Płocku) (General Prosecutor represented

by the National Prosecutor's Office [initially District Public Prosecutor's Office in Płock]) into the activities of members of an organised criminal group which carries out, inter alia, assassinations and kidnappings of persons with the aim of obtaining money for their release. The defendants admitted to the criminal allegations against them, and applied for cooperative witness status due to their cooperation with the law enforcement authorities. In consequence, the referring court indicates that it will have to decide whether to apply the extraordinary mitigation of a penalty pursuant to Article 60(3) to (5) of the Polish Criminal Code. The application of such a milder penalty has caused the referring court to experience a real fear that, in the event that a particular decision is taken in the case, this may result in disciplinary proceedings being initiated against the members of the formation ruling in that case and in particular Judge Igor Tuleya.

37. The referring courts harbour doubts whether the new regime for disciplinary proceedings against judges in Poland is consistent with the second subparagraph of Article 19(1) TEU. (10) They indicate that on account of changes to the system of disciplinary proceedings in relation to judges brought about by the 2017 Law on the Supreme Court, read in conjunction with the Law on the NCJ and the Law on the ordinary courts, the Minister for Justice, who is also the Public Prosecutor General, has gained decisive influence over the initiation and conduct of disciplinary proceedings against judges. The referring courts consider that, as a result of the adopted model for disciplinary proceedings, disciplinary courts may become a tool for removing persons who issue decisions of which the authorities disapprove and there may be a paralysing effect on judges through the threat of initiating disciplinary proceedings for judicial decisions issued, thereby constituting a direct threat to judicial independence and giving rise to the risk that the judiciary will be used for political ends. In that regard, the referring courts make, inter alia, the following observations.

38. First, the judges sitting in the newly created Disciplinary Chamber of the Supreme Court ('the Disciplinary Chamber'), which examines disciplinary cases involving judges, are recommended by the NCJ for appointment by the President of the Republic. Yet, the NCJ's members are now elected primarily by the legislative authorities and thus its membership reflects the political choices of the governing political party in Poland. This is borne out by the NCJ's selection of judicial candidates for the Disciplinary Chamber which raises concerns about the fairness and impartiality of disciplinary proceedings against judges. The NCJ has also become a quasi-disciplinary body examining appeals against decisions of court presidents concerning the transfer of a judge to another court division.

39. Moreover, the Minister for Justice directly appoints disciplinary court judges at the appellate courts, and the provisions in force oblige judges to perform the functions of a disciplinary court judge, since a judge's refusal to do so entails the possibility that disciplinary proceedings may be initiated against that judge. The Minister for Justice also appoints the Disciplinary Officer and two Deputy Disciplinary Officers for Ordinary Court Judges which gives him influence over the initiation of disciplinary proceedings against judges. There is a new body called the Disciplinary Officer of the Minister for Justice who is appointed by the Minister for Justice to conduct specific cases concerning judges, and has a privileged position since his appointment precludes other disciplinary officers from acting in a given case. The Minister for Justice can object to a disciplinary officer's decision not to initiate proceedings, and this may cause such proceedings to continue without a determined time frame.

40. There are also concerns that the procedural guarantees afforded to judges in disciplinary proceedings are restricted. In particular, a disciplinary court may conduct proceedings despite the justified absence of the accused judge or his representative; there is the possibility of issuing a penalty order and of using evidence obtained by means of a criminal act against a judge; the definition of offences for which a judge can be held liable is unclear; and the Minister for Justice may request the reopening of disciplinary proceedings in certain cases which means that a judgment of the disciplinary court does not prevent the accused judge from later being held liable for the same act.

41. The referring courts indicate that the new disciplinary regime involving judges and the provisions of the 2017 Law on the Supreme Court, the Law on the NCJ and the Law on the ordinary courts listed in the orders for reference are of fundamental importance for the decisions to be given in the main proceedings, since those decisions may entail for the judges ruling in the cases politically motivated disciplinary penalties applied on the basis of those Polish laws. In their view, this infringes the second subparagraph of Article 19(1) TEU and therefore the interpretation of that provision is essential to enable the referring courts to give judgment. The referring courts also consider that the interpretation of the second subparagraph of Article 19(1) TEU is relevant to the main proceedings, since Article 267 TFEU gives them certain discretion to determine the EU provisions whose interpretation is required to decide on the main actions, and the provisions of Polish law relating to disciplinary proceedings against judges are of real, and not purely hypothetical, relevance to the decisions in those cases.

42. The referring courts further indicate that they are European courts because cases in fields covered by EU law, as referred to in the second subparagraph of Article 19(1) TEU, fall within their jurisdiction.

43. It was in these circumstances that the Sąd Okręgowy w Łodzi (District Court, Łódź), in Case C-558/18, decided to stay the proceedings, and to refer the following question to the Court for a preliminary ruling:

‘On a proper construction of the second subparagraph of Article 19(1) of the Treaty on European Union, does the resulting obligation for Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law preclude provisions which materially increase the risk of undermining the guarantee of independent disciplinary proceedings against judges in Poland through:

- (1) political influence on the conduct of disciplinary proceedings;
- (2) the emerging risk that the system of disciplinary measures will be used to politically control the content of judicial decisions; and
- (3) the possibility of evidence obtained by [means of a criminal act] being used in disciplinary proceedings against judges?’

44. The Sąd Okręgowy w Warszawie (District Court, Warsaw), in Case C-563/18, also decided to stay the proceedings, and to refer the following question to the Court for a preliminary ruling:

‘On a proper construction of the second subparagraph of Article 19(1) of the Treaty on European Union, does the resulting obligation for Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law preclude provisions which remove the guarantee of independent disciplinary proceedings against judges in Poland by permitting disciplinary proceedings to be conducted under political influence, giving rise to a risk that the system of disciplinary measures will be used to politically control the content of judicial decisions?’

IV. Events following the requests for a preliminary ruling

45. On the basis of paragraph 24 of the Court’s Recommendations, (11) the referring courts filed letters supplementing their requests for a preliminary ruling, so as to inform the Court of events which took place following those requests.

46. In respect of Case C-558/18, according to the first letter of 7 December 2018, the referring court indicated, inter alia, that the Deputy Disciplinary Officer for Ordinary Court Judges summoned Judge Ewa Maciejewska, who submitted the reference for a preliminary ruling in Case C-558/18, to appear as a witness at a hearing on 20 September 2018 ‘regarding the restriction of the independence of the ruling given by the judge chairing the formation’ in the main action. That disciplinary officer also asked the President of the Sąd Okręgowy w Łodzi (District Court, Łódź) for information concerning the number of claims for payment made against the State Treasury registered with the First Civil Division of the Sąd Okręgowy w Łodzi (District Court, Łódź) between January 2015 and 31 August 2018, the list of cases of that type assigned to Judge Maciejewska’s Chamber, together with an indication of the content of the rulings issued, including the reference numbers of the cases in which the grounds of the judgments were set out.

47. According to the second letter of 11 December 2018, the referring court in Case C-558/18 indicated that Judge Ewa Maciejewska received a request from the Deputy Disciplinary Officer for Ordinary Court Judges to submit a ‘written statement ... concerning a possible exceeding of jurisdiction by the [referring court] consisting in a request for a preliminary ruling made by that court contrary to the conditions of Article 267 [TFEU]’.

48. In respect of Case C-563/18, according to the first letter of 30 October 2018, the referring court indicated that Judge Igor Tuleya is participating in six sets of proceedings conducted by the Disciplinary Officer for Ordinary Court Judges, one of which concerns the reasons for the referring courts’ submission of the requests for a preliminary ruling in Cases C-558/18 and C-563/18.

49. According to the second letter of 12 December 2018, the referring court in Case C-563/18 indicated in particular that Judge Igor Tuleya is participating in seven sets of proceedings conducted by the Disciplinary Officer for Ordinary Court Judges, and that he received a request from the Deputy Disciplinary Officer for Ordinary Court Judges to submit a ‘written statement concerning a possible exceeding of jurisdiction by the [referring court] consisting in a request for a preliminary ruling made by that court contrary to the conditions of Article 267 [TFEU]’.

V. Procedure before the Court

50. By decision of the Court, the present cases were joined for the purposes of the written and oral procedure and the judgment.

51. By order of 1 October 2018, (12) the President of the Court rejected the referring courts' requests to deal with the present cases under the accelerated procedure pursuant to Article 105(1) of the Court's Rules of Procedure.

52. By decision of 12 November 2018, the President of the Court gave the present cases priority pursuant to Article 53(3) of the Court's Rules of Procedure.

53. Written observations on the questions referred in the present cases were submitted by the Skarb Państwa — Wojewoda Łódzki (State Treasury — Governor of Łódź Province), the Prokurator Generalny zastępowany przez Prokuraturę Krajową (initially Prokuratura Regionalna w Łodzi) (General Prosecutor represented by the National Prosecutor's Office, Poland [initially Regional Public Prosecutor's Office in Łódź, Poland]) and Prokurator Generalny zastępowany przez Prokuraturę Krajową (initially Prokuratura Okręgowa w Płocku) (General Prosecutor represented by the National Prosecutor's Office [initially District Public Prosecutor's Office in Płock]) ('the General Prosecutor'), the Netherlands Government, the Republic of Latvia, the Republic of Poland and the European Commission.

54. The General Prosecutor, the Rzecznik Praw Obywatelskich (Commissioner for Human Rights, Poland), the Republic of Poland, the EFTA Surveillance Authority and the European Commission presented oral argument at the hearing held on 18 June 2019. (13)

VI. Summary of the observations of the parties

A. Procedural objections

55. The State Treasury and Poland submit that the main proceedings constitute purely internal situations and do not fall within the scope of EU law. The State Treasury emphasises that Article 19(1) TEU has no link to the main proceedings, and none of the exceptions involving internal situations in the case-law justify the Court's jurisdiction in the present cases. (14)

56. Poland, joined by the General Prosecutor, submits, inter alia, that rules on disciplinary proceedings against judges fall within the competences of the Member States, and for this reason, EU law does not apply to their assessment. In Poland's view, specific standards relating to disciplinary proceedings cannot be deduced from Article 19(1) TEU. Poland stressed at the hearing that, following from the Court's case-law, (15) Member State measures must actually, and not potentially, fall within the fields covered by EU law under the second subparagraph of Article 19(1) TEU. The General Prosecutor further argued that Member States' competence over the organisation of justice was not changed by the Lisbon Treaty, as reflected in the Lisbon judgment of the German Federal Constitutional Court. (16)

57. The Commission, although not raising a formal objection, submits for the sake of completeness that the main proceedings do not fall within the fields covered by EU law under the second subparagraph of Article 19(1) TEU. It points out that, in respect of Case C-558/18, the exercise of tasks in the field of public administration is not covered by EU law and in particular does not constitute State aid under Article 107(1) TFEU. Likewise, in respect of Case C-563/18, the Commission submits that the main proceedings concern Polish criminal law and in particular do not fall within the scope of Article 4(b) of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (OJ 2008 L 300, p. 42) or Article 7(4) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1).

58. The State Treasury, the General Prosecutor, Poland and the Commission submit that the questions referred are inadmissible because they are hypothetical and have no link to the main proceedings. (17)

59. The State Treasury, the General Prosecutor and Poland assert that the referring courts do not set out, inter alia, the reasons for examining the question of the interpretation of Article 19(1) TEU or the link between that provision of EU law and the national legislation applicable to the main proceedings, as required by the case-law, Article 94 of the Court's Rules of Procedure and its Recommendations.

60. The State Treasury, the General Prosecutor and Poland further contend that the Court's reply is not necessary to resolve the disputes in the main proceedings, as those disputes have nothing to do with the disciplinary regime in Poland and the judges concerned are not currently subject to any disciplinary proceedings. In their view, the references relate to the judges' subjective fears as to potential disciplinary proceedings being brought which are hypothetical events, and the Court has dealt with similar situations in *Falciola* (18) and *Nour* (19) which led to its rejection of the questions referred. They also claim that if national courts could submit questions unrelated to the disputes in the main proceedings, this would undermine the purpose of the preliminary ruling procedure. The State Treasury stresses that the Court's case-law (20) relaxing the condition of the relevance of the questions referred for resolving the main action is inapplicable to the present cases.

61. Poland and the Commission emphasise that the fact that the referring courts may rule on questions concerning the application or interpretation of EU law is not sufficient to establish the admissibility of the questions referred, as they must be relevant and necessary for the resolution of the disputes pending before the referring courts. The General Prosecutor and the Commission further assert that the present cases differ from *Associação Sindical dos Juízes Portugueses*, (21) since in that case the interpretation of Article 19(1) TEU was relevant to the resolution of the dispute in the main proceedings.

62. The Commission argues that Article 19(1) TEU is not relevant to the subject matter of the disputes in the main proceedings or any preliminary question (*quaestio in limine litis*) relating to those disputes. In its view, the Court's reply would amount to giving an advisory opinion on general or hypothetical questions and exceed the limits of the preliminary ruling mechanism under Article 267 TFEU, as defined in the case-law. (22) It acknowledges that the referring courts' concerns about the possibility of being subject to disciplinary proceedings cannot be ruled out, but considers that circumstance does not change the fact that the questions referred are inadmissible. The Commission stressed at the hearing that the referring courts have not indicated any element which would lead them to take a decision in consequence of a reply given by the Court on the interpretation of Article 19(1) TEU.

63. The Polish Commissioner for Human Rights and the EFTA Surveillance Authority submit that the questions referred are admissible.

64. The Polish Commissioner for Human Rights argues that *Falciola* (23) is not applicable to the present cases, as it was decided before Article 19(1) TEU was introduced into the Treaties. He contends that there is an EU law element in the present cases due primarily to the need to guarantee the effectiveness of Article 19(1) TEU and the preliminary ruling procedure laid down in Article 267 TFEU. Following from *Associação Sindical dos Juízes Portugueses*, (24) the protection of judicial independence under Article 19(1) TEU is triggered once the national legislature entrusts matters of EU law to a court, and extends to all the judicial activity of the national court so as not to deprive that provision of useful effect. Also, in his view, judges protected by Article 19(1) TEU must be able to initiate the preliminary ruling procedure without incurring any risks, and the absence of those guarantees constitutes in itself an EU law element in the present cases, regardless of the fact that investigations were initiated against the referring judges.

65. The Polish Commissioner for Human Rights further contends that the questions referred are not hypothetical, and the Court's answer is necessary for the referring courts to issue a decision under the protection of judicial independence afforded by the second subparagraph of Article 19(1) TEU. He emphasises that if judges could only raise the issue of judicial independence in disciplinary procedures brought against them, that would be incompatible with *Unibet*, (25) in which the Court ruled that raising the incompatibility of national law with EU law when the individual risks certain sanctions is not sufficient to ensure effective judicial protection.

66. The EFTA Surveillance Authority argues that it follows from *Associação Sindical dos Juízes Portugueses* (26) that judicial independence is indivisible. In its view, national courts act as EU Courts at all times and not only when deciding on cases specifically relating to EU law. Thus, it contends that the present cases are admissible, as there is clearly a question of EU law to be addressed in respect of the requirements of judicial independence imposed on national courts.

B. Substance

67. The Polish Commissioner for Human Rights submits that the questions referred should be answered in the affirmative. He argues that, in light of the Court's case-law, (27) Polish measures on disciplinary proceedings do not ensure that judges are protected from excessive control by the executive authorities. He contends, inter alia, that the Minister for Justice appoints disciplinary court judges at the appellate courts for a defined term of office, but that term of office expires when the judge is subject to disciplinary sanctions, and there have been situations where judges have

refused to initiate disciplinary proceedings against another judge and, in turn, have been the subject of disciplinary proceedings. He also points out that the Minister for Justice appoints the Disciplinary Officer for Ordinary Court Judges and the two Deputies, and may oppose the decision of a disciplinary officer not to open disciplinary proceedings, which results in the need to initiate disciplinary proceedings and the Minister for Justice's instructions as to the conduct of such proceedings are binding on that disciplinary officer.

68. In addition, according to the Polish Commissioner for Human Rights, the Minister for Justice can appoint the Disciplinary Officer of the Minister for Justice which excludes other disciplinary officers from acting and is tantamount to the need to initiate the disciplinary procedure. He asserts that disciplinary proceedings can be initiated without a defined time frame which infringes the requirement that cases must be decided in a reasonable time, and that the Minister for Justice may request the reopening of disciplinary proceedings which makes it possible to censure a judge for the same breaches in the event of new circumstances or evidence.

69. The Polish Commissioner for Human Rights further argues that there is an absence of the necessary guarantees of the rights of defence of judges in disciplinary proceedings. In particular, he asserts that the disciplinary court can adjudicate in the justified absence of the accused judge and his representative, and in reference to Article 115c of the Law on the ordinary courts, that the use of evidence from criminal proceedings is not justified in disciplinary proceedings relating to professional misconduct of judges. In his view, institutional aspects of the disciplinary regime are also problematic, including the use of lay judges in the Disciplinary Chamber since legal knowledge is needed to decide disciplinary cases, and the fact that the President of the Disciplinary Chamber designates the disciplinary court of first instance which raises doubts whether such court is a tribunal established by law.

70. The General Prosecutor argues that the Polish disciplinary regime in relation to judges meets the guarantees of judicial independence set out in the Court's case-law, (28) along with the standards resulting from the European Court of Human Rights case-law. (29) In particular, it points out that the Minister for Justice may initiate disciplinary proceedings and object to a decision refusing to open such proceedings, but he cannot determine the outcome of the procedure nor can he sanction a judge. In its view, Poland's reforms of the disciplinary regime aim to improve the accountability of judges. It stressed at the hearing that there is no disciplinary liability of judges for the content of their decisions, and no one has been the subject of disciplinary proceedings for having submitted requests for preliminary rulings; the investigation procedure involving the judges in the present cases was different, and sought to clarify why the references were identical.

71. Poland argues that the Polish legal system does not contain provisions which infringe the guarantees of independent disciplinary proceedings against judges or which increase the risk of infringements of those guarantees. In its view, the requests refer to measures which do not exist in Poland, and are hypothetical, since they do not indicate which concrete guarantees have been infringed and how they have been infringed. Moreover, Poland asserts that it is difficult to respond to the allegations in the requests, as they consist of a selective statement of certain provisions of Polish law relating to disciplinary proceedings, mixed with subjective assessments, the aim of which is to formulate a general criticism of the reform of the justice system in Poland.

72. Poland submits, inter alia, that neither the Minister for Justice nor another organ of the executive branch rules on disciplinary proceedings or applies disciplinary sanctions with respect to judges. It points out that, according to Articles 110 and 110a of the Law on the ordinary courts, disciplinary courts at the appellate courts rule on disciplinary proceedings in relation to ordinary court judges, and in certain cases, the Disciplinary Chamber adjudicates such proceedings. According to Poland, judges of the Disciplinary Chamber are appointed, in accordance with Article 179 of the Polish Constitution, by the President of the Republic, and the Minister for Justice, after consulting the NCJ, appoints disciplinary court judges at the appellate courts for a 6-year term from among judges of the ordinary courts with at least 10 years' seniority and, as such, from among judges appointed to that office in accordance with the Polish Constitution. In its view, judges who adjudicate in disciplinary proceedings against judges enjoy the formal guarantees of independence, (30) including appointment for an unlimited time, irremovability, immunity, remuneration and the obligation to remain apolitical. (31)

73. Poland emphasises that neither the Minister for Justice nor any other politician exercises influence on the disciplinary courts and the judges sitting in such courts in particular because: (1) they do not determine the composition of the disciplinary courts which under Article 111 of the Law on the ordinary courts is determined by drawing lots from a list of the judges of a given court; (2) they cannot address guidelines to judges sitting in disciplinary courts; (3) they cannot remove judges of disciplinary courts; (4) they cannot dismiss a judge of a disciplinary court from a case he is dealing with; and (5) they have no right to control the activity of disciplinary courts.

74. Poland acknowledges that the Minister for Justice has certain powers to initiate disciplinary proceedings, since he may require a disciplinary officer to initiate an investigation, object to that disciplinary officer's decision refusing to open disciplinary proceedings, or designate a Disciplinary Officer of the Minister for Justice to handle a specific case. Even so, Poland stresses, the Minister for Justice exercises indirect influence, mainly by opposing the decision refusing to open disciplinary proceedings, and has no influence on the outcome of proceedings initiated by disciplinary officers or the disciplinary court's decision. Poland stated at the hearing that the Disciplinary Officer of the Minister for Justice is appointed in situations where it is necessary to focus on one procedure, and this body was created to facilitate the workload of disciplinary officers and handle cases involving complex legal and factual circumstances.

75. Poland submits that judges enjoy the procedural guarantees of the right to a fair trial in disciplinary proceedings. It asserts that cases are decided by a court acting on the basis of the Law on the ordinary courts, the judges ruling in those cases are subject to the guarantees of impartiality and independence, and disciplinary proceedings are public under Article 116(1) of the Law on the ordinary courts. Poland points out that the disciplinary procedure respects the principles of equality of arms and *ne bis in idem*, and the accused judge may appoint defence counsel from among judges, prosecutors, lawyers or legal advisers and, in the event of illness, is entitled to a court-appointed defence counsel pursuant to Article 113(1) and (2) of the Law on the ordinary courts; that judge also benefits from the presumption of innocence, and may lodge an appeal against the decision of the disciplinary court at first instance which must be examined within 2 months of its filing under Article 121 of the Law on the ordinary courts. According to Poland, the definition of disciplinary offences set out in Article 107 of the Law on the ordinary courts has remained unchanged for many years, and ensures flexibility and predictability. Poland stressed at the hearing that there is no disciplinary liability for the content of judicial decisions.

76. In respect of the referring courts' letters supplementing their requests for a preliminary ruling, Poland states that the Disciplinary Officer for Ordinary Court Judges replied to the information contained in those letters in a Communication 'on the investigation procedures with the participation of Judges Ewa Maciejewska and Igor Tuleya, in connection with the submission of preliminary questions to the Court of Justice of the European Union'. (32) Poland asserts that, according to that Communication, the purpose of the investigation was to determine whether any judge had attempted to exert influence on the referring judges in order to interfere with the content of the judgments in the cases in which those questions were asked. Poland states that the suspicion of disciplinary misconduct was raised because the orders for reference were virtually identical. Poland further states that the Deputy Disciplinary Officer for Ordinary Court Judges closed the investigation given the absence of disciplinary misconduct committed, and that in those proceedings the judges concerned had the status of witnesses and not as accused judges. Moreover, Poland points out that those judges are not currently the subject of disciplinary proceedings and have only been heard as witnesses in cases concerning other judges.

77. Latvia proposes that the Court should reply to the questions referred that the second subparagraph of Article 19(1) TEU should be interpreted as meaning that a Member State has an obligation to ensure that the disciplinary regime for judges respects the guarantees of judicial independence. It stresses that such a regime must comply with those guarantees set out in the Court's case-law, (33) as illustrated by the Latvian disciplinary system. It observes that judicial decisions do not in principle engage the disciplinary liability of judges, and only flagrant and inexcusable misconduct may be subject to that liability. (34) It underlines the linkage of judicial independence to the separation of powers and the rule of law as recognised in, inter alia, Latvian and EU law. (35)

78. The Netherlands proposes that the questions referred should be answered in the affirmative. (36) It takes the view that, following from the Court's case-law, (37) national measures which, as explained by the referring courts, involve or allow political influence on disciplinary proceedings against judges and which may be used to exercise political control over the content of judicial decisions, infringe the principle of judicial independence under the second subparagraph of Article 19(1) TEU, along with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

79. The EFTA Surveillance Authority emphasises the importance of judicial independence for observance of the rule of law, as recognised in the EEA and EU legal orders. (38) It expresses concerns that, on the basis of the Court's case-law, (39) a number of elements of the Polish disciplinary regime against judges are inconsistent with the requirements of judicial independence. These elements include: (1) the disciplinary offence of professional misconduct is not clearly defined; (2) there seems to be a link between the party responsible for disciplinary proceedings and the executive branch with respect to the Disciplinary Chamber's composition and the executive branch's appointment of disciplinary officers for the examination of cases and in the outcome of the investigations; (3) the use of evidence obtained from criminal proceedings or operational surveillance in disciplinary proceedings; (4) concerns about the independence of

the Disciplinary Chamber; and (5) disciplinary sanctions are severe and proceedings can be reopened to the detriment of accused judges.

80. The EFTA Surveillance Authority contends that the whole picture of the changes in the law relating to the justice system in Poland should be taken into account, and that if each change were considered separately, without considering the cumulative effects, there is a risk that insufficient attention would be given to the full impact of what appears to be a set of coordinated measures. It also stresses that there is a chilling effect resulting from the fact that the referring courts were called upon to submit written statements in respect of the questions referred.

81. The Commission submitted in the alternative at the hearing that, under the Court's case-law,⁽⁴⁰⁾ the disciplinary system in Poland breaches the principle of judicial independence because it does not offer the necessary guarantees to avoid the risk of using that system as an instrument for political control of the content of judicial decisions. For this reason, the Commission stated that it launched an infringement procedure under Article 258 TFEU against Poland, alleging that the new disciplinary regime for judges is incompatible with the second subparagraph of Article 19(1) TEU, in conjunction with Article 47 of the Charter. ⁽⁴¹⁾

82. Summarising its allegations in the context of that procedure, the Commission contends in particular that: (1) Polish law makes it possible to hold judges of ordinary courts liable for disciplinary action because of the content of their judicial decisions, including requests for preliminary rulings; (2) the Disciplinary Chamber does not meet the requirements of judicial independence under EU law, as covered by pending Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*; (3) the Polish disciplinary regime does not guarantee that a tribunal established by law will rule at first instance in disciplinary proceedings against an ordinary court judge, since the President of the Disciplinary Chamber determines, on an ad hoc and discretionary basis, the disciplinary court to hear the case; and (4) the procedural rights of judges in disciplinary proceedings are restricted, since this regime no longer guarantees that cases are dealt with within a reasonable time, and the rights of defence of the accused judges are affected.

VII. Analysis

83. I have reached the conclusion that the requests for a preliminary ruling in the present cases are inadmissible because the Court is not in possession of sufficient factual and legal material to determine whether there has been a breach of the obligation on Member States to guarantee judicial independence under the second subparagraph of Article 19(1) TEU.

84. More specifically, the absence of explanation in the orders for reference about the link between the Member State measures in question and the second subparagraph of Article 19(1) TEU, which is inconsistent with the requirements set out in Article 94(c) of the Court's Rules of Procedure, has led the referring courts to submit generalised questions. A reply by the Court to those questions would thus constitute an advisory opinion which is precluded under Article 267 TFEU.

85. My analysis is divided into two parts. First, in Section A, I will examine whether the situation in the main proceedings falls within the material scope of EU law and in particular the second subparagraph of Article 19(1) TEU. Second, in Section B, I will conduct an assessment of the admissibility of the requests for a preliminary ruling. In the course of the discussion in Section B, it will become evident why there is insufficient information in the case file to conduct a substantive assessment of whether a structural breach of judicial independence under the second subparagraph of Article 19(1) TEU has occurred. For this reason, I will not express a view on whether the guarantees inherent in the second subparagraph of Article 19(1) TEU have been breached.

A. *The situation in the main proceedings falls within the material scope of the second subparagraph of Article 19(1) TEU*

86. In my view, the situation in the main proceedings falls within the material scope of EU law, and more specifically the second subparagraph of Article 19(1) TEU.

87. In its judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18), ⁽⁴²⁾ the Court affirmed that, as regards the material scope of the second subparagraph of Article 19(1) TEU, that provision refers to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter. In paragraph 51 of that judgment, the Court held as follows:

‘Contrary to what has been claimed by the Republic of Poland and Hungary in this respect, the fact that the national salary reduction measures at issue in the case which gave rise to the judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117) were adopted due to requirements linked to the elimination of the excessive budget deficit of the Member State concerned and in the context of an EU financial assistance programme for that Member State *did not*, as is apparent from paragraphs 29 to 40 of that judgment, play *any* role in the interpretation which led the Court to conclude that the second subparagraph of Article 19(1) TEU was applicable in the case in question. That conclusion was reached on the basis of the fact that the national body which that case concerned, namely the Tribunal de Contas (Court of Auditors, Portugal), *could*, subject to verification to be carried out by the referring court in that case, rule, as a court or tribunal, on questions concerning the application or interpretation of EU law and which therefore fell within the fields covered by EU law (see, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 40).’ (43)

88. What is noteworthy in the judgment just mentioned is the Court’s rejection of arguments put forward by Poland and Hungary that the second subparagraph of Article 19(1) TEU was applicable in *Associação Sindical dos Juizes Portugueses* because the national salary reduction measures at issue which gave rise to the Court’s judgment in that case were adopted due to requirements to limit the excessive budget deficit in the Member State concerned in the context of an EU financial assistance programme. Rather, the Court confirmed that what was essential in *Associação Sindical dos Juizes Portugueses* was that the national body in question in that case ‘could’ rule, as a court or tribunal, which I take to mean under Article 267 TFEU, on questions concerning the application or interpretation of EU law and which therefore fell within the fields covered by EU law.

89. The same is true of the referring courts in the present cases (see point 42 of this Opinion). It is not disputed that they are bodies which ‘could’ rule, as courts or tribunals under Article 267 TFEU, on questions concerning the application or interpretation of EU law. Therefore, in principle the referring courts fall within the material scope of the second subparagraph of Article 19(1) TEU and that provision is applicable in the present cases.

90. That said, I take the view that the Court did not rule in its judgments in *Associação Sindical dos Juizes Portugueses* or *Commission v Poland (Independence of the Supreme Court)* (C-619/18) that the broad material scope of the second subparagraph of Article 19(1) TEU displaced, or even attenuated, the rules of the Court on the admissibility of requests for preliminary rulings. It is this aspect — which was not present in the proceedings giving rise to my Opinion in *Joined Cases A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, (44) another reference for preliminary ruling from a Polish court on the compliance of Polish measures with the requirements of judicial independence under the second subparagraph of Article 19(1) TEU — which precludes the Court from ruling on whether the second subparagraph of Article 19(1) TEU has been breached in these proceedings. This will be discussed below in Section B of this Opinion.

91. The broad material scope of the second subparagraph of Article 19(1) TEU also means that, contrary to arguments of the State Treasury, the Court’s line of case-law on so-called internal situations and in particular its judgment in *Ullens de Schooten* (45) does not apply to the situation in the main proceedings. That line of case-law is concerned with the Court’s ability to reply to requests for preliminary rulings in circumstances which may be considered to derogate from the general rule that internal situations, in which all the elements of a particular case are confined within a single Member State, fall outside the scope of EU law. This case-law is largely situated in the context of requests for preliminary rulings relating to the EU free movement rules and other areas of EU law where in principle a cross-border element is required. (46) The present cases are concerned with the scope of application of the second subparagraph of Article 19(1) TEU. This cannot, by definition, be classified as a matter which is purely internal.

92. This is so because ‘the fields covered by Union law’ under the second subparagraph of Article 19(1) TEU include an authority vested in the Court to rule on structural breaches of the guarantees of judicial independence, given that Article 19 TEU is a concrete manifestation of the rule of law, one of the fundamental values on which the European Union is founded under Article 2 TEU, and Member States are bound under the second subparagraph of Article 19(1) TEU to ‘provide remedies sufficient to ensure effective legal protection’. (47) Structural breaches of judicial independence inevitably impact on the preliminary ruling mechanism under Article 267 TFEU and therefore on the capacity of Member State courts to act as EU Courts.

93. In this regard, I accept the arguments of the Polish Commissioner for Human Rights in point 64 of this Opinion on the meaning of ‘the fields covered by Union law’ under the second subparagraph of Article 19(1) TEU, (48) and reject those of the General Prosecutor and Poland in point 56 of this Opinion that a ruling to the effect that the main proceedings fall within the material scope of the second subparagraph of Article 19(1) TEU would interfere with the division of competences between the European Union and the Member States. This is because EU law impacts on the

competences of the Member States to organise their systems for the administration of justice in the narrow circumstances here described.

94. I am therefore unconcerned that the disputes in the main proceedings pertain to the application of provisions of Polish law in the field of public administration in Case C-558/18 and of Polish criminal law in Case C-563/18. As made clear by the Court in paragraph 51 of *Commission v Poland (Independence of the Supreme Court)* (C-619/18) and reproduced in point 87 of this Opinion, the material scope of the second subparagraph of Article 19(1) TEU is not linked in any way to whether the substantive dispute in which judicial independence is being challenged concerns EU law. As pointed out above in points 88 and 89 of this Opinion, the material scope of the second subparagraph of Article 19(1) TEU is broad. Whether or not the breach of judicial independence is structural in nature and therefore in violation of the second subparagraph of Article 19(1) TEU is a separate exercise (see point 125 of this Opinion).

95. Thus, the similarities of the present cases with the Court's rulings in *Falciola* (49) and *Nour* (50) are not directly pertinent to the situation in the main proceedings, given that those rulings were issued prior to the Court's judgments in *Associação Sindical dos Juizes Portugueses* and *Commission v Poland (Independence of the Supreme Court)* (C-619/18).

96. In the order of 26 January 1990 of the Full Court in *Falciola*, (51) the dispute before the referring court concerned the application of EU rules on public procurement, yet it was clear from the order for reference that the aim of the questions referred was to determine whether the national judges could carry out their duties as EU judges in an independent and impartial manner despite the adoption of Italian legislation on the liability of the judiciary. The Court found that the questions referred bore no relation to the main action, since they did not concern the interpretation of the EU rules on public procurement in question, and the referring court was 'in doubt only as to the possible psychological reactions of certain Italian judges' as a result of that legislation. Consequently, the Court held that the questions referred did not involve an interpretation of EU law objectively required to settle the dispute, and it had no jurisdiction to rule on those questions.

97. Likewise, in its order of 25 May 1998 in *Nour*, (52) the Court held that the questions referred had no relation to the main action, and it had no jurisdiction to answer them. Those questions were submitted by an Austrian appeals board in the context of a dispute between a doctor and an insurance fund about his medical fees, and concerned the general principles forming part of EU law in relation to certain aspects of that board's functioning. The Court's reasoning rested on three grounds. First, the questions referred fell outside the scope of the dispute, and thus did not involve an interpretation of EU law objectively required to resolve that dispute. Second, it was not permissible under the procedure of Article 267 TFEU to permit a national judge to refer questions connected with a dispute in which he was involved on a private basis via the tribunal he presides over and in the context of different proceedings, as the president of that appeals board had done. Third, EU law was not shown to be applicable to the situation in the main proceedings.

98. Yet, neither of those cases concerned the second subparagraph of Article 19(1) TEU. In view of the foregoing considerations, the objection alleging that the situation in the main proceedings does not fall within the material scope of the second subparagraph of Article 19(1) TEU should be rejected.

B. Why the questions referred are inadmissible

99. I take the view that the objection concerning the admissibility of the questions referred should be accepted, but for reasons which are slightly different from those put forward in the observations of the parties. The heart of the admissibility problem in the present cases lies in the absence of sufficient bases, both in terms of law and fact, for the Court to determine whether breach of judicial independence protected under the second subparagraph of Article 19(1) TEU has occurred. For this reason, it is impossible for me to advise the Court on whether that provision has been breached. I will therefore refrain from expressing a view in the alternative, should the Court disagree with my analysis of the admissibility of the questions referred.

1. Pertinent rules on the admissibility of requests for preliminary rulings

100. It is useful to recall that, under established case-law, 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 EU law, the Court is in principle bound to answer. (53)

101. It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling 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. (54)

102. Under the case-law interpreting Article 94(a) and (b) of the Court's Rules of Procedure, (55) the need to provide an interpretation of EU law which will be of use to the national court requires that court to define the factual and legislative context of the questions referred or at least to explain the factual circumstances on which those questions are based. (56) Moreover, pursuant to Article 94(c) of the Court's Rules of Procedure, it is essential that the referring court provides some explanation of the reasons for the choice of the provisions of EU law which it seeks to have interpreted and of the link which it establishes between those provisions and the national legislation applicable to the main proceedings. (57) As noted in point 6 of this Opinion, those requirements also appear in the Court's Recommendations. (58)

103. It is also settled case-law that the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that it is necessary for the effective resolution of a dispute. (59) Thus, where the Court's reply to a question referred would lead it to deliver an advisory opinion on a problem which is general (60) or hypothetical (61) in nature, the Court finds such questions inadmissible.

104. This corresponds to the purpose of the preliminary ruling procedure under Article 267 TFEU. By setting up a dialogue between the Court and the courts and tribunals of the Member States, that procedure has the object of securing the consistency and uniformity in the interpretation of EU law, thereby serving to ensure its full effect and its autonomy, as well as, ultimately, the particular nature of the law established by the Treaties. (62)

105. An analysis of the case-law on the requirements of the content of requests for preliminary rulings laid down in Article 94 of the Court's Rules of Procedure shows why the requests for a preliminary ruling in the present cases are problematic in terms of admissibility.

106. The Court's judgment of 27 September 2017 in *Pušár* (63) concerned the interpretation of several provisions of EU law in the context of an action brought against the Slovakian authorities to remove the applicant's name from a list of persons considered to act as 'fronts' in company director roles. The applicant claimed that his inclusion in that list infringed his personality rights.

107. The fourth question in *Pušár* (64) concerned whether precedence should be given to the case-law of the Court when it differs from that of the European Court of Human Rights. The Court held that that question was inadmissible, as it 'was raised by the referring court in general terms, without the latter clarifying in a clear and concrete manner what those differences are'. The Court added that, with respect to the requirements laid down in Article 94 of its Rules of Procedure, 'the referring court must set out the precise reasons that led it to raise the question of the interpretation of certain provisions of EU law' and that 'it is essential that the national court should give at the very least some explanation of the reasons for the choice of the EU law provisions which it seeks to have interpreted and of the link it establishes between those provisions and the national legislation applicable to the proceedings pending before it'.

108. Insufficient explanation of Member State law to enable the establishment of this critical link, and therefore a finding of inadmissibility, occurred in particular in the judgments of 9 March 2017 in *Milkova* (65) and of 13 December 2018 in *Rittinger and Others*, (66) along with the order of 7 June 2018 in *Filippi and Others*. (67)

109. In *Milkova*, (68) involving a challenge to a dismissal of employment before the Bulgarian courts which allegedly breached the prohibition against discrimination on the grounds of disability, the Court held that the referring court merely referred generally to Article 4 of Directive 2000/78, along with other provisions of that directive, without establishing a link between those provisions and the national legislation at issue in those proceedings.

110. *Rittinger and Others* (69) involved a dispute by reference, inter alia, to EU State aid law in respect of German legislation under which all adults possessing a dwelling in the national territory were required to pay a contribution to public broadcasters. The Court concluded that it was fatal to the admissibility of the order for reference that 'while the referring court states that the broadcasting contribution enabled that system to be financed for the sole benefit of broadcasters in Germany, it does not explain the conditions of financing that system or the reasons why other broadcasters are excluded from using the system'.

111. In *Filippi and Others*, (70) concerning seizure by the Austrian authorities and other sanctions with respect to gaming machines requiring authorisation, the Court held that the request for a preliminary ruling was manifestly inadmissible. This was due in particular to the failure to satisfy the requirements referred to in Article 94(c) of the Court's Rules of Procedure because there was nothing in the order for reference which set out with the necessary precision and clarity the reasons which led the referring court to inquire into the interpretation of the relevant provisions of EU law, and the link between EU law and the national legislation applicable to the disputes in the main proceedings was not explained. Moreover, in respect to those requirements, the requisite information on that national legislation was lacking. While the request for a preliminary ruling set out the content of certain provisions of national law, it did not 'indicate in a sufficiently clear manner how such provisions could apply in the disputes before the referring court and which are the subject of the request'.

112. Finally, I note that in the recent judgment of the Full Court in *Wightman and Others*, (71) rejecting arguments concerning the admissibility of a reference relating to the United Kingdom's notification of its intention to withdraw from the European Union, the requirements of Article 94 of the Court's Rules of Procedure, including the link required by Article 94(c) of those rules between the relevant provisions of EU law and the Member State law applicable to the main proceedings, was not in dispute.

2. Application to the present cases

113. The Court has held that in order to ascertain whether the information supplied in the order for reference satisfies the requirements concerning the content of requests for preliminary rulings, the nature and scope of the question referred are taken into account. (72) It is also established in the case-law that those requirements as set out in Article 94 of the Court's Rules of Procedure are of particular importance in areas, such as competition law, where the factual and legal situations are often complex. (73)

114. These considerations, combined with the fact that it is established more broadly in the case-law that the requirements laid down in Article 94 of the Court's Rules of Procedure entail scrupulous adherence, (74) leads me to conclude that the complexities of determining whether a structural breach of judicial independence under the second subparagraph of Article 19(1) TEU has occurred means that, in this context, Article 94(c) of the Court's Rules of Procedure requires sufficient explanation of the Member State measures challenged and why they are inconsistent with the guarantees of judicial independence afforded by the second subparagraph of Article 19(1) TEU.

115. In the present cases, the orders for reference do not provide sufficient explanation of the relationship between the second subparagraph of Article 19(1) TEU and the Polish measures in question. In the context of the referring courts' concerns with respect to judicial independence, the relevant Polish measures are generally reproduced in points 8 to 32 of this Opinion. However, in contrast with other cases in which the Court has been asked to assess the compatibility of national measures relating to the reform of the justice system in Poland with the guarantees of judicial independence under the second subparagraph of Article 19(1) TEU, (75) there is a dearth of information in the case file concerning which provisions of Polish law are incompatible with those guarantees and why.

116. In this regard, I agree with the arguments made in substance by Poland and reproduced above in point 71 of this Opinion that the allegations set out in the orders for reference are generalised in nature. In particular, while the orders for reference set out the content of several provisions of Polish law, they do not explain the operation of those provisions or indicate how those provisions allegedly breach the requirements of judicial independence under second subparagraph of Article 19(1) TEU. The orders for reference also do not explain how the specified provisions of Polish law have been modified by the laws adopted in the context of the reform of the Polish justice system or how those provisions apply within the framework of the new regime for disciplinary proceedings against judges. Consequently, the factual and legal material necessary to assess the allegations set out in the orders for reference and to ascertain their scope is lacking.

117. In addition, the orders for reference are concerned with an element of subjective bias with respect to the impact of the new disciplinary regime on the referring judges' capacities to adjudicate independently. This has been described in both orders for reference as a 'fear' (see points 34 and 36 of this Opinion). In the absence of a dispute between interested parties with respect to this issue, it is difficult to determine whether judicial independence has been tainted by subjective bias, which as I have pointed out in my previous Opinions concerning the independence of the judiciary in Poland (76) is a separate exercise from assessing objective independence.

118. In the present cases, the orders for reference indicate that the interpretation of the second subparagraph of Article 19(1) TEU is necessary for the decisions to be given in the main proceedings on the grounds that the referring

courts fear that, in the event of a particular decision being taken in those proceedings, disciplinary proceedings will be initiated against the judges of those courts. It follows that the initiation of disciplinary proceedings has not yet occurred. On the basis of the orders for reference, the referring courts have merely a subjective fear which has not crystallised into disciplinary proceedings and remains hypothetical.

119. Thus, the question whether there is a structural breach of judicial independence under the second subparagraph of Article 19(1) TEU remains hypothetical in the circumstances of the main proceedings, due to the absence of sufficient information as to how this breach has occurred and why, both of which are compounded by the lack of crystallisation of a dispute between interested parties with respect to judicial independence.

120. I note in particular that none of the parties making submissions in the present cases refuted at the hearing the detailed arguments in the written observations of Poland on why specified provisions of Polish law are consistent with Member States' obligations with respect to judicial independence (see points 72 to 75 of this Opinion). Nor were any submissions made as to why the subjective fear of the judges concerned remained justified, even though the General Prosecutor and Poland asserted that the reason for the investigations of those judges was because the references were identical, and not because references had been made, and that no disciplinary action has been taken against those judges (see points 70 and 76 of this Opinion). In the light of all this, it is difficult to see how any dispute in respect of those judges has crystallised in the present cases.

121. As indicated by the General Prosecutor and the Commission, the circumstances of the present cases differ from those leading to the Court's judgment in *Associação Sindical dos Juizes Portugueses*. (77) That case involved an action brought before a Portuguese court by the Trade Union of Portuguese Judges against the Portuguese Court of Auditors, seeking, inter alia, the annulment of national salary reduction measures which reduced their pay. In support of its action, that trade union argued that those measures infringed the principle of judicial independence enshrined in Portuguese and EU law. (78) It is clear that the judges in that case suffered a reduction in salary. It is not clear in the circumstances of the present cases that the action taken by Poland led to a justified apprehension of bias that requires substantive investigation.

122. Moreover, as indicated by the State Treasury, the examples in the Court's case-law which give a broad interpretation of the relevance of questions referred for the purposes of resolving the disputes in the main proceedings do not invalidate this analysis. For instance, the Court has replied to questions relating to the national court's right or obligation to refer under Article 267 TFEU, (79) which strictly speaking may not determine the outcome of the decision to be given in the main proceedings. Additionally, in a line of case-law situated in the field of judicial cooperation in civil matters, (80) the Court has given a broad interpretation of the terms 'give judgment' for the purposes of the second paragraph of Article 267 TFEU as covering the whole of the procedure leading to the referring court's judgment.

123. Yet, that is a different matter from sufficiently setting out the link between the Member State measures at issue and the relevant provisions of EU law, which is here the second subparagraph of Article 19(1) TEU. Further, as pointed out above in point 114 of this Opinion, the complexities of determining whether Member State measures are inconsistent with the guarantees of judicial independence under the second subparagraph of Article 19(1) TEU require rigorous adherence to the requirements set out in Article 94 of the Court's Rules of Procedure.

124. To this, I would add that, in light of arguments put forward by the Polish Commissioner for Human Rights on the relevance of the Court's judgment in *Unibet* (81) to the present cases (see point 65 of this Opinion), that judgment does not excuse a national court from complying with the Court's rules on the admissibility of requests for preliminary rulings. I do not view the present cases as instances in which it is the absence of a Member State remedy which is thwarting the application of EU law. The present cases are simply instances in which the Court has insufficient information to determine if EU law has been breached.

125. Finally, I note that while the second subparagraph of Article 19(1) TEU has a broad material scope and extends to all national courts which 'could' make references under Article 267 TFEU (see points 87 to 89 of this Opinion), substantively speaking and in terms of EU competence, I take the position that, in the context of judicial independence, the second subparagraph of Article 19(1) TEU is confined to structural breaches which compromise the essence of judicial independence. I have expressed the view in previous Opinions that such a structural breach occurs when it impacts on an entire tier of the judiciary, and I reached the same conclusion with respect to the Disciplinary Chamber in a context in which it is the forum provided under Polish law to decide on cases involving judges affected by measures lowering the retirement age of Supreme Court judges, (82) which were held by the Court in its judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18) to infringe the guarantees of

judicial independence under the second subparagraph of Article 19(1) TEU. (83) Compliance with Article 94 of the Court's Rules of Procedure also requires sufficient explanation as to why the breach of judicial independence at issue is structural in nature for the purposes of the second subparagraph of Article 19(1) TEU, rather than one to be dealt with under Article 47 of the Charter, but only when Member States are implementing EU law under Article 51(1) of the Charter.

126. In view of the foregoing considerations, the objection alleging that the questions referred in the present cases are inadmissible should be upheld.

VIII. Conclusion

127. I propose that the Court should declare that the requests for a preliminary ruling submitted by the Sąd Okręgowy w Łodzi (District Court, Łódź, Poland) in Case C-558/18 and by the Sąd Okręgowy w Warszawie (District Court, Warsaw, Poland) in Case C-563/18 are inadmissible.

1 Original language: English.

2 See Opinions of Advocate General Tanchev in *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:325) concerning the lowering of the retirement age of Supreme Court judges and granting the President of the Republic the power to extend the active mandate of Supreme Court judges; in *Commission v Poland (Independence of the ordinary courts)* (C-192/18, EU:C:2019:529) concerning alleged discrimination on grounds of sex due to the retirement age of ordinary court judges, Supreme Court judges and prosecutors being lowered to a different age for women than for men and granting the Minister for Justice the power to extend the active mandate of ordinary court judges; and in *Joined Cases 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:2019:551) concerning the independence of the Disciplinary Chamber of the Supreme Court in view of changes to the manner in which the judicial members of the National Council of the Judiciary are appointed.

3 Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final, 20 December 2017. In that reasoned proposal, the Commission objected in particular to the following measures: (1) the Ustawa o zmianie ustawy o Krajowej Szkole Sądownictwa i Prokuratury, ustawy — Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the National School of Judiciary and Public Prosecution, the Law on the system of the ordinary courts and certain other laws) of 11 May 2017 (Dz. U. of 2017, heading 1139, as amended); (2) the Ustawa o zmianie ustawy — Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the system of the ordinary courts and certain other laws) of 12 July 2017 (Dz. U. of 2017, heading 1452, as amended); (3) the Ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, heading 5, as amended); and (4) the Ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law amending the Law on the National Council of the Judiciary and certain other laws) of 8 December 2017 (Dz. U. of 2018, heading 3, as amended). It is primarily the latter two measures, among others, which are at issue in the present cases.

4 See, for example, European Commission for Democracy Through Law (Venice Commission), Opinion No 904/2017 of 11 December 2017 on the Draft Act amending the Act on the National Council of the Judiciary, on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, CDL-AD(2017)031; United Nations Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland, 5 April 2018, A/HRC/38/38/Add.1; Organisation for Security and Co-Operation in Europe (OSCE) Office for Democratic Institutions and Human Rights, Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (as of 26 September 2017), 13 November 2017, JUD-POL/315/2017.

5 These include requests for preliminary rulings submitted by the Polish Supreme Court (C-522/18, C-537/18, C-585/18, C-624/18, C-625/18, C-668/18, C-487/19 and C-508/19), the Polish Supreme Administrative Court (C-824/18) and Polish lower courts (C-623/18), along with two infringement actions lodged by the Commission against Poland (C-619/18 and C-192/18). In its judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531), the Court held that measures lowering the retirement age of Supreme Court judges and granting the President of the Republic the power to extend the active mandate of Supreme Court judges are incompatible with Poland's obligations under the second subparagraph of Article 19(1) TEU, given that they are inconsistent with the principles of the irremovability and independence of judges which are protected under EU law.

6 See points 92 and 125 of this Opinion.

7 As I noted in my Opinion in *Commission v Poland (Independence of the ordinary courts)* (C-192/18, EU:C:2019:529), I refer to the term 'effective legal protection' in conformity with the wording of the English version of the second subparagraph of Article 19(1) TEU, while acknowledging that the Court has held that that provision ensures 'effective judicial protection'. See, for example, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, in particular paragraphs 3, 48, 54 and the case-law cited). There seems to be similar wording in some language versions of that provision as illustrated by the judgment just cited (see, for example, Maltese: 'protezzjoni legali effettiva' and 'protezzjoni ġudizzjarja effettiva'; Polish: 'skutecznej ochrony prawnej' and 'skutecznej ochrony sądowej'), as compared to others (see, for example, Dutch: 'daadwerkelijke rechtsbescherming'; French: 'protection juridictionnelle effective'; Spanish: 'tutela judicial efectiva').

[8](#) See, for example, judgments of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, paragraph 19), and of 2 May 2019, *Asendia Spain* (C-259/18, EU:C:2019:346, paragraph 19).

[9](#) See, for example, judgment of 13 December 2018, *Rittinger and Others* (C-492/17, EU:C:2018:1019, paragraph 38). Those recommendations are published in the *Official Journal of the European Union* (OJ 2018 C 257, p. 1) ('the Court's Recommendations').

[10](#) They refer in particular to the judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117), and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586).

[11](#) Paragraph 24 of the Court's Recommendations states in relevant part: 'Since the preliminary ruling procedure is predicated on there being proceedings actually pending before the referring court or tribunal, it is incumbent on that court or tribunal to inform the Court of any procedural step that may affect the referral and, in particular, of any discontinuance or withdrawal, amicable settlement or other event leading to the termination of the proceedings.'

[12](#) *Miasto Łowicz and Prokuratura Okręgowa w Płocku* (C-558/18 and C-563/18, not published, EU:C:2018:923).

[13](#) Although the Disciplinary Chamber is not among the parties to the main proceedings and thus cannot participate in the present cases in accordance with the Court's Rules of Procedure, the President of the Court, by decision of 14 June 2019, accepted a document lodged by Poland from the Disciplinary Chamber, namely, Resolution No 8 of the Assembly of the Judges of the Disciplinary Chamber of the Supreme Court of 4 June 2019 containing the position of that chamber on the present cases (see footnotes 17 and 30 of this Opinion).

[14](#) The State Treasury refers in particular to the judgments of 18 October 1990, *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360); of 5 December 2006, *Cipolla and Others* (C-94/04 and C-202/04, EU:C:2006:758); and of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874).

[15](#) Poland referred in particular to the judgments of 29 May 1997, *Kremzow* (C-299/95, EU:C:1997:254, paragraph 16), and of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 39 and 40).

[16](#) BVerfG, Urteil vom 30. Juni 2009 (2 BvE 2/08), BVerfE 123, 267.

[17](#) I note that in the resolution setting out its position in the present cases (see footnote 13 of this Opinion), the Disciplinary Chamber asserts, inter alia, that the questions referred are inadmissible and without object because they arise in cases with no link to EU law and they are abstract and hypothetical, since they do not concern the disputes in the main proceedings but rather the judicial organisation of a Member State which falls within the exclusive competence of that Member State.

[18](#) Order of 26 January 1990 (C-286/88, EU:C:1990:33).

[19](#) Order of 25 May 1998 (C-361/97, EU:C:1998:250).

[20](#) The State Treasury refers to the judgments of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723), and of 17 February 2011, *Weryński* (C-283/09, EU:C:2011:85).

[21](#) Judgment of 27 February 2018 (C-64/16, EU:C:2018:117).

[22](#) The Commission refers in particular to the judgments of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400), and of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236).

[23](#) Order of 26 January 1990 (C-286/88, EU:C:1990:33).

[24](#) Judgment of 27 February 2018 (C-64/16, EU:C:2018:117, paragraph 40).

[25](#) Judgment of 13 March 2007 (C-432/05, EU:C:2007:163, paragraphs 62 and 64).

[26](#) Judgment of 27 February 2018 (C-64/16, EU:C:2018:117, paragraphs 37 and 40).

[27](#) The Polish Commissioner for Human Rights referred to the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 67).

[28](#) The General Prosecutor referred to the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 67).

[29](#) The General Prosecutor referred to ECtHR, 25 September 2018, *Denisov v. Ukraine* (CE:ECHR:2018:0925JUD007663911), and ECtHR, 9 January 2013, *Oleksandr Volkov v. Ukraine* (CE:ECHR:2013:0109JUD002172211).

[30](#) I note that in the resolution setting out its position in the present cases (see footnote 13 of this Opinion), the Disciplinary Chamber contends, inter alia, that the judges of the Disciplinary Chamber enjoy all the guarantees of independence under the same rules as other chambers of the Supreme Court, and that that chamber meets all of the requirements under EU law for ensuring effective judicial protection for litigants, including in disciplinary cases involving judges.

[31](#) Poland refers to Articles 178(2) and (3), 179, 180 and 181 of the Polish Constitution.

[32](#) NR RDSP 713-53/18, 17 December 2018, available at <http://rzecznik.gov.pl/wp-content/uploads/2018/12/Komunikat-Rzecznika-Dysc-z-1712.pdf>.

[33](#) Latvia refers to the judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice) (C-216/18 PPU, EU:C:2018:586, paragraph 67).

[34](#) Latvia refers in particular to the Venice Commission, Directorate of Human Rights and OSCE Office for Democratic Institutions and Human Rights, Joint Opinion No 755/2014 of 24 March 2014 on the Draft Law on Disciplinary Liability of Judges of the Republic of Moldova, CDL-AD(2014)006, and Venice Commission Opinion No 825/2015 of 21 December 2015 on the Laws on the Disciplinary Liability and Evaluation of Judges of 'the Former Yugoslav Republic of Macedonia', CDL-AD(2015)042.

[35](#) Latvia refers in particular to the judgment of 18 January 2010 by the Satversmes tiesa (Constitutional Court, Latvia), No 2009-11-01; and to the judgments of 19 September 2006, Wilson (C-506/04, EU:C:2006:587); of 6 March 2018, Achmea (C-284/16, EU:C:2018:158); and of 27 February 2018, Associação Sindical dos Juízes Portugueses (C-64/16, EU:C:2018:117).

[36](#) The Netherlands notes in its written observations that it does not take a position on point 3 of the question referred in Case C-558/18 concerning the possibility of using evidence obtained by means of a criminal act in disciplinary proceedings against judges, as there is not sufficient material for it to answer.

[37](#) The Netherlands refers to the judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice)(C-216/18 PPU, EU:C:2018:586, paragraphs 48 to 54, 63 to 67).

[38](#) The EFTA Surveillance Authority refers in particular to the decision of the EFTA Court of 14 February 2017, *Pascal Nobile v DAS Rechtsschutz-Versicherungs*, E-21/16; and to the judgments of 19 September 2006, Wilson (C-506/04, EU:C:2006:587); and of 27 February 2018, Associação Sindical dos Juízes Portugueses (C-64/16, EU:C:2018:117).

[39](#) The EFTA Surveillance Authority refers to the judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice) (C-216/18 PPU, EU:C:2018:586, paragraph 67).

[40](#) The Commission refers to the judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice)(C-216/18 PPU, EU:C:2018:586, paragraph 67).

[41](#) Press release — Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control, 3 April 2019, available at http://europa.eu/rapid/press-release_IP-19-1957_en.htm.

[42](#) EU:C:2019:531, paragraph 50 and the case-law cited.

[43](#) My emphasis.

[44](#) C-585/18, C-624/18 and C-625/18, EU:C:2019:551. In those cases, the admissibility of the questions referred was not at issue because there was a clear link between EU law, namely 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), and the disputes requiring resolution in the main proceedings. That being so, I maintain the view that the Court is able to rule in those cases, in addition to alleged breach of Article 47 of the Charter, on whether there has been a structural breach of judicial independence under the second subparagraph of Article 19(1) TEU. See further point 125 of this Opinion.

[45](#) Judgment of 15 November 2016 (C-268/15, EU:C:2016:874, paragraphs 49 to 55); see also judgment of 20 September 2018, Fremoluc (C-343/17, EU:C:2018:754).

[46](#) See Iglesias Sánchez, S., 'Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to be Abandoned?', *European Constitutional Law Review*, Vol. 14, 2018, pp. 7 to 36, in particular pp. 14 to 28. For further discussion, see, for example, Dubout, E., 'Voyage en eaux troubles: vers une épuration des situations « purement » internes? CJUE, gde ch., 15 novembre 2016, *Ullens de Schooten*, aff. C-268/15, ECLI:EU:C:2016:874', *Revue des affaires européennes*, N° 4, 2016, pp. 679 to 693; Krommendijk, J., 'Wide Open and Unguarded Stand our Gates : The CJEU and References for a Preliminary Ruling in Purely Internal Situations', *German Law Journal*, Vol. 18, 2017, pp. 1359 to 1394; Potvin-Solis, L., 'Qualification des situations purement internes', in Neframi, E., ed., *Renvoi préjudiciel et marge d'appréciation du juge national*, Larcier, 2015, pp. 39 to 99.

[47](#) See, in that regard, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, in particular paragraphs 42 to 48, 54, 55, 57, 58 and the case-law cited).

[48](#) This is to the exclusion of his arguments concerning the *Falciola* case at least in the circumstances of the present cases.

[49](#) Order of 26 January 1990 (C-286/88, EU:C:1990:33).

[50](#) Order of 25 May 1998 (C-361/97, EU:C:1998:250).

[51](#) C-286/88, EU:C:1990:33, in particular paragraphs 1 to 5, 8 to 10. For further discussion of this case and its role in the development of the Court's case-law on the admissibility of references, see, for example, Opinions of Advocate General Lenz in *Bosman and Others* (C-415/93, EU:C:1995:293, points 76 to 80); of Advocate General Fennelly in *Corsica Ferries France* (C-266/96, EU:C:1998:19, point 19, footnote 30); and of Advocate General Jacobs in *Centrosteeel* (C-456/98, EU:C:2000:137, point 24).

[52](#) C-361/97, EU:C:1998:250, in particular paragraphs 1 to 9, 12 to 20. This order was issued by a three-Judge chamber.

[53](#) See, for example, judgments of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 26), and of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraphs 43 and 44).

[54](#) See, for example, judgments of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 27), and of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraph 48).

[55](#) Article 94 of the Court's Rules of Procedure states: '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 [EU] law, and the relationship between those provisions and the national legislation applicable to the main proceedings.'

[56](#) See, for example, judgments of 10 March 2016, *Safe Interenvios* (C-235/14, EU:C:2016:154, paragraph 114), and of 20 December 2017, *Asociación Profesional Élite Taxi* (C-434/15, EU:C:2017:981, paragraph 24).

[57](#) See, for example, judgments of 9 November 2017, *Maio Marques da Rosa* (C-306/16, EU:C:2017:844, paragraph 54), and of 2 May 2019, *Asendia Spain* (C-259/18, EU:C:2019:346, paragraph 18).

[58](#) See, for example, judgments of 13 July 2017, *INGSTEEL and Metrostav* (C-76/16, EU:C:2017:549, paragraph 51), and of 2 May 2019, *Asendia Spain* (C-259/18, EU:C:2019:346, paragraph 20).

[59](#) See, for example, judgments of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 28), and of 13 December 2018, *Rittinger and Others* (C-492/17, EU:C:2018:1019, paragraph 50).

[60](#) See, for example, judgments of 24 April 2012, *Kamberaj* (C-571/10, EU:C:2012:233, paragraphs 44 to 46), and of 7 November 2013, *Romeo* (C-313/12, EU:C:2013:718, paragraphs 39 to 41).

[61](#) See, for example, judgments of 25 July 2018, *Aviabaltika* (C-107/17, EU:C:2018:600, paragraphs 40 to 43), and of 11 December 2018, *Weiss and Others* (C-493/17, EU:C:2018:1000, paragraphs 165 and 166).

[62](#) See, for example, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 45).

[63](#) C-73/16, EU:C:2017:725, in particular paragraphs 1, 2, 25 and 26.

[64](#) Judgment of 27 September 2017 (C-73/16, EU:C:2017:725, paragraphs 118 to 124).

[65](#) C-406/15, EU:C:2017:198.

[66](#) C-492/17, EU:C:2018:1019.

[67](#) C-589/16, EU:C:2018:417.

[68](#) Judgment of 9 March 2017 (C-406/15, EU:C:2017:198, in particular paragraphs 73 to 77).

[69](#) Judgment of 13 December 2018 (C-492/17, EU:C:2018:1019, in particular paragraphs 45 to 47).

[70](#) Order of 7 June 2018 (C-589/16, EU:C:2018:417, in particular paragraphs 25, 28, 31 to 33).

[71](#) Judgment of 10 December 2018 (C-621/18, EU:C:2018:999, in particular paragraphs 29 to 34).

[72](#) See, for example, judgment of 14 December 2006, Confederación Española de Empresarios de Estaciones de Servicio (C-217/05, EU:C:2006:784, paragraph 29).

[73](#) See, for example, judgments of 13 December 2018, *Rittinger and Others* (C-492/17, EU:C:2018:1019, paragraph 39); and of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraph 49); see also Opinion of Advocate General Bot in *Danqua* (C-429/15, EU:C:2016:485, point 32).

[74](#) See, for example, judgments of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, paragraph 19), and of 2 May 2019, *Asendia Spain* (C-259/18, EU:C:2019:346, paragraph 19).

[75](#) See footnote 2 of this Opinion.

[76](#) See Opinion of Advocate General Tanchev in *Joined Cases 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:2019:551, point 120).

[77](#) Judgment of 27 February 2018 (C-64/16, EU:C:2018:117).

[78](#) See judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117, in particular paragraphs 11 to 13).

[79](#) See, for example, judgments of 10 January 2006, *IATA and ELFAA* (C-344/04, EU:C:2006:10, paragraphs 23 to 26); of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, paragraphs 68 to 74); and of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199, paragraphs 31 to 36). I note that no objection as to the admissibility of the request for a preliminary ruling was made in the latter case.

[80](#) See judgments of 17 February 2011, *Weryński* (C-283/09, EU:C:2011:85, paragraphs 34 to 42); of 11 June 2015, *Fahnenbrock and Others* (C-226/13, C-245/13, C-247/13 and C-578/13, EU:C:2015:383, paragraph 30); and of 16 June 2016, *Pebros Servizi* (C-511/14, EU:C:2016:448, paragraph 28).

[81](#) Judgment of 13 March 2007 (C-432/05, EU:C:2007:163, paragraphs 62 and 64).

[82](#) See Opinions of Advocate General Tanchev in *Commission v Poland (Independence of the ordinary courts)* (C-192/18, EU:C:2019:529, points 114 to 116), and in *Joined Cases 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:2019:551, points 145 to 152).

[83](#) EU:C:2019:531. See footnote 5 of this Opinion.

Joined Cases C 558/18 and C 563/18, Miasto Łowicz v Skarb Państwa — Wojewoda Łódzki: Judgment of the Court

JUDGMENT OF THE COURT (Grand Chamber)

26 March 2020 (*)

(References for a preliminary ruling — Second subparagraph of Article 19(1) TEU — Rule of law — Effective judicial protection in the fields covered by Union law — Principle of judicial independence — Disciplinary regime applicable to national judges — Jurisdiction of the Court — Article 267 TFEU — Admissibility — Interpretation necessary for the referring court to be able to give judgment — Meaning)

In Joined Cases **C-558/18 and C-563/18**,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Sąd Okręgowy w Łodzi (Regional Court, Łódź, Poland) (C-558/18) and from the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) (C-563/18), made by decisions of 31 August 2018 and 4 September 2018, received at the Court on 3 September 2018 and 5 September 2018 respectively, in the proceedings

Miasto Łowicz

v

Skarb Państwa — Wojewoda Łódzki,

intervening parties:

Prokurator Generalny, represented by the Prokuratura Krajowa, formerly the Prokuratura Regionalna w Łodzi,

Rzecznik Praw Obywatelskich (C-558/18),

and

Prokurator Generalny, represented by the Prokuratura Krajowa, formerly the Prokuratura Okręgowa w Płocku,

v

VX,

WW,

XV (C-563/18),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Prechal (Rapporteur), M. Vilaras, E. Regan, P.G. Xuereb and L.S. Rossi, Presidents of Chambers, M. Ilešič, J. Malenovský, L. Bay Larsen, T. von Danwitz, C. Toader, K. Jürimäe, C. Lycourgos and N. Piçarra, Judges,

Advocate General: E. Tanchev,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 18 June 2019,

after considering the observations submitted on behalf of:

- the Skarb Państwa — Wojewoda Łódzki, by J. Zasada and L. Jurek, acting as Agents,
- the Prokurator Generalny, represented by the Prokuratura Krajowa, A. Reczka, S. Bańko, B. Górecka, J. Szubert and P. Tarczyński,
- the Rzecznik Praw Obywatelskich, by M. Taborowski and M. Wróblewski, acting as Agents,
- the Polish Government, by B. Majczyna and P. Zwolak, acting as Agents, and by W. Gontarski, adwokat,
- the Latvian Government, by I. Kucina and V. Soņeca, acting as Agents,
- the Netherlands Government, by M.K. Bulterman and C.S. Schillemans, acting as Agents,
- the European Commission, by K. Herrmann and H. Krämer, acting as Agents,
- the EFTA Surveillance Authority, by I.O. Vilhjálmisdóttir and C. Howdle, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 September 2019,
gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 19(1) TEU.

2 The requests have been made, first, in proceedings between Miasto Łowicz (town of Łowicz, Poland) and the Skarb Państwa — Wojewoda Łódzki (State Treasury — Governor of Łódź Province, Poland) ('the State Treasury') concerning a claim for payment of public subsidies (Case C-558/18) and, secondly, in criminal proceedings against VX, WW and XV for participation in kidnappings for financial gain (Case C-563/18).

The disputes in the main proceedings and the questions referred for a preliminary ruling

[text deleted – see AG Opinion for details]

Procedure before the Court

19 By decision of the President of the Court of Justice of 1 October 2018, Cases C-558/18 and C-563/18 were joined for the purposes of the written and oral procedure, and the judgment.

20 In the course of the written part of the procedure before the Court, the Sąd Okręgowy w Łodzi (Regional Court, Łódź), by letters of 7 and 11 December 2018, and the Sąd Okręgowy w Warszawie (Regional Court, Warsaw), by letters of 30 October and 12 December 2018, informed the Court that both judges who had referred the questions to the Court for a preliminary ruling in those cases had received from an assistant to the disciplinary officer responsible for cases relating to judges in the ordinary courts a summons to attend a hearing, as witnesses, concerning the grounds which led them to refer those questions and the issue whether judicial independence could have been undermined by the fact that the two judges in question did not adopt their respective orders for reference independently.

21 In those letters, the two referring courts also note, first, that during those hearings questions relating to the confidentiality of deliberations were put to the judges concerned. Secondly, those judges both received from the assistant to the disciplinary officer an order to file a written statement concerning potential '*ultra vires* conduct' for having referred those questions for a preliminary ruling, in breach of the conditions laid down in Article 267 TFEU.

22 By documents lodged at the Court Registry on 24 December 2019, 13 February and 2 March 2020, the Rzecznik Praw Obywatelskich (Ombudsman, Poland) requested that the oral part of the procedure be reopened.

23 In support of his request of 24 December 2019, the Ombudsman argues that the Advocate General stated in his Opinion that the present requests for a preliminary ruling should be declared inadmissible on the ground, in essence, that the Court does not have sufficient factual and legal material to enable it to rule on those requests and to establish whether there has been a breach of the Member States' obligation to guarantee judicial independence. In those circumstances, the Court should order the reopening of the oral part of the procedure in order, first, to allow the parties to express their views on such a potential ground for the inadmissibility of those requests, which, as the Advocate General stated, was neither advanced nor discussed by the parties and, secondly, to clarify further the circumstances of the cases as required.

24 In the same request, the Ombudsman also refers to new facts that have arisen since the closure of the oral part of the procedure and which demonstrate that the questions put to the Court are not hypothetical and may therefore have a decisive influence on the decision which the Court is called upon to give in the present joined cases. Those new facts consist, first, of a number of specific cases in which disciplinary proceedings have recently been brought against judges as a result of the content of decisions which they adopted and, in particular, decisions in which those judges intended to follow the lessons to be drawn from the judgment of the Court 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).

25 Secondly, on 20 December 2019, the Sejm adopted the ustawa o zmianie ustawy — Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law on the organisation of the ordinary courts, the Law on the Sąd Najwyższy (Supreme Court) and several other laws), which is intended to bolster considerably the disciplinary regime applicable to judges, and which provides, inter alia — in order to render that judgment of the Court of Justice ineffective — that, if the validity of a judge's appointment or the legitimacy of a constitutional body is called into question by a court, disciplinary measures will be taken against the judge or judges sitting in that court. To those ends, that law now makes any examination of complaints relating to the lack of independence of a judge or court subject to the exclusive jurisdiction of the Izba Kontroli Nadzwyczajnej i Spraw

Publicznych Sądu Nwyższego (Chamber of Extraordinary Control and Public Affairs of the Supreme Court, Poland), which has recently been established and which exhibits defects — in particular in relation to the process for appointing its members — that are similar to those highlighted by the Court of Justice in relation to the Disciplinary Chamber of the Supreme Court in its judgment 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).

26 In his further request of 13 February 2020, the Ombudsman states, first, that the Law of 20 December 2019 has since been signed by the President of the Republic of Poland, on 4 February 2020, and published (Dz. U. of 2020, item 190), and that its entry into force was set for 14 February 2020. Secondly, he refers to the continuance and to the growing number of disciplinary proceedings and administrative measures and, thereafter, to the adoption of disciplinary measures against judges, in particular for the reasons already mentioned in paragraph 24 above. In his further request of 2 March 2020, the Ombudsman refers to the fact that the Prokuratura Krajowa (National Prosecutor, Poland), under the Law of 20 December 2019, recently brought an action before the Disciplinary Chamber of the Supreme Court to waive immunity for the judge who made the reference for a preliminary ruling in Case C-563/18 and to authorise criminal proceedings against that judge for allowing the media to record the pronouncement of a decision handed down in a case concerning a challenge to the change of location of the sittings of the Sejm, in which the judge ordered the prosecutor to resume the investigation relating to that move. According to the Ombudsman, those new developments should be taken into consideration by the Court for the purposes of assessing the admissibility and substance of the questions referred to it in the present cases, which justifies the Court reopening the oral part of the procedure.

27 In that regard, it should be noted, first, that the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court make no provision for the interested parties referred to in Article 23 of the Statute to submit observations in response to the Advocate General's Opinion (judgment of 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, paragraph 61 and the case-law cited).

28 Secondly, under the second paragraph of Article 252 TFEU, the Advocate General, acting with complete impartiality and independence, must make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. The Court is not bound either by the Advocate General's Opinion or by the reasoning which led to that Opinion. Consequently, a party's disagreement with the Opinion of the Advocate General, irrespective of the questions which were examined in that Opinion, cannot in itself constitute grounds justifying the reopening of the oral part of the procedure (judgment 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, paragraph 62 and the case-law cited).

29 However, the Court may at any time, after hearing the Advocate General, order the reopening of the oral procedure in accordance with Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information, or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to have a decisive influence on the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the interested persons.

30 In the present case, however, after hearing the Advocate General, the Court considers that it has at its disposal, following the written procedure and the hearing which took place before it, all the information necessary to give a ruling and that the new facts relied on by the Ombudsman are not of such a nature as to have a decisive influence on the decision which the Court is called upon to give. Furthermore, the Court finds that the present joined cases do not have to be decided on the basis of an argument which was not the subject of exchanges between the interested persons. In such circumstances, it is not necessary to order the reopening of the oral procedure.

The jurisdiction of the Court

31 The State Treasury, the Prokurator Generalny (General Public Prosecutor, Poland) and the Polish Government maintain that the Court has no jurisdiction to hear the present requests for a preliminary ruling, arguing, in essence, that both the disputes in the main proceedings, which are purely domestic in nature and do not fall within the areas covered by EU law, and the national provisions relating to the organisation of national courts and the disciplinary measures applicable to judges, which fall within the exclusive competence of the Member States, are outside the scope of EU law.

32 In that regard, it should be recalled that, under the second subparagraph of Article 19(1) TEU, the interpretation of which is, in the present case, the subject of the questions referred to the Court for a preliminary ruling, Member

States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is therefore for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields (judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 34 and the case-law cited, and of 5 November 2019, *Commission v Poland (Independence of the ordinary courts)*, C-192/18, EU:C:2019:924, paragraph 99 and the case-law cited).

33 As regards the scope of the second subparagraph of Article 19(1) TEU, it follows, moreover, from the Court's case-law that that provision refers to the 'fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter of Fundamental Rights of the European Union (judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 29, 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, paragraph 82 and the case-law cited).

34 Thus, the second subparagraph of Article 19(1) TEU is intended inter alia to apply to any national body which can rule, as a court or tribunal, on questions concerning the application or interpretation of EU law and which therefore fall within the fields covered by that law (see, to that effect, judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 40, 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, paragraph 83 and the case-law cited).

35 This is true of the referring courts, which may be called upon, in their capacity as ordinary Polish courts, to rule on questions relating to the application or interpretation of EU law and, as 'courts or tribunals' within the meaning of EU law, come under the Polish judicial system in the 'fields covered by Union law', within the meaning of the second subparagraph of Article 19(1) TEU, so that those courts must meet the requirements of effective judicial protection (judgment of 5 November 2019, *Commission v Poland (Independence of the ordinary courts)*, C-192/18, EU:C:2019:924, paragraph 104).

36 Furthermore, it should be recalled that, although the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU (judgment of 5 November 2019, *Commission v Poland (Independence of the ordinary courts)*, C-192/18, EU:C:2019:924, paragraph 102 and the case-law cited).

37 It follows from the foregoing that the Court has jurisdiction to interpret the second subparagraph of Article 19(1) TEU.

Admissibility

38 The Public Treasury, the General Prosecutor and the Polish Government also submit that the requests for a preliminary ruling are inadmissible on the following grounds. First, the orders for reference do not satisfy the requirements arising from Article 94 of the Rules of Procedure, in particular because they have not specified the link between the provision of EU law for which an interpretation is sought and the national legislation applicable to the disputes in the main proceedings.

39 Secondly, the questions referred bear no relation to the procedures and the subject matter of the disputes in the main proceedings and are general and hypothetical in nature, in that the referring courts are not called upon to apply, in those disputes, either the national provisions relating to the disciplinary regime for judges or the second subparagraph of Article 19(1) TEU. The hypothetical nature of the questions also stems from the fact that the opening of disciplinary proceedings following the decisions which the referring courts will deliver in the main proceedings appears, at this stage, to be a mere possibility, so that the questions do not relate to the disputes in the main proceedings, but to possible future disputes which might arise between the judges concerned and the national disciplinary authorities. An answer to those questions will not affect the obligation of the referring courts to rule on the cases in the main proceedings on the basis of the applicable substantive and procedural provisions of national law, nor will it alter the scope of that obligation. It is not therefore necessary for the resolution of those cases.

40 The European Commission also maintains that the present requests for a preliminary ruling are inadmissible, in so far as the rule of EU law to which the questions put to the Court relate bears no relation to the subject matter of the disputes in the main proceedings, which concern, first, the payment of expenses incurred by a Polish town in the performance of certain tasks entrusted to it in respect of government administration and, secondly, criminal

proceedings brought against certain persons as a result of their involvement in kidnappings, in which an exceptional reduction in the sentence is anticipated. Moreover, the answer which the Court might give to the questions referred for a preliminary ruling would not be of a sort capable of determining the content of any preliminary decision which the referring courts would be required to make, either in terms of procedure or as regards their own jurisdiction, before ruling, as necessary, on the substance of the disputes in the main proceedings. Such an answer would not therefore be necessary for the resolution of those disputes, but would amount to the Court giving an advisory opinion on general or hypothetical questions.

41 In those various respects, it should be noted at the outset that, in their respective requests for a preliminary ruling, the referring courts, first, described, to the requisite legal standard, the circumstances of the disputes in the main proceedings and, secondly, set out in detail the provisions constituting the new national legal framework on the disciplinary regime applicable to judges. Thirdly, those courts have indicated both the reasons why, as national courts capable of ruling on the application or interpretation of EU law, they entertained doubts as to the compatibility of those rules with the second subparagraph of Article 19(1) TEU, and the reasons why they considered that an answer to the questions of interpretation addressed to the Court was necessary in view of the judgments which they are called upon to deliver in the main proceedings that are pending, given their fear, in the particular context of those proceedings, that the judges concerned may be subject to disciplinary proceedings if they were to rule on those disputes along the lines set out, respectively, in paragraphs 4 and 5 of this judgment.

42 In so doing, those courts have satisfied the requirements laid down in Article 94 of the Rules of Procedure, including, inter alia, the requirement in paragraph (c) of that article, by adequately stating the reasons which prompted them to inquire about the interpretation of the second subparagraph of Article 19(1) TEU and, in particular, the connection which they see between that Treaty provision and the national provisions which, in their view, are liable to influence the judicial process before delivery of their judgments and, accordingly, the outcome of the actions brought before them in the main proceedings.

43 Furthermore, it must be noted that, 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 (judgments of 15 May 2003, *Salzmann*, C-300/01, EU:C:2003:283, paragraph 31, and of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 16 and the case-law cited).

44 However, it has also been consistently held that the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them (judgments of 18 October 1990, *Dzodzi*, C-297/88 and C-197/89, EU:C:1990:360, paragraph 33, and of 19 December 2013, *Fish Legal and Shirley*, C-279/12, EU:C:2013:853, paragraph 29 and the case-law cited). The justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (judgments of 15 June 1995, *Zabala Erasun and Others*, C-422/93 to C-424/93, EU:C:1995:183, paragraph 29, and of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 28 and the case-law cited).

45 As is apparent from the actual wording of Article 267 TFEU, the question referred for a preliminary ruling must be 'necessary' to enable the referring court to 'give judgment' in the case before it (see, to that effect, judgment of 17 February 2011, *Weryński*, C-283/09, EU:C:2011:85, paragraph 35).

46 The Court has thus repeatedly held that it is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court by way of a request for a preliminary ruling unless a case is pending before it in which it is called upon to give a decision which is capable of taking account of the preliminary ruling (judgments of 21 April 1988, *Pardini*, 338/85, EU:C:1988:194, paragraph 11; of 4 October 1991, *Society for the Protection of Unborn Children Ireland*, C-159/90, EU:C:1991:378, paragraphs 12 and 13; and of 27 February 2014, *Pohotovost'*, C-470/12, EU:C:2014:101, paragraph 28 and the case-law cited).

47 In that context, the task of the Court must be distinguished according to whether it is requested to give a preliminary ruling or to rule on an action for failure to fulfil obligations. Whereas, in an action for failure to fulfil obligations, the Court must ascertain whether the national measure or practice challenged by the Commission or another Member State, contravenes EU law in general, without there being any need for there to be a relevant dispute before the national courts, the Court's function in proceedings for a preliminary ruling is, by contrast, to help the

referring court to resolve the specific dispute pending before that court (see, to that effect, judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 49).

48 In such proceedings, there must therefore be a connecting factor between that dispute and the provisions of EU law whose interpretation is sought, by virtue of which that interpretation is objectively required for the decision to be taken by the referring court (see, to that effect, order of 25 May 1998, *Nour*, C-361/97, EU:C:1998:250, paragraph 15 and the case-law cited).

49 In the present case, it must be held, first, that the disputes in the main proceedings are not substantively connected to EU law, in particular to the second subparagraph of Article 19(1) TEU to which the questions referred relate, and that the referring courts are not therefore required to apply that law, or that provision, in order to determine the substantive solution to be given to those disputes. In that respect, the present joined cases can be distinguished, in particular, from the case which gave rise to the judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117), in which the referring court had to rule on an action seeking annulment of administrative decisions reducing the remuneration of the members of the Tribunal de Contas (Court of Auditors, Portugal) pursuant to national legislation which provided for such a reduction and whose compatibility with the second subparagraph of Article 19(1) TEU was challenged before that referring court.

50 Secondly, although the Court has already held to be admissible questions referred for a preliminary ruling on the interpretation of procedural provisions of EU law which the referring court is required to apply in order to deliver its judgment (see, to that effect, inter alia, judgment of 17 February 2011, *Weryński*, C-283/09, EU:C:2011:85, paragraphs 41 and 42), that is not the scope of the questions raised in the present joined cases.

51 Thirdly, an answer by the Court to those questions does not appear capable of providing the referring courts with an interpretation of EU law which would allow them to resolve procedural questions of national law before being able to rule on the substance of the disputes before them. In that regard, the present cases also differ, for example, from the cases giving rise to the judgment 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), in which the interpretation sought from the Court was such as to have a bearing on the issue of determining which court had jurisdiction for the purposes of settling disputes relating to EU law, as is clear specifically from paragraphs 100, 112 and 113 of that judgment.

52 In those circumstances, it is not apparent from the orders for reference that there is a connecting factor between the provision of EU law to which the questions referred for a preliminary ruling relate and the disputes in the main proceedings, and which makes it necessary to have the interpretation sought so that the referring courts may, by applying the guidance provided by such an interpretation, make the decisions needed to rule on those disputes.

53 Those questions do not therefore concern an interpretation of EU law which meets an objective need for the resolution of those disputes, but are of a general nature.

54 As regards the circumstance, mentioned by the national courts in their letters referred to in paragraphs 20 and 21 above, in which the two judges who made the present requests for a preliminary ruling were, as a result of those requests, the subject of an investigation prior to the initiation of potential disciplinary proceedings against them, it should be noted that the disputes in the main proceedings in respect of which the Court is requested to provide a preliminary ruling in the present joined cases do not relate to that circumstance. Moreover, it should be noted, as the Polish Government stated in its written observations and at the hearing before the Court, that those investigation proceedings have since been closed on the ground that no disciplinary misconduct, involving a failure to respect the dignity of their office as a result of making those requests for a preliminary ruling, had been established.

55 In that context, it is important to note, as is clear from the Court's settled case-law, that the keystone of the judicial system established by the Treaties is the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniformity in the interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (Opinion 2/13 of 18 December 2014, EU:C:2014:2454, paragraph 176, and judgment of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 41).

56 In accordance with equally settled case-law, Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving the interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case before them.

National courts are, moreover, free to exercise that discretion at whatever stage of the proceedings they consider appropriate (judgments of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraph 26, and of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 42 and the case-law cited).

57 Therefore, a rule of national law cannot prevent a national court from using that discretion, which is an inherent part of the system of cooperation between the national courts and the Court of Justice established in Article 267 TFEU and of the functions of the court responsible for the application of EU law, entrusted by that provision to the national courts (judgment 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, paragraph 103 and the case-law cited).

58 Provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot therefore be permitted (see, to that effect, order of the President of the Court of 1 October 2018, *Miasto Łowicz and Prokuratura Okręgowa w Płocku*, C-558/18 and C-563/18, not published, EU:C:2018:923, paragraph 21). Indeed, the mere prospect, as the case may be, of being the subject of disciplinary proceedings as a result of making such a reference or deciding to maintain that reference after it was made is likely to undermine the effective exercise by the national judges concerned of the discretion and the functions referred to in the preceding paragraph.

59 For those judges, not being exposed to disciplinary proceedings or measures for having exercised such a discretion to bring a matter before the Court, which is exclusively within their jurisdiction, also constitutes a guarantee that is essential to judicial independence (see, to that effect, order of 12 February 2019, *RH*, C-8/19 PPU, EU:C:2019:110, paragraph 47), which independence is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU (see, to that effect, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 54 and the case-law cited).

60 It follows from all of the foregoing that the present requests for a preliminary ruling must be declared inadmissible.

Costs

61 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

The requests for a preliminary ruling made by the Sąd Okręgowy w Łodzi (Regional Court, Łódź, Poland) and by the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), by decisions of 31 August 2018 and 4 September 2018, are inadmissible.

[Signatures]

JUDGMENT OF THE COURT (Grand Chamber)

19 November 2019 ^(*)(i)

Joined Cases C-585/18, C-624/18 and C-625/18,

THREE REQUESTS for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych) (Supreme Court (Labour and Social Insurance Chamber), Poland), made by decisions of 30 August 2018 (C-585/18) and of 19 September 2018 (C-624/18 and C-625/18), received at the Court on 20 September 2018 (C-585/18) and 3 October 2018 (C-624/18 and C-625/18), in the proceedings

A. K.

v

Krajowa Rada Sądownictwa (C-585/18),

and

CP (C-624/18),

DO (C-625/18)

v

Sąd Najwyższy,

third party:

Prokurator Generalny, represented by the Prokuratura Krajowa,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Prechal (Rapporteur), E. Regan, P.G. Xuereb and L.S. Rossi, Presidents of Chambers, E. Juhász, M. Ilešič, J. Malenovský, and N. Piçarra, Judges, Advocate General: E. Tanchev,

Registrar: M. Aleksejev, Head of Unit, and R. Schiano, Administrator,

having regard to the written procedure and further to the hearings on 19 March and 14 May 2019,

after considering the observations submitted on behalf of:

- A. K., CP and DO, by S. Gregorczyk-Abram and M. Wawrykiewicz, adwokaci,
 - the Krajowa Rada Sądownictwa, by D. Drajewicz, J. Dudzicz, and D. Pawełczyk-Woicka,
 - the Sąd Najwyższy, by M. Wrzolek-Romańczuk, radca prawny,
 - the Prokurator Generalny, represented by the Prokuratura Krajowa, by S. Bańko, R. Hernand, A. Reczka, T. Szafranski and M. Szumacher,
 - the Polish Government, by B. Majczyna and S. Żyrek, acting as Agents, and by W. Gontarski, adwokat,
 - the Latvian Government, by I. Kucina and V. Soņeca, acting as Agents,
 - the European Commission, by H. Krämer and by K. Herrmann, acting as Agents,
 - the EFTA Surveillance Authority, by J.S. Watson, C. Zatschler, I.O. Vilhjálmsdóttir and C. Howdle, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 27 June 2019,
gives the following

Judgment

¹ These requests for a preliminary ruling concern the interpretation of Article 2 and of the second subparagraph of Article 19(1) TEU, of the third paragraph of Article 267 TFEU, of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and of Article 9(1) 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 requests have been made in proceedings between, on the one hand, A. K., Judge of the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) and the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) ('the KRS') (Case C-585/18) and, on the other, CP and DO, Judges of the Sąd Najwyższy (Supreme Court, Poland), and that court (Cases C-624/18 and C-625/18) concerning their early retirement due to the entry into force of new national legislation.

Legal context

European Union law

The EU Treaty

3 Article 2 TEU reads as follows:

'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.'

4 Article 19(1) TEU provides:

'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.'

The Charter

5 Title VI of the Charter, under the heading 'Justice', includes Article 47 thereof, entitled 'Right to an effective remedy and to a fair trial', which states as follows:

'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.'

6 Under Article 51 of the Charter, under the heading 'Scope':

'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 must 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 European 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.'

7 Article 52(3) of the Charter states:

'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms[, signed in Rome on 4 November 1950], 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.'

8 The Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) point out that the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR').

Directive 2000/78

9 Article 1 of Directive 2000/78 provides:

'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of ... age ... as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

10 Article 2(1) of that directive provides:

'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.'

11 Article 9(1) of Directive 2000/78 states:

'Member States shall ensure that judicial and/or administrative procedures ... for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.'

Polish law

The Constitution

12 Under Article 179 of the Constitution, the President of the Republic of Poland ('the President of the Republic') shall appoint judges, on a proposal of the KRS, for an indefinite period.

13 Under Article 186(1) of the Constitution:

'The [KRS] shall be the guardian of the independence of the courts and of the judges.'

14 Article 187 of the Constitution provides:

'1. The [KRS] shall be composed of:

(1) the First President of the [Sąd Najwyższy (Supreme Court)], the Minister for Justice, the President of the [Naczelny Sąd Administracyjny (Supreme Administrative Court)] and a person designated by the President of the Republic,

(2) Fifteen elected members from among the judges of the [Sąd Najwyższy (Supreme Court)], the ordinary courts, the administrative courts and the military courts,

(3) Four members elected by [the Sejm (Lower Chamber of the Polish Parliament)] from among the members [of the Lower Chamber] and two members elected by the Senate from among the senators.

...

3. The elected members of the [KRS] shall have a mandate of four years.

4. The regime applicable to the [KRS] ... and the procedure by which its members are elected shall be laid down by law.'

The New Law on the Supreme Court

– *The provisions lowering the retirement age for judges of the Sąd Najwyższy (Supreme Court)*

15 Article 30 of the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 23 November 2002 (Dz. U. of 2002, item 240) set the retirement age for judges of the Sąd Najwyższy (Supreme Court) at 70 years.

16 On 20 December 2017, the President of the Republic signed the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, item 5) ('the New Law on the Supreme Court'), which entered into force on 3 April 2018. That law was subsequently amended on several occasions.

17 Under Article 37 of the New Law on the Supreme Court:

‘1. Judges of the [Sąd Najwyższy (Supreme Court)] shall retire on the day of their 65th birthday, unless they make a statement, no earlier than 12 months and no later than 6 months before reaching [the age of 65], indicating their desire to continue to perform their duties, and submit a certificate, drawn up under the conditions applicable to candidates applying for a judge’s post, confirming that their state of health allows them to serve, and the [President of the Republic] consents to their continuing to perform their duties at the [Sąd Najwyższy (Supreme Court)].

1a. Prior to granting such authorisation, the [President of the Republic] shall consult the [KRS]. The [KRS] shall provide the [President of the Republic] with an opinion within 30 days of the date on which the [President of the Republic] requests submission of such an opinion. If the opinion is not submitted within the period referred to in the second sentence, the [KRS] shall be deemed to have submitted a positive opinion.

1b. When providing the opinion referred to in paragraph 1a, the [KRS] shall take into account the interest of the judicial system or an important public interest, in particular the rational distribution of members of the [Sąd Najwyższy (Supreme Court)] or the needs arising from the workload of individual chambers of the [Sąd Najwyższy (Supreme Court)].

...

4. The authorisation referred to in paragraph 1 shall be granted for a period of three years, no more than twice. ...’

18 Article 39 of that law provides:

‘The [President of the Republic] shall declare the date on which a judge of the [Sąd Najwyższy (Supreme Court)] retires or is retired.’

19 Under Article 111(1) of that law:

‘Judges of the [Sąd Najwyższy (Supreme Court)] who by the date of entry into force of this law have reached the age of 65 or who will have reached the age of 65 within three months of the date of entry into force of this law shall retire on the day following the expiry of that three-month period, unless they submit the declaration and certificate referred to in Article 37(1) within one month of the date of entry into force of this law and the [President of the Republic] grants authorisation for those judges of the [Sąd Najwyższy (Supreme Court)] to continue to carry out their duties. ...’

– *Provisions on the appointment of judges to the Sąd Najwyższy (Supreme Court)*

20 Under Article 29 of the New Law on the Supreme Court, judges shall be appointed to the Sąd Najwyższy (Supreme Court) by the President of the Republic acting on a proposal from the [KRS]. Article 30 of that law sets out the conditions which a person must satisfy in order to qualify for the post of judge of the Sąd Najwyższy (Supreme Court).

– *Provisions on the Disciplinary Chamber*

21 The New Law on the Supreme Court created a new chamber within the Sąd Najwyższy (Supreme Court) known as the ‘Izba Dyscyplinarna’ (‘the Disciplinary Chamber’).

22 Article 20 of the New Law on the Supreme Court states:

‘With regard to the Disciplinary Chamber and the judges who adjudicate in it, the powers of the First President of the [Sąd Najwyższy (Supreme Court)] as defined in:

– Article 14(1)(1), (4) and (7), Article 31(1), Article 35(2), Article 36(6), Article 40(1) and (4) and Article 51(7) and (14) shall be exercised by the President of the [Sąd Najwyższy (Supreme Court)] who shall direct the work of the Disciplinary Chamber;

– Article 14(1)(2) and the second sentence of Article 55(3) shall be exercised by the First President of the [Sąd Najwyższy (Supreme Court)] in agreement with the President of the [Sąd Najwyższy (Supreme Court)] who shall direct the work of the Disciplinary Chamber.’

23 Article 27(1) of the New Law on the Supreme Court states:

The following cases shall fall within the jurisdiction of the Disciplinary Chamber:

(1) disciplinary proceedings:

– involving [Sąd Najwyższy (Supreme Court)] judges

...

(2) proceedings in the field of labour law and social security involving [Sąd Najwyższy (Supreme Court)] judges;

(3) proceedings concerning the compulsory retirement of a [Sąd Najwyższy (Supreme Court)] judge.'

24 Article 79 of the New Law on the Supreme Court provides:

'Labour law and social insurance cases concerning [Sąd Najwyższy (Supreme Court)] judges and cases relating to the retirement of a [Sąd Najwyższy (Supreme Court)] judge shall be heard:

(1) at first instance by one judge of the Disciplinary Chamber of the [Sąd Najwyższy (Supreme Court)];

(2) at second instance by three judges of the Disciplinary Chamber of the [Sąd Najwyższy (Supreme Court)].'

25 Under Article 25 of the New Law on the Supreme Court:

'The Izba Pracy i Ubezpieczeń Społecznych [Labour and Social Insurance Chamber] shall have jurisdiction to hear and rule on cases concerning labour law, social insurance ...'

26 The transitional measures of the New Law on the Supreme Court include inter alia the following provisions:

'Article 131

Until all of the judges of the [Sąd Najwyższy (Supreme Court)] have been appointed to the Disciplinary Chamber, the other judges of the [Sąd Najwyższy (Supreme Court)] cannot sit within that chamber.

...

Article 134

On entry into force of the present law, the judges of the [Sąd Najwyższy (Supreme Court)] sitting in the Labour, Social Insurance and Public Affairs Chamber shall sit in the Labour and Social Insurance Chamber.'

27 Under Article 1(14) of the ustawa o zmianie ustawy o Sądzie Najwyższym (Law amending the Law on the Supreme Court), of 12 April 2018 (Dz. U. of 2018, item 847), which entered into force on 9 May 2018, Article 131 of the New Law on the Supreme Court was amended as follows:

'Judges who, on the date of the entry into force of the present law, occupy posts in other Chambers of the [Sąd Najwyższy (Supreme Court)], may be transferred to posts in the Disciplinary Chamber. Until all judges of the [Sąd Najwyższy (Supreme Court)] sitting in the Disciplinary Chamber have been appointed for the first time, a judge occupying a post in another chamber of the [Sąd Najwyższy (Supreme Court)] may submit a request [to the KRS] to be transferred to a post in the Disciplinary Chamber, after having obtained the consent of the First President of the [Sąd Najwyższy (Supreme Court)] and of the President of the [Sąd Najwyższy (Supreme Court)] responsible for directing the work of the Disciplinary Chamber and of the President of the chamber in which the applicant judge occupies a position. On a proposal [from the KRS], the [President of the Republic] shall appoint a judge of the [Sąd Najwyższy (Supreme Court)], to the Disciplinary Chamber, until the date on which all posts within that chamber have been filled for the first time.'

Law on the system of administrative courts

28 Article 49 of the ustawa — Prawo o ustroju sądów administracyjnych (Law on the system of administrative courts) of 25 July 2002 (Dz. U. of 2017, item 2188) provides that, as regards aspects which are not governed by that law, the provisions of the New Law on the Supreme Court are to be applied.

29 The KRS is governed by the *ustawa o Krajowej Radzie Sądownictwa* (Law on the National Council of the Judiciary) of 12 May 2011 (Dz. U. No 126 of 2011, item 714), as amended by the *ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw* (Law amending the Law on the National Council of the Judiciary and certain other laws) of 8 December 2017 (Dz. U. of 2018, item 3) ('Law on the KRS').

30 Under Article 9a of the Law on the KRS:

'1. The Lower Chamber [of the Polish Parliament] shall elect, among the judges of the [Sąd Najwyższy (Supreme Court)] and of the ordinary, administrative and military courts, 15 members [of the KRS] for a collective term of four years.

2. In the election referred to in paragraph 1, the Lower Chamber shall, as far as possible, take into account the need for representativeness within [the KRS] of various types and levels of the courts.

3. The collective term of the new members [of the KRS], elected among the judges, shall begin the day following their election. Serving members [of the KRS] shall exercise their posts until the day on which the collective term of the new members [of the KRS] begins.'

31 Under Article 11a(2) of the Law on the KRS, candidates for the post of member of the KRS, chosen among the judges, may be presented by a group of at least 2 000 Polish citizens or by a group of at least 25 judges in active service. The procedure for the Lower Chamber to appoint members of the KRS is set out in Article 11d of the Law on the KRS.

32 In accordance with Article 34 of the Law on the KRS, a panel of three members of the KRS is to adopt a position on the assessment of candidates' suitability for the post of judge.

33 Article 35 of the Law on the KRS provides:

'1. Where several candidates have applied for a post of judge or trainee judge, the group shall draw up a list of recommended candidates.

2. In determining the order of the candidates on the list, the group shall take into account, in the first place, the assessment of the candidates' qualifications and it shall also consider:

(1) the professional experience, including experience in the application of legislative provisions, academic output, the opinion of his or her superiors, letters of recommendation, publications and other documents enclosed with the application form;

(2) the opinion of the kolegium (general assembly) of the relevant court and the evaluation of the relevant general assembly of judges.

3. The absence of any of the documents referred to in paragraph 2 shall not constitute an obstacle to the drawing up of a list of recommended candidates.'

34 Under Article 37(1) of the Law on the KRS:

'If several candidates have applied for a single post of judge, [the KRS] shall examine and evaluate all the applications lodged together. In that case, [the KRS] shall adopt a resolution including its decisions for the purposes of presenting one appointment proposition to the post of judge in respect of all candidates.'

35 Article 44 of the Law on the KRS provides:

'1. An applicant may bring an action before the [Sąd Najwyższy (Supreme Court)] on the ground of the illegality of [the KRS's] resolution, unless specific provisions provide otherwise. ...

1a. In individual cases regarding appointment to the post of judge of the [Sąd Najwyższy (Supreme Court)], an action may be brought before the [Naczelny Sąd Administracyjny (Supreme Administrative Court)]. In those cases, no action may be brought before the [Sąd Najwyższy (Supreme Court)]. The action before the [Naczelny Sąd Administracyjny

(Supreme Administrative Court)] cannot be based on a plea alleging an inadequate evaluation of whether the candidates fulfilled the criteria taken into account in arriving at its decision on the presentation of an appointment proposal to the post of judge of the [Sąd Najwyższy (Supreme Court)].

1b. If all of the applicants have not challenged the resolution referred to in Article 37(1) in individual cases regarding appointment to the post of judge of the [Sąd Najwyższy (Supreme Court)], that resolution shall become final in respect of the part concerning the decision on the presentation of the appointment proposition to the post of judge of the [Sąd Najwyższy (Supreme Court)] and in respect of the part concerning the decision not to present an appointment proposition to the post of judge of that court, as regards the applicants who did not challenge that decision.

2. An action shall be lodged through the offices of the Przewodniczący [President of the KRS], within two weeks of notice of the resolution with its statement of reasons. ...'

36 Under Article 6 of the Law of 8 December 2017 amending the Law on the KRS:

'The term of office of the members [of the KRS] referred to in Article 187(1)(2) of the [Constitution], elected pursuant to provisions now in force, shall continue until the day preceding the term of the new members [of the KRS] without, however, exceeding 90 days from the date of the entry into force of the present law, unless that term has not already expired.'

The disputes in the main proceedings and the questions referred for a preliminary ruling

37 In Case C-585/18, A. K., a judge of the Naczelny Sąd Administracyjny (Supreme Administrative Court) who reached the age of 65 before the entry into force of the New Law on the Supreme Court, submitted, on the basis of Article 37(1) and of Article 111(1) of that law, a declaration indicating his wish to continue in his position. On 27 July 2018, the KRS issued an unfavourable opinion to that request under Article 37(1a) of that law. On 10 August 2018, A. K. brought an action before the Sąd Najwyższy (Supreme Court) in respect of that opinion. In support of his action, A. K. claimed, inter alia, that retiring him at the age of 65 infringed the second subparagraph of Article 19(1) TEU, Article 47 of the Charter and Directive 2000/78, in particular, Article 9(1) thereof.

38 Cases C-624/18 and C-625/18 concern two judges of the Sąd Najwyższy (Supreme Court), CP and DO, who also reached the age of 65 before the date of the entry into force of the New Law on the Supreme Court but who have not submitted declarations on the basis of Article 37(1) and of Article 111(1) of that law. Having been informed that the President of the Republic had, pursuant to Article 39 of that law, declared that they had been retired as of 4 July 2018, CP and DO brought actions before the Sąd Najwyższy (Supreme Court) against the President of the Republic for a declaration that their employment relationship of judge in active service in the referring court had not been transformed, as of that date, into an employment relationship of retired judge of that court. In support of their actions, they rely, inter alia, on an infringement of Article 2(1) of Directive 2000/78 prohibiting discrimination on the ground of age.

39 The Izba Pracy i Ubezpieczeń Społecznych (Labour and Social Insurance Chamber) of the Sąd Najwyższy (Supreme Court) ('the Labour and Social Insurance Chamber'), before which these various actions are pending, notes, in its orders for reference in Cases C-624/18 and C-625/18, that the actions were brought before it since the Disciplinary Chamber has not yet been formed. In those circumstances, the referring court asks whether Article 9(1) of Directive 2000/78 and Article 47 of the Charter require it to disapply the provisions of national law which reserve jurisdiction to hear and rule on such actions to a chamber which has not yet been formed. The referring court points out, however, that that question could become irrelevant if enough posts of judge of the Disciplinary Chamber were actually filled.

40 Furthermore, in its orders for reference in Cases C-585/18, C-624/18 and C-625/18, the referring court considers that, in the light of, inter alia, the circumstances in which the new judges of the Disciplinary Chamber will be appointed, serious doubts arise as to whether that chamber and its members will provide sufficient guarantees of independence and impartiality.

41 In that regard, the referring court, which observes that those judges are appointed by the President of the Republic on a proposal of the KRS, notes, first of all, that, under the reform enacted by the Law of 8 December 2017 amending the Law on the National Council of the Judiciary and certain other laws, the 15 members of the KRS who, of its 25 members, must be elected among judges are now not elected by general assembly of judges of all levels as before, but by the Lower Chamber of the Polish Parliament. According to the referring court, that situation disregards the principle of the separation of powers as the basis for a democratic State governed by the rule of law and is not consistent

with the prevailing international and European standards in that regard, as is clear, in particular, from Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on Judges: independence, efficiency and responsibilities of 17 November 2010, from Opinion No 904/2017 (CDL-AD(2017)031) of the European Commission for Democracy through Law (Venice Commission) of 11 December 2017 and from Opinion No 10(2007) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society of 23 November 2007.

42 Next, according to the referring court, both the conditions, in particular those of a procedural nature, under which the members of the KRS were selected and appointed during 2018 and an examination of the way in which that body thus constituted has acted, until the present, demonstrate that the KRS is subject to the political authorities and is incapable of exercising its constitutional role of ensuring the independence of the courts and of the judiciary.

43 First, the referring court considers that the recent elections of the new members of the KRS were not transparent and there are serious doubts as to whether the requirements laid down in the applicable legislation were actually complied with during those elections. Moreover, the requirement of representativeness of the various types and levels of the judiciary laid down in Article 187(1)(2) of the Constitution has not been respected. The KRS has no elected judge from the Sąd Najwyższy (Supreme Court), the courts of appeal or the military courts, but has 1 representative of a regional administrative court, 2 representatives of regional courts and 12 representatives of district courts.

44 Second, an examination of the activities of the KRS as now formed is said to demonstrate a complete lack of the adoption of any stance by that body for the purposes of defending the independence of the Sąd Najwyższy (Supreme Court) in the crisis caused by the recent legislative reforms affecting that court. By contrast, the KRS, or members thereof, have publicly criticised members of the Sąd Najwyższy (Supreme Court) for having referred questions to the Court of Justice for a preliminary ruling or cooperated with the EU institutions, in particular with the European Commission. Furthermore, the KRS's practice — when called on to issue an opinion on the possibility for a judge of the Sąd Najwyższy (Supreme Court) to continue to serve beyond the retirement age now set at 65 — consists, as demonstrated, *inter alia*, in the opinion of the KRS challenged before the referring court in Case C-585/18, in issuing unreasoned unfavourable opinions or merely reproducing the wording of Article 37(1b) of the New Law on the Supreme Court.

45 In addition, the selection procedure conducted by the KRS for the purposes of filling the 16 posts of judge of the Disciplinary Chamber declared vacant on 24 May 2018 by the President of the Republic reveals that the 12 candidates chosen by the KRS, namely 6 Public Prosecutors, 2 judges, 2 legal advisers and 2 professors, were persons who were, until that time, subject to the executive, persons who, during the crisis of the rule of law in Poland, have acted on the instructions of the political authorities or in line with their expectations, or, lastly, persons who do not meet the statutory criteria or persons who have in the past been the subject of disciplinary sanctions.

46 Lastly, the referring court notes that the procedure during the course of which the KRS is called on to select candidates to the posts of judge of the Disciplinary Chamber, who cannot be chosen from currently serving members of the Sąd Najwyższy (Supreme Court), was designed and, subsequently, amended, so that the KRS may act in an *ad hoc* manner, without the possibility of any meaningful review in that regard.

47 First, the Supreme Court is no longer involved in that appointment process and, thus, the actual and effective assessment of the qualities of the candidates may no longer be guaranteed. Second, the fact that candidates have not provided the documents referred to in Article 35(2) of the Law on the KRS, which are nevertheless essential for the purposes of distinguishing between the candidates, is no longer, as is clear from Article 35(3) of that law, an obstacle to the drawing up of the list of candidates recommended by the KRS. Third, under Article 44 of that law, the KRS's decisions become final until challenged by all of the candidates, which effectively precludes any actual possibility of their judicial review.

48 In that context, the referring court harbours doubts as to the importance which should be ascribed, as regards compliance with the requirement stemming from EU law that the courts and the judiciary of the Member States must be independent, to factors such as, first, independence, from the political authorities, of the body responsible for selecting judges, and, second, the circumstances surrounding the selection of the members of a newly created chamber of a court in a particular Member State, where that chamber has jurisdiction to rule on cases governed by EU law.

49 In the event that such a chamber of a court does not meet the requirement that courts be independent, the referring court wishes to know whether EU law must be interpreted as meaning that the referring court must disapply the application of provisions of national law which, by reserving such jurisdiction to that chamber, impinge on its own

jurisdiction to hear and to rule, where relevant, on the cases in the main proceedings. In its orders for reference in Cases C-624/18 and C-625/18, the referring court observes, in that regard, that it has general jurisdiction in labour law and the law of social security, which empowers it, in particular, to rule on cases such as those in the main proceedings which concern alleged infringement of the prohibition of discrimination in employment on the ground of age.

50 In those circumstances the Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych) (Supreme Court (Labour and Social Insurance Chamber)) decided to stay the proceedings and refer questions to the Court for a preliminary ruling.

51 In Case C-585/18, the questions referred are worded as follows:

(1) On a proper construction of the third paragraph of Article 267 TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the [Charter], is a newly created chamber of a court of last instance of a Member State which has jurisdiction to hear an action by a national court judge and which must be composed exclusively of judges selected by a national body tasked with safeguarding the independence of the courts (the [KRS]), which, having regard to the systemic model for the way in which it is formed and the way in which it operates, is not guaranteed to be independent from the legislative and executive authorities, an independent court or tribunal within the meaning of EU law?

(2) If the answer to the first question is negative, should the third paragraph of Article 267 TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the [Charter of Fundamental Rights], be interpreted as meaning that a chamber of a court of last instance of a Member State which does not have jurisdiction in the case but meets the requirements of EU law for a court and is seised of an appeal in a case falling within the scope of EU law should disregard the provisions of national legislation which preclude it from having jurisdiction in that case?

52 In Cases C-624/18 and C-625/18, the questions referred were worded as follows:

(1) Should Article 47 of the [Charter], read in conjunction with Article 9(1) of [Directive 2000/78], be interpreted as meaning that, where an appeal is brought before a court of last instance in a Member State against an alleged infringement of the prohibition of discrimination on the ground of age in respect of a judge of that court, together with a motion for granting security in respect of the reported claim, that court — in order to protect the rights arising from EU law by ordering an interim measure provided for under national law — must refuse to apply national provisions which confer jurisdiction, in the case in which the appeal has been lodged, on a chamber of that court which is not operational by reason of a failure to appoint judges to be its members?

(2) In the event that judges are appointed to adjudicate within the chamber with jurisdiction under national law to hear and determine the action brought, on a proper construction of the third paragraph of Article 267 TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the [Charter], is a newly created chamber of a court of last instance of a Member State which has jurisdiction to hear the case of a national court judge at first or second instance and which is composed exclusively of judges selected by a national body tasked with safeguarding the independence of the courts, namely the [(KRS)], which, having regard to the systemic model for the way in which it is formed and the way in which it operates, is not guaranteed to be independent from the legislative and executive authorities, an independent court or tribunal within the meaning of EU law?

(3) If the answer to the second question is negative, should the third paragraph of Article 267 TFEU, read in conjunction with Article 19(1) and Article 2 TEU and Article 47 of the [Charter], be interpreted as meaning that a chamber of a court of last instance of a Member State which does not have jurisdiction in the case but meets the requirements of EU law for a court seised with an appeal in an EU case should disregard the provisions of national legislation which preclude it from having jurisdiction in that case?

[text deleted]

The first question in Cases C-624/18 and C-625/18

66 By its first question in Cases C-624/18 and C-625/18, the referring court asks, in essence, whether Article 9(1) of Directive 2000/78 read in conjunction with Article 47 of the Charter must be interpreted as meaning that, where an action is brought before a court of last instance in a Member State alleging infringement of the prohibition of discrimination on the ground of age arising from that directive, such a court must refuse to apply provisions of national law which confer jurisdiction to rule on such an action on a court, such as the Disciplinary Chamber, which has not yet been formed because the judges of that court have not been appointed.

67 In the present cases, it is, however, important to take account of the fact that, shortly after the adoption of the orders for reference in Cases C-624/18 and C-625/18, the President of the Republic appointed the judges of the Disciplinary Chamber, which has now been formed.

68 In the light of that fact, it must be found that an answer to the first question in Cases C-624/18 and C-625/18 is no longer relevant for the purposes of the decisions which the referring court is called on to deliver in those two cases. Only if the Disciplinary Chamber were not sufficiently operational would that question need to be answered.

69 It has consistently been held that the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them (judgment of 19 December 2013, *Fish Legal and Shirley*, C-279/12, EU:C:2013:853, paragraph 29 and the case-law cited).

70 In that regard, it should be borne in mind that the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 28 and the case-law cited). If it appears that the question raised is manifestly no longer relevant for the purposes of deciding the case, the Court must declare that there is no need to proceed to judgment (see, to that effect, judgment of 24 October 2013, *Stoilov i Ko*, C-180/12, EU:C:2013:693, paragraph 38 and the case-law cited).

71 It follows, as submitted by the KRS, the Polish Government and the Commission, and as had, moreover, been suggested by the referring court itself, as is clear from paragraph 39 above, that it is no longer necessary for the Court to rule on the first question referred in Cases C-624/18 and C-625/18.

The questions in Case C-585/18 and the second and third questions in Cases C-624/18 and C-625/18

72 By its questions in Case C-585/18 and its second and third questions in Cases C-624/18 and C-625/18, which it is appropriate to consider together, the referring court asks, in essence, whether Article 2 and the second subparagraph of Article 19(1) TEU, Article 267 TFEU and Article 47 of the Charter must be interpreted as meaning that a chamber of a supreme court in a Member State, such as the Disciplinary Chamber, which is called on to rule on cases falling within the scope of EU law, satisfies, in the light of the circumstances in which it was formed and its members appointed, the requirements of independence and impartiality required by those provisions of EU law. If that is not the case, the referring court asks whether the principle of the primacy of EU law must be interpreted as meaning that that court is required to disapply the provisions of national law which reserve jurisdiction to rule on such cases to that chamber of that court.

The jurisdiction of the Court

73 The Public Prosecutor has submitted, in the first place, that the Court has no jurisdiction to provide rulings on the second and third questions referred in Cases C-624/18 and C-625/18 on the ground that the provisions of EU law to which those questions refer do not provide a definition of the concept of an 'independent court' and do not lay down any rules on the jurisdiction of national courts and national councils of the judiciary, since those questions fall within the exclusive competencies of the Member States and cannot be encroached upon by the European Union.

74 However, the fact remains that the arguments thus advanced by the Public Prosecutor do in fact concern the very scope of those provisions of EU law and, thus, concern an interpretation of those provisions. An interpretation of that nature clearly falls within the jurisdiction of the Court under Article 267 TFEU.

75 In that regard, the Court has previously held that, although the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law (judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 52 and the case-law cited).

76 In the second place, the Public Prosecutor claims that, as regards the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, the Court also lacks jurisdiction to rule on those two referred questions because the provisions of national law at issue in the main proceedings do not implement EU law or fall within the scope thereof and they cannot therefore be assessed under that law.

77 As regards, first of all, the provisions of the Charter, it should certainly be recalled that, in the context of a request for a preliminary ruling under Article 267 TFEU, the Court may interpret EU law only within the limits of the powers conferred upon it (judgment of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci*, C-205/15, EU:C:2016:499, paragraph 22 and the case-law cited).

78 The scope of the Charter, in so far as the action of the Member States is concerned, is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States when they are implementing EU law. That provision confirms the Court's settled case-law, which states that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations (judgment of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci*, C-205/15, EU:C:2016:499, paragraph 23 and the case-law cited).

79 However, in the present cases, as regards, in particular, Article 47 of the Charter, the Court notes that, in the actions in the main proceedings, the applicants rely, inter alia, on infringements to their detriment of the prohibition of discrimination in employment on the ground of age, which is provided for by Directive 2000/78.

80 In addition, it is to be noted that the right to an effective remedy is reaffirmed by Directive 2000/78, Article 9 of which provides that Member States must ensure that all persons who consider themselves wronged by failure to apply the principle of equal treatment to them as provided for by that directive are able to assert their rights (judgment of 8 May 2019, *Leitner*, C-396/17, EU:C:2019:375, paragraph 61 and the case-law cited).

81 It follows from the foregoing that the present cases are situations governed by EU law, so that the applicants in the main proceedings are justified in asserting the right to effective judicial protection afforded to them by Article 47 of the Charter.

82 Next, as regards the scope of the second subparagraph of Article 19(1) TEU, that provision, first, aims to guarantee effective judicial protection in 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter (judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 50 and the case-law cited).

83 Contrary to what has been claimed by the Public Prosecutor in that regard, the fact that the national salary reduction measures at issue in the case which gave rise to the judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117) were adopted due to requirements linked to the elimination of the excessive budget deficit of the Member State concerned and in the context of an EU financial assistance programme for that Member State did not, as is apparent from paragraphs 29 to 40 of that judgment, play any role in the interpretation which led the Court to conclude that the second subparagraph of Article 19(1) TEU was applicable in the case in question. That conclusion was reached on the basis of the fact that the national body at issue in that case, namely the Tribunal de Contas (Court of Auditors, Portugal), could, subject to verification to be carried out by the referring court in that case, rule, as a court or tribunal, on questions concerning the application or interpretation of EU law and thus falling within the fields covered by EU law (judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 51 and the case-law cited).

84 Since the actions in the main proceedings concern alleged infringements of rules of EU law, it is sufficient to find that, in the present cases, the court called on to dispose of the cases will be required to rule on questions concerning the application or interpretation of EU law and thus falling within the fields covered by EU law within the meaning of the second subparagraph of Article 19(1) TEU.

85 Lastly, in respect of Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to the Republic of Poland and to the United Kingdom (OJ 2010 C 83, p. 313), on which the Public Prosecutor also relies, it must be observed that that protocol does not concern the second subparagraph of Article 19(1) TEU and it should be recalled that it does not call into question the applicability of the Charter in Poland, nor is it intended to exempt the Republic of Poland from the obligation to comply with the provisions of the Charter (judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 53 and the case-law cited).

86 It follows from all the foregoing that the Court has jurisdiction to interpret Article 47 of the Charter and the second subparagraph of Article 19(1) TEU in the present cases.

Whether it is necessary to give a ruling

87 The KRS, the Public Prosecutor and the Polish Government have stated that, on 17 December 2018, the President of the Republic signed the *ustawa o zmianie ustawy o Sądzie Najwyższym* (Law amending the [New Law on the Supreme Court]) of 21 November 2018 (Dz. U. of 2018, item 2507, 'the Law of 21 November 2018'), which entered into force on 1 January 2019.

88 It is clear that Article 1 of that law repeals Article 37(1a) to (4) and Article 111(1) of the New Law on the Supreme Court and amends Article 37(1) thereof to the effect that 'the judges of the Sąd Najwyższy [(Supreme Court)] shall retire at the age of 65'. It is, however, specified that that provision applies only to judges of the Sąd Najwyższy (Supreme Court) who entered into service in that court after 1 January 2019. The previous wording of Article 30 of the Law on the Supreme Court of 23 November 2002, which provided for retirement at the age of 70, applies to judges of the Sąd Najwyższy (Supreme Court) who entered into service before that date.

89 Article 2(1) of the Law of 21 November 2018 provides that, 'from the date of the entry into force of the present law, any judge of the Sąd Najwyższy [(Supreme Court)] or of the Naczelny Sąd Administracyjny [(Supreme Administrative Court)] who has been retired pursuant to Article 37(1) to (4) or Article 111(1) or (1a) of the [New Law on the Supreme Court] shall re-enter active service in the post he or she held on the date of the entry into force of [that law]. Service as judge of the Sąd Najwyższy [(Supreme Court)] or of the Naczelny Sąd Administracyjny [(Supreme Administrative Court)] shall be regarded as having continued without interruption'.

90 Article 4(1) of the Law of 21 November 2018 provides that 'procedures commenced pursuant to Article 37(1) and to Article 111(1) to (1b) of the [New Law on the Supreme Court] and appeal procedures pending in those cases on the date of the entry into force of the present law shall be discontinued', and Article 4(2) thereof provides that 'procedures commenced and pending at the date of the entry into force of the present law, for the purposes of establishing the existence of an employment relationship as a judge in active service of the Sąd Najwyższy [(Supreme Court)] or of the Naczelny Sąd Administracyjny [(Supreme Administrative Court)], in respect of the judged referred to in Article 2(1), shall be discontinued'.

91 According to the KRS, the Public Prosecutor and the Polish Government, it follows from Article 1 and Article 2(1) of the Law of 21 November 2018 that the judges who are applicants in the main proceedings and were retired pursuant to provisions of the New Law on the Supreme Court, now repealed, have been returned to their previous posts in those courts by operation of law, until they reach the age of 70, in accordance with the provisions of national law previously in force, but that any possibility of extension, by the President of the Republic, of their term in office beyond the ordinary retirement age has also been repealed.

92 In those circumstances, and in accordance with Article 4 of that law providing for cases such as those in the main proceedings to be discontinued, it is said that those cases have become devoid of purpose, so that it is no longer necessary for the Court to rule on the present references for a preliminary ruling.

93 In the light of the foregoing, on 23 January 2019, the Court asked the referring court whether, following the entry into force of the Law of 21 November 2018, that court considered that an answer to the questions referred was still necessary to enable it to deliver judgment in the cases pending before it.

94 In its reply of 25 January 2019, the referring court confirmed that request, adding that, by orders of 23 January 2019, it had ordered a stay in the proceedings on the requests that there is no need to proceed to judgment lodged before it by the Public Prosecutor, under Article 4(1) and (2) of the Law of 21 November 2018, until the Court has ruled on the present cases.

95 In that reply, the referring court explains that an answer to the questions referred in those cases is still necessary for it to be able to dispose of the preliminary procedural problems with which it is faced prior to it being able to deliver judgment in those cases.

96 Furthermore, as regards the substance of the cases in the main proceedings, the referring court indicated that the Law of 21 November 2018 was not intended to render national law compatible with EU law, but to apply the interim measures ordered by the Vice-President of the Court in her order of 19 October 2018, *Commission v Poland* (C-619/18 R, not published, EU:C:2018:852), upheld by order of the Court of 17 December 2018, *Commission v Poland* (C-619/18 R, EU:C:2018:1021). That law did not therefore repeal the provisions of national law at issue or their legal effects *ex tunc*. Whereas that law purports to reinstate those judges who are applicants in the main proceedings to their office after

their retirement and to introduce a legal fiction as to the continued nature of their term in office effected by that reinstatement, the actions in the main proceedings seek a declaration that the judges in question never took retirement and remained fully in their posts during that entire period, which can result only from the invalidity of the rules of national law at issue, under the primacy of EU law. That distinction is fundamental in determining the status of the judges in question from the perspective of their capacity to take judicial, organisational and administrative measures and from the perspective of any mutual rights and obligations in respect of the Sąd Najwyższy (Supreme Court) on the basis of an employment relationship, or even that of disciplinary sanctions. In that latter respect, the referring court notes that, according to the declarations of representatives of the political authorities, those judges were exercising their judicial office illegally until 1 January 2019, the date of the entry into force of the Law of 21 November 2018.

97 It should be noted that, as is clear from settled case-law, 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 a rule of EU law, the Court is in principle bound to give a ruling (judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 26 and the case-law cited).

98 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of 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 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 27 and the case-law cited).

99 In the present cases, the Court notes, first of all, that, by the questions which the referring court referred to the Court for a preliminary ruling and by the interpretation of EU law sought in the present cases, the referring court wishes to be instructed not as to the substance of the cases before it which do in turn raise other questions of EU law, but as regards a procedural problem which it must answer *in limine litis*, since that problem relates to the jurisdiction of that court to hear and rule on those cases.

100 In that regard, it should be noted that, according to settled case-law, the Court has power to explain to the national court points of EU law which may help to solve the problem of jurisdiction with which that court is faced (judgments of 22 October 1998, *IN. CO. GE.'90 and Others*, C-10/97 to C-22/97, EU:C:1998:498, paragraph 15 and the case-law cited, and of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 43). That applies in particular where, as in the present cases, and as is clear from paragraphs 79 to 81 above, the questions raised relate to the issue whether a national court which ordinarily has jurisdiction to rule on a case in which an individual relies on a right stemming from EU law meets the requirements derived from the right to an effective remedy before a court of law as enshrined in Article 47 of the Charter and Article 9(1) of Directive 2000/78.

101 The Law of 21 November 2018 does not concern aspects relating to jurisdiction to rule on the cases in the main proceedings on which the referring court is thus called to rule and in respect of which it has, in the present cases, requested an interpretation of EU law.

102 Next, it should be made clear that the fact that national legislation, such as Article 4(1) and (2) of the Law of 21 November 2018, provides for discontinuance of cases such as those in the main proceedings cannot, in principle and without a decision of the referring court ordering such discontinuance or to the effect that there is no need to rule on the cases in the main proceedings, lead the Court to find that it is no longer necessary for it to answer the questions before it which were referred for a preliminary ruling.

103 It should be noted that national courts have the widest discretion in referring questions to the Court involving interpretation of relevant provisions of EU law, that discretion being replaced by an obligation for courts ruling at final instance, subject to certain exceptions recognised by the Court's case-law. A rule of national law thus cannot prevent a national court, where appropriate, from exercising that discretion, or complying with that obligation. Both that discretion and that obligation are an inherent part of the system of cooperation between the national courts and the Court of Justice established by Article 267 TFEU and of the functions of the court responsible for the application of EU law entrusted by that provision to the national courts (judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraphs 32 and 33 and the case-law cited).

104 Provisions of national law such as those referred to in paragraph 102 above cannot therefore preclude a chamber of a court from which there is no appeal, faced with a question on the interpretation of EU law, from confirming questions which it referred to the Court for a preliminary ruling.

105 Lastly, it is to be noted that, as regards Cases C-624/18 and C-625/18, which concern the issue whether or not the applicants in the main proceedings continue to be in an employment relationship as judges in active service with the Sąd Najwyższy (Supreme Court) as their employer, it is clear from the explanations provided by the referring court, set out in paragraph 96 above, that, in the light of, inter alia, all of the consequences resulting from the existence of such an employment relationship, the mere fact of the entry into force of Article 2(1) of the Law of 21 November 2018 does not mean that it is beyond doubt that a declaration that there is no need to rule on the cases before the referring court is appropriate.

106 It follows from all the foregoing that the adoption and entry into force of the Law of 21 November 2018 is not capable of justifying the Court in not ruling on the second and third questions in Cases C-624/18 and C-625/18.

107 By contrast, as regards Case C-585/18, it must be borne in mind that the action before the referring court relates to an opinion of the KRS delivered in a procedure capable of leading to a decision extending the exercise of judicial functions of the applicant in the main proceedings beyond the age of retirement now set at 65.

108 Indeed, it does not flow from the abovementioned explanations provided by the referring court that that action might still have a purpose, more particularly, that such an opinion might not be invalid, despite the fact that, under the provisions of national law adopted between then and now, both the provisions of national law setting a new retirement age and those setting out the procedure for extending the exercise of judicial functions bringing about the need for such an opinion have been repealed, as a result of which the applicant in the main proceedings may continue in his post as a judge until the age of 70, in accordance with the provisions of national law in force before the adoption of the provisions which were repealed.

109 In those circumstances, and in the light of the principles set out in paragraphs 69 and 70 above, it is no longer necessary for the Court to rule on the questions referred in Case C-585/18.

Admissibility of the second and third questions in Cases C-624/18 and C-625/18

110 The Polish Government claims that the second and third questions in Cases C-624/18 and C-625/18 are inadmissible. It maintains, in the first place, that those questions are irrelevant because answers to them are unnecessary on account of the fact that the proceedings pending before the Labour and Social Insurance Chamber which referred the questions for a preliminary ruling are invalid, under Article 379(4) of the Civil Procedure Code, because they disregarded the rules relating to the composition and jurisdiction of the courts. There is a three-judge panel sitting in those cases in that chamber, whereas Article 79 of the New Law on the Supreme Court provides that cases such as those in the main proceedings must, at first instance, be decided by a single-judge panel. In the second place, the answers to the questions referred cannot, in any event, enable the referring court to rule on cases which fall within the jurisdiction of another chamber of the Sąd Najwyższy (Supreme Court) without impinging on the exclusive competency of the Member States to organise their national courts or overstepping the competency of the European Union, nor can those answers therefore be relevant to the outcome of the cases in the main proceedings.

111 However, the arguments thus put forward, which concern matters of substance, cannot affect the admissibility of the questions referred.

112 Indeed, the questions referred precisely concern the question of whether, notwithstanding rules of national law in force in the Member State in question attributing jurisdiction, a court such as the referring court has the obligation, under the provisions of EU law to which those questions refer, to disapply those rules of national law and to assume, where relevant, jurisdiction for the actions in the main proceedings. A judgment in which the Court were to uphold the existence of such an obligation would be binding on the referring court and all other bodies of the Republic of Poland, and could not be affected by provisions of domestic law relating to the invalidity of proceedings or by the distribution of jurisdiction between the courts to which the Polish Government refers.

113 It follows that the objections made by the Polish Government as to the admissibility of those questions cannot be upheld.

The substance of the second and third questions in Cases C-624/18 and C-625/18

114 It should be noted that, as is clear from paragraphs 77 to 81 above, in situations such as those at issue in the main proceedings, in which the applicants rely on infringements to their detriment of the prohibition of discrimination on the ground of age in employment provided by Directive 2000/78, both Article 47 of the Charter, which enshrines the right to effective judicial protection, and Article 9(1) of the directive, which reaffirms it, may apply.

115 In that regard, according to settled case-law, when there are no EU rules governing the matter, although it is for the domestic legal system of every Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, the Member States are, however, responsible for ensuring that, pursuant to Article 47 of the Charter, the right to effective judicial protection of those rights is effectively protected in every case (see, to that effect, judgments of 22 October 1998, *IN. CO. GE.90 and Others*, C-10/97 to C-22/97, EU:C:1998:498, paragraph 14 and the case-law cited; of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraphs 44 and 45; and of 19 March 2015, *E.ON Földgáz Trade*, C-510/13, EU:C:2015:189, paragraphs 49 and 50 and the case-law cited).

116 Furthermore, it should be noted that Article 52(3) of the Charter states that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are to be the same as those laid down by the ECHR.

117 As is clear from the explanations relating to Article 47 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 interpretation of the Charter, the first and second paragraphs of Article 47 of the Charter correspond to Article 6(1) and Article 13 of the ECHR (judgment of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci*, C-205/15, EU:C:2016:499, paragraph 40 and the case-law cited).

118 The Court must therefore ensure that the interpretation which it gives to the second paragraph of Article 47 of the Charter safeguards a level of protection which does not fall below the level of protection established in Article 6 of the ECHR, as interpreted by the European Court of Human Rights (judgment of 29 July 2019, *Gambino and Hyka*, C-38/18, EU:C:2019:628, paragraph 39).

119 As regards the substance of the second paragraph of Article 47 of the Charter, it is clear from the very wording of that provision that the fundamental right to an effective remedy enshrined therein means, inter alia, that everyone is entitled to a fair hearing by an independent and impartial tribunal.

120 That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 58 and the case-law cited).

121 According to settled case-law, the requirement that courts be independent has two aspects to it. The first aspect, which is external in nature, requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 63 and the case-law cited, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 72).

122 The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 65 and the case-law cited, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 73).

123 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgments of 25 July 2018, *Minister for Justice and Equality*

(*Deficiencies in the system of justice*), C-216/18 PPU, EU:C:2018:586, paragraph 66 and the case-law cited, and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 74).

124 Moreover, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive (see, to that effect, judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraph 35).

125 In that regard, it is necessary that judges are protected from external intervention or pressure liable to jeopardise their independence. The rules set out in paragraph 123 above must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned (see, to that effect, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 112 and the case-law cited).

126 That interpretation of Article 47 of the Charter is borne out by the case-law of the European Court of Human Rights on Article 6(1) of the ECHR according to which that provision requires that the courts be independent of the parties and of the executive and legislature (ECtHR, 18 May 1999, *Ninn-Hansen v. Denmark*, CE:ECHR:1999:0518DEC002897295, p. 19 and the case-law cited).

127 According to settled case-law of that court, in order to establish whether a tribunal is 'independent' within the meaning of Article 6(1) of the ECHR, regard must be had, inter alia, to the mode of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body at issue presents an appearance of independence (ECtHR, 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, § 144 and the case-law cited), it being added, in that connection, that what is at stake is the confidence which such tribunals must inspire in the public in a democratic society (see, to that effect, ECtHR, 21 June 2011, *Fruni v. Slovakia*, CE:ECHR:2011:0621JUD000801407, § 141).

128 As regards the condition of 'impartiality', within the meaning of Article 6(1) of the ECHR, impartiality can, according to equally settled case-law of the European Court of Human Rights, be tested in various ways, namely, according to a subjective test where regard must be had to the personal convictions and behaviour of a particular judge, that is, by examining whether the judge gave any indication of personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. In this connection, even appearances may be of a certain importance. Once again, what is at stake is the confidence which the courts in a democratic society must inspire in the public, and first and foremost in the parties to the proceedings (see, inter alia, ECtHR, 6 May 2003, *Kleyn and Others v. Netherlands*, CE:ECHR:2003:0506JUD003934398, § 191 and the case-law cited, and 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, §§ 145, 147 and 149 and the case-law cited).

129 As the European Court of Human Rights has repeatedly held, the concepts of independence and objective impartiality are closely linked which generally means that they require joint examination (see, inter alia, ECtHR, 6 May 2003, *Kleyn and Others v. Netherlands*, CE:ECHR:2003:0506JUD003934398, § 192 and the case-law cited, and 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, § 150 and the case-law cited). According to the case-law of the European Court of Human Rights, in deciding whether there is reason to fear that the requirements of independence and objective impartiality are not met in a given case, the perspective of a party to the proceedings is relevant but not decisive. What is decisive is whether such fear can be held to be objectively justified (see, inter alia, ECtHR, 6 May 2003, *Kleyn and Others v. Netherlands*, CE:ECHR:2003:0506JUD003934398, §§ 193 and 194 and the case-law cited, and of 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, §§ 147 and 152 and the case-law cited).

130 In that connection, the European Court of Human Rights has repeatedly stated that, although the principle of the separation of powers between the executive and the judiciary has assumed growing importance in its case-law, neither Article 6 nor any other provision of the ECHR requires States to adopt a particular constitutional model governing in one way or another the relationship and interaction between the various branches of the State, nor requires those States to comply with any theoretical constitutional concepts regarding the permissible limits of such interaction. The question is always whether, in a given case, the requirements of the ECHR have been met (see, inter alia, ECtHR, 6 May 2003, *Kleyn and Others v. Netherlands*, CE:ECHR:2003:0506JUD003934398, § 193 and the case-law cited; 9 November 2006, *Sacilor*

Lormines v. France, CE:ECHR:2006:1109JUD006541101, § 59; and 18 October 2018, *Thiam v. France*, CE:ECHR:2018:1018JUD008001812, § 62 and the case-law cited).

131 In the present cases, the doubts expressed by the referring court concern, in essence, the question whether, in the light of the rules of national law relating to the creation of a specific court, such as the Disciplinary Chamber, and, in particular, pertaining to the jurisdiction granted to it, its composition and the circumstances and conditions surrounding the appointment of the judges called to sit on that court, the context of its creation and those appointments, such a court and the members sitting on it satisfy the requirements of independence and impartiality which must be met by a court under Article 47 of the Charter where that court has jurisdiction to rule on a case in which subjects of the law rely, as in the present cases, on an infringement of EU law that is to their detriment.

132 It is ultimately for the referring court to rule on that matter having made the relevant findings in that regard. It must be borne in mind that Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and of acts adopted by the EU institutions. According to settled case-law, the Court may, however, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions (judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 71 and the case-law cited).

133 In that regard, as far as concerns the circumstances in which the members of the Disciplinary Chamber were appointed, the Court points out, as a preliminary remark, that the mere fact that those judges were appointed by the President of the Republic does not give rise to a relationship of subordination of the former to the latter or to doubts as to the former's impartiality, if, once appointed, they are free from influence or pressure when carrying out their role (see, to that effect, judgment of 31 January 2013, *D. and A.*, C-175/11, EU:C:2013:45, paragraph 99, and ECtHR, 28 June 1984, *Campbell and Fell v. United Kingdom*, CE:ECHR:1984:0628JUD000781977, § 79; 2 June 2005, *Zolotas v. Greece*, CE:ECHR:2005:0602JUD003824002 §§ 24 and 25; 9 November 2006, *Sacilor Lormines v. France*, CE:ECHR:2006:1109JUD006541101, § 67; and 18 October 2018, *Thiam v. France*, CE:ECHR:2018:1018JUD008001812, § 80 and the case-law cited).

134 However, it is still necessary to ensure that the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges (see, by analogy, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 111).

135 In that perspective, it is important, inter alia, that those conditions and detailed procedural rules are drafted in a way which meets the requirements set out in paragraph 125 above.

136 In the present cases, it should be made clear that Article 30 of the New Law on the Supreme Court sets out all the conditions which must be satisfied by an individual in order for that individual to be appointed as a judge of that court. Furthermore, under Article 179 of the Constitution and Article 29 of the New Law on the Supreme Court, the judges of the Disciplinary Chamber are, as is the case for judges who are to sit in the other chambers of the referring court, appointed by the President of the Republic on a proposal of the KRS, that is to say the body empowered under Article 186 of the Constitution to ensure the independence of the courts and of the judiciary.

137 The participation of such a body, in the context of a process for the appointment of judges, may, in principle, be such as to contribute to making that process more objective (see, by analogy, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 115; see also, to that effect, ECtHR, 18 October 2018, *Thiam v. France*, CE:ECHR:2018:1018JUD008001812, §§ 81 and 82). In particular, the fact of subjecting the very possibility for the President of the Republic to appoint a judge to the Sąd Najwyższy (Supreme Court) to the existence of a favourable opinion of the KRS is capable of objectively circumscribing the President of the Republic's discretion in exercising the powers of his office.

138 However, that is only the case provided, inter alia, that that body is itself sufficiently independent of the legislature and executive and of the authority to which it is required to deliver such an appointment proposal (see, by analogy, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 116).

139 The degree of independence enjoyed by the KRS in respect of the legislature and the executive in exercising the responsibilities attributed to it under national legislation, as the body empowered, under Article 186 of the Constitution, to ensure the independence of the courts and of the judiciary, may become relevant when ascertaining whether the judges which it selects will be capable of meeting the requirements of independence and impartiality arising from Article 47 of the Charter.

140 It is for the referring court to ascertain whether or not the KRS offers sufficient guarantees of independence in relation to the legislature and the executive, having regard to all of the relevant points of law and fact relating both to the circumstances in which the members of that body are appointed and the way in which that body actually exercises its role.

141 The referring court has pointed to a series of elements which, in its view, call into question the independence of the KRS.

142 In that regard, although one or other of the factors thus pointed to by the referring court may be such as to escape criticism *per se* and may fall, in that case, within the competence of, and choices made by, the Member States, when taken together, in addition to the circumstances in which those choices were made, they may, by contrast, throw doubt on the independence of a body involved in the procedure for the appointment of judges, despite the fact that, when those factors are taken individually, that conclusion is not inevitable.

143 Subject to those reservations, among the factors pointed to by the referring court which it shall be incumbent on that court, as necessary, to establish, the following circumstances may be relevant for the purposes of such an overall assessment: first, the KRS, as newly composed, was formed by reducing the ongoing four-year term in office of the members of that body at that time; second, whereas the 15 members of the KRS elected among members of the judiciary were previously elected by their peers, those judges are now elected by a branch of the legislature among candidates capable of being proposed *inter alia* by groups of 2 000 citizens or 25 judges, such a reform leading to appointments bringing the number of members of the KRS directly originating from or elected by the political authorities to 23 of the 25 members of that body; third, the potential for irregularities which could adversely affect the process for the appointment of certain members of the newly formed KRS.

144 For the purposes of that overall assessment, the referring court is also justified in taking into account the way in which that body exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary and its various powers, in particular if it does so in a way which is capable of calling into question its independence in relation to the legislature and the executive.

145 Furthermore, in the light of the fact that, as is clear from the case file before the Court, the decisions of the President of the Republic appointing judges to the Sąd Najwyższy (Supreme Court) are not amenable to judicial review, it is for the referring court to ascertain whether the terms of the definition, in Article 44(1) and (1a) of the Law on the KRS, of the scope of the action which may be brought challenging a resolution of the KRS, including its decisions concerning proposals for appointment to the post of judge of that court, allows an effective judicial review to be conducted of such resolutions, covering, at the very least, an examination of whether there was no *ultra vires* or improper exercise of authority, error of law or manifest error of assessment (see, to that effect, ECtHR, 18 October 2018, *Thiam v. France*, CE:ECHR:2018:1018JUD008001812, §§ 25 and 81).

146 Notwithstanding the assessment of the circumstances in which the new judges of the Disciplinary Chamber were appointed and the role of the KRS in that regard, the referring court may, for the purposes of ascertaining whether that chamber and its members meet the requirements of independence and impartiality arising from Article 47 of the Charter, also wish to take into consideration various other features that more directly characterise that chamber.

147 That applies, first, to the fact referred to by the referring court that this court has been granted exclusive jurisdiction, under Article 27(1) of the New Law on the Supreme Court, to rule on cases of the employment, social security and retirement of judges of the Sąd Najwyższy (Supreme Court), which previously fell within the jurisdiction of the ordinary courts.

148 Although that fact is not conclusive *per se*, it should, however, be borne in mind, as regards, in particular, cases relating to the retiring of judges of the Sąd Najwyższy (Supreme Court) such as those in the main proceedings, that the assignment of those cases to the Disciplinary Chamber took place in conjunction with the adoption, which was highly contentious, of the provisions of the New Law on the Supreme Court which lowered the retirement age of the judges of the Sąd Najwyższy (Supreme Court), applied that measure to judges currently serving in that court and empowered the

President of the Republic with discretion to extend the exercise of active judicial service of the judges of the referring court beyond the new retirement age set by that law.

149 It must be borne in mind, in that regard, that, in its judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531), the Court found that, as a result of adopting those measures, the Republic of Poland had undermined the irremovability and independence of the judges of the Sąd Najwyższy (Supreme Court) and failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

150 Second, in that context, the fact must also be highlighted, as it was by the referring court, that, under Article 131 of the New Law on the Supreme Court, the Disciplinary Chamber must be constituted solely of newly appointed judges, thereby excluding judges already serving in the Sąd Najwyższy (Supreme Court).

151 Third, it should be made clear that, although established as a chamber of the Sąd Najwyższy (Supreme Court), the Disciplinary Chamber appears, by contrast to the other chambers of that court, and as is clear *inter alia* from Article 20 of the New Law on the Supreme Court, to enjoy a particularly high degree of autonomy within the referring court.

152 Although any one of the various facts referred to in paragraphs 147 to 151 above is indeed not capable, *per se* and taken in isolation, of calling into question the independence of a chamber such as the Disciplinary Chamber, that may, by contrast, not be true once they are taken together, particularly if the abovementioned assessment as regards the KRS were to find that that body lacks independence in relation to the legislature and the executive.

153 Thus, the referring court will need to assess, in the light, where relevant, of the reasons and specific objectives alleged before it in order to justify certain of the measures in question, whether, taken together, the factors referred to in paragraphs 143 to 151 above and all the other relevant findings of fact which it will have made are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the Disciplinary Chamber to external factors, and, in particular, to the direct or indirect influence of the legislature and the executive, and as to its neutrality with respect to the interests before it and, thus, whether they may lead to that chamber not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law.

154 If the referring court were to conclude that that is the case, it would follow that such a court does not meet the requirements arising from Article 47 of the Charter and from Article 9(1) of Directive 2000/78 on account of its not being an independent and impartial tribunal, within the meaning of the former provision.

155 If that is the case, the referring court also wishes to know whether the principle of the primacy of EU law requires it to disapply those provisions of national law which confer jurisdiction to rule on the cases in the main proceedings on that court.

156 For the purposes of answering that question, it should be noted that EU law is characterised by the fact that it stems from an independent source of law, namely the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions that are applicable to their nationals and to the Member States themselves. Those essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the European Union and its Member States reciprocally as well as binding the Member States to one another (Opinion 1/17 (EU-Canada CET Agreement) of 30 April 2019, EU:C:2019:341, paragraph 109 and the case-law cited).

157 The principle of the primacy of EU law establishes the pre-eminence of EU law over the law of the Member States (judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 53 and the case-law cited).

158 That principle therefore requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States (judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 54 and the case-law cited).

159 In that regard, it should, *inter alia*, be pointed out that the principle that national law must be interpreted in conformity with EU law, by virtue of which the national court is required, to the greatest extent possible, to interpret national law in conformity with the requirements of EU law, is inherent in the system of the treaties, since it permits the national court, within the limits of its jurisdiction, to ensure the full effectiveness of EU law when it determines the dispute before it (judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 55 and the case-law cited).

160 It is also in the light of the primacy principle that, where it is impossible for it to interpret national law in compliance with the requirements of EU law, the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU 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 that court to request or await the prior setting aside of such provision by legislative or other constitutional means (judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 58 and the case-law cited).

161 In that regard, any national court, hearing a case within its jurisdiction, has, as a body of a Member State, more specifically the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it (judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 61 and the case-law cited).

162 As regards Article 47 of the Charter, it is clear from the case-law of the Court that that provision is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right which they may rely on as such (judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 78, and of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, paragraph 56).

163 The same applies to Article 9(1) of Directive 2000/78 in so far as, as has been stated in paragraph 80 above, by providing that the Member States are to ensure that all persons who consider themselves wronged by a failure to apply the principle of equal treatment enshrined in that directive to them may enforce their rights, that provision expressly reaffirms the right to an effective remedy in the relevant field. In applying Directive 2000/78, the Member States are required to comply with Article 47 of the Charter and the characteristics of the remedy provided for in Article 9(1) of the directive must be determined in a manner that is consistent with Article 47 of the Charter (see, by analogy, judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, paragraphs 55 and 56).

164 Consequently, in the situation referred to in paragraph 160 above, the national court is required to ensure within its jurisdiction the judicial protection for individuals flowing from Article 47 of the Charter and from Article 9(1) of Directive 2000/78, and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 79).

165 A provision of national law which granted exclusive jurisdiction to hear and rule on a case in which an individual pleads, as in the present cases, an infringement of rights arising from rules of EU law in a particular court which does not meet the requirements of independence and impartiality arising from Article 47 of the Charter would deprive that individual of any effective remedy within the meaning of that article and of Article 9(1) of Directive 2000/78, and would fail to comply with the essential content of the right to an effective remedy enshrined in Article 47 of the Charter (see, by analogy, judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, paragraph 72).

166 It follows that, where it appears that a provision of national law reserves jurisdiction to hear cases, such as those in the main proceedings, to a court which does not meet the requirements of independence or impartiality under EU law, in particular, those of Article 47 of the Charter, another court before which such a case is brought has the obligation, in order to ensure effective judicial protection, within the meaning of Article 47, in accordance with the principle of sincere cooperation enshrined in Article 4(3) TEU, to disapply that provision of national law, so that that case may be determined by a court which meets those requirements and which, were it not for that provision, would have jurisdiction in the relevant field, namely, in general, the court which had jurisdiction, in accordance with the law then in force, before the entry into force of the amending legislation which conferred jurisdiction on the court which does not meet those requirements (see, by analogy, judgments of 22 May 2003, *Connect Austria*, C-462/99, EU:C:2003:297, paragraph 42, and of 2 June 2005, *Koppensteiner*, C-15/04, EU:C:2005:345, paragraphs 32 to 39).

167 Furthermore, as regards Articles 2 and 19 TEU, provisions on which the referring court has also referred questions to the Court, it must be borne in mind that Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court (judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 47 and the case-law cited).

168 The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law which is now enshrined in Article 47 of the Charter, so that the former provision requires Member States to provide remedies that are sufficient to ensure effective legal

protection, within the meaning in particular of the latter provision, in the fields covered by EU law (see, to that effect, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraphs 49 and 54 and the case-law cited).

169 In those circumstances, it does not appear necessary to conduct a distinct analysis of Article 2 and the second subparagraph of Article 19(1) TEU, which can only reinforce the conclusion already set out in paragraphs 153 and 154 above, for the purposes of answering the questions posed by the referring court and of disposing of the cases before it.

170 Lastly, it is also not necessary, in the present cases, for the Court to interpret Article 267 TFEU, to which the referring court also refers in its questions. In the order for reference, that court has provided no reasons as to why an interpretation of that article could be relevant for the purposes of resolving the points which it is called on to address in the actions in the main proceedings. In addition, in any event, it is clear that the interpretation of Article 47 of the Charter and of Article 9(1) of Directive 2000/78 given in paragraphs 114 to 154 above is sufficient for the purposes of providing a response capable of instructing the referring court in relation to the decisions which it is called on to make in those cases.

171 In the light of all of the foregoing considerations, the answer to the second and third questions referred in Cases C-624/18 and C-625/18 is:

– Article 47 of the Charter and Article 9(1) of Directive 2000/78 must be interpreted as precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal, within the meaning of the former provision. That is the case where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. It is for the referring court to determine, in the light of all the relevant factors established before it, whether that applies to a court such as the Disciplinary Chamber of the *Sąd Najwyższy* (Supreme Court).

– If that is the case, the principle of the primacy of EU law must be interpreted as requiring the referring court to disapply the provision of national law which reserves jurisdiction to hear and rule on the cases in the main proceedings to the abovementioned chamber, so that those cases may be examined by a court which meets the abovementioned requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field.

Costs

172 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. It is no longer necessary to answer questions referred by the *Izba Pracy i Ubezpieczeń Społecznych* (Labour and Social Insurance Chamber) of the *Sąd Najwyższy* (Supreme Court, Poland) in Case C-585/18 or the first question referred by the same court in Cases C-624/18 and C-625/18.

2. The answer to the second and third questions referred by the referring court in Cases C-624/18 and C-625/18 is as follows:

Article 47 of the Charter of Fundamental Rights of the European Union and Article 9(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 cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal, within the meaning of the former provision. That is the case where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external

factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. It is for the referring court to determine, in the light of all the relevant factors established before it, whether that applies to a court such as the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court).

If that is the case, the principle of the primacy of EU law must be interpreted as requiring the referring court to disapply the provision of national law which reserves jurisdiction to hear and rule on the cases in the main proceedings to the abovementioned chamber, so that those cases may be examined by a court which meets the abovementioned requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field.

[Signatures]

OPINION OF ADVOCATE GENERAL BOBEK

delivered on 20 May 2021⁽¹⁾

Joined Cases C-748/19 to C-754/19

Prokuratura Rejonowa w Mińsku Mazowieckim

v

WB (C-748/19)

and

Prokuratura Rejonowa Warszawa-Żoliborz w Warszawie

v

XA,

YZ (C-749/19)

and

Prokuratura Rejonowa Warszawa-Wola w Warszawie

v

DT (C-750/19)

and

Prokuratura Rejonowa w Pruszkowie

v

ZY (C-751/19)

and

Prokuratura Rejonowa Warszawa-Ursynów w Warszawie

v

AX (C-752/19)

and

Prokuratura Rejonowa Warszawa-Wola w Warszawie

v

BV (C-753/19)

and

Prokuratura Rejonowa Warszawa-Wola w Warszawie

v

CU (C-754/19),

joined parties:

Pictura Sp. z o.o.

(Request for a preliminary ruling from the Sąd Okręgowy w Warszawie (Regional Court of Warsaw, Poland))

(Reference for a preliminary ruling – Principles of EU law – Judicial independence – Second subparagraph of Article 19(1) TEU – Directive (EU) 2016/343 – Composition of judicial panels in criminal cases including judges seconded by the Minister for Justice – Admissibility of requests for a preliminary ruling — Independence of the judicial panel)

issuing the order for reference – Limits to Article 19(1) TEU – Concept of ‘court or tribunal’ for the purposes of Article 267 TFEU – Relevance and necessity of the question – Presumption of innocence)

I. Introduction

1. The present cases raise crucial issues relating to the admissibility of questions referred for a preliminary ruling on the requirement of judicial independence pursuant to the second subparagraph of Article 19(1) TEU. The Court is invited to clarify the limits of Article 19(1) TEU, in particular in the light of the recent decisions in *A. K. and Others*; *Miasto Łowicz*; *Maler*; and *Land Hessen*. (2)

2. The present cases also raise a significant substantive question: does EU law preclude national provisions according to which the Minister for Justice, who is simultaneously the General Prosecutor, may, on the basis of criteria that are not made public, second judges to higher courts for an indefinite period and, at any time, may terminate that secondment at his own discretion?

II. Legal framework

A. EU law

3. Article 2 TEU reads as follows:

‘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.’

4. Pursuant to the second subparagraph of Article 19(1) TEU, ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’.

5. Under Article 267 TFEU, only a ‘court or tribunal’ of a Member State may submit to the Court of Justice of the European Union a request for a preliminary ruling.

6. Title VI of the Charter of Fundamental Rights of the European Union (‘the Charter’), under the heading ‘Justice’, includes Article 47 thereof, entitled ‘Right to an effective remedy and to a fair trial’, which states as follows:

‘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.’

7. Recital 22 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, (3) reads as follows:

‘The burden of proof for establishing the guilt of suspects and accused persons is on the prosecution, and any doubt should benefit the suspect or accused person. The presumption of innocence would be infringed if the burden of proof were shifted from the prosecution to the defence, without prejudice ... to the independence of the judiciary when assessing the guilt of the suspect or accused person ...’

8. Pursuant to Article 6 of Directive 2016/343, entitled ‘Burden of proof’:

‘1. Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution. ...

2. Member States shall ensure that any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted.’

B. Polish law

9. Article 77 of the Ustawa z dnia 27 lipca 2001 r. – Prawo o ustroju sądów powszechnych (Law of 27 July 2001 on the Organisation of the Ordinary Courts) ('Law on the organisation of ordinary courts') (4) reads as follows:

'1. The Minister for Justice may second a judge, with his or her consent, for the purpose of exercising judicial functions or administrative tasks:

(1) to another court of the same or lower rank or, in particularly justified cases, to a higher court, taking into account the rational use of ordinary court staff and the needs resulting from the workload of the various courts, ...

– for a fixed period, which may not exceed 2 years, or for an indeterminate period. ...

4 Where a judge is seconded, on the basis of points 2, 2a and 2b of paragraph 1 and of paragraph 2a, for an indefinite period, the secondment of that judge may be revoked or the person concerned may resign from the post to which he or she has been seconded provided that three months' notice is given. In other cases where a judge is seconded, such revocation or resignation does not require prior notice. ...'

10. Pursuant to Article 30(2) of the Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego (Law of 6 June 1997 – Code of Criminal Procedure) ('the Code of Criminal Procedure'), (5) 'the court of appeal shall give its ruling as a single judge, or as a panel of three judges where the decision under appeal was not delivered by a court sitting in a single-judge session or where, due to the particular complexity of the case or its importance, the president of the court orders that it be examined by a panel of three judges, unless the law provides otherwise'.

11. In accordance with Article 41(1) of the Code of Criminal Procedure, 'a judge shall be excluded where there exists a circumstance such as to give rise to a legitimate doubt as to his or her impartiality in the case at issue'.

III. Facts, national proceedings and the questions referred

12. The present requests for preliminary rulings have been submitted by the President of a judicial panel of the 10th Criminal Appeal Section of the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), in the context of seven criminal cases pending before that court. According to the orders for reference, those criminal proceedings concern various criminal offences set out in the Criminal Code (6) and the Criminal Tax Code. (7)

13. The referring court considers that the present proceedings are governed by EU law. It states that Polish courts are obliged, pursuant to Articles 3 and 6 of Directive 2016/343, to ensure that suspects and accused persons are presumed innocent until proven guilty according to law and must apply appropriate standards as regards the distribution of the burden of proof. In accordance with Article 6, read in conjunction with recital 22 of that directive, the presumption of innocence must be without prejudice to the independence of the judiciary.

14. That court points out that each of the judicial panels destined to hear the respective case at issue in the main proceedings is composed of the referring judge as President, and two other judges. In each of the cases, one of the 'other' judges is a judge seconded from a lower court by decision of the Minister for Justice/General Prosecutor, adopted pursuant to Article 77 of the Law on the organisation of ordinary courts ('the seconded judges'). Furthermore, according to the explanations provided by the referring court, some of the seconded judges also hold the position of 'disciplinary agent' attached to the Rzecznik Dyscyplinarny Sędziów Sądów Powszechnych (Disciplinary Officer for Ordinary Court Judges).

15. The referring court harbours doubts as to the compatibility with EU law of certain provisions of national law which grant the Minister for Justice/General Prosecutor the power to second judges to higher courts for an indefinite period and, to terminate, at any time, that secondment at his own discretion ('the national provisions at issue'). In particular, the referring court takes the view that those provisions may infringe the requirement of independence of the national judiciary that follows from Article 19(1) TEU, read in conjunction with Article 2 TEU.

16. It is within this factual and legal context that the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) decided to stay the proceedings and, in each of the seven cases, refer the following (identically worded) questions to the Court of Justice for a preliminary ruling:

'(1) Should the second subparagraph of Article 19(1) [TEU], in conjunction with Article 2 thereof and the principle of the rule of law enshrined therein, and Article 6(1) and (2), in conjunction with recital 22, of Directive [2016/343] be interpreted as meaning that the requirements of effective judicial protection, including the independence of the

judiciary, and the requirements arising from the presumption of innocence are infringed in the case where judicial proceedings, such as criminal proceedings against a person accused under [various provisions of the Criminal Code] and other matters, are conducted in the following manner:

– the composition of the court includes a [judge] seconded pursuant to a personal decision of the Minister Sprawiedliwości (Minister for Justice [Poland]) from a court situated one level below in the court hierarchy, the criteria followed by the Minister for Justice when seconding this judge are not known, and national law does not provide for any judicial review of such a decision and allows the Minister for Justice to terminate the judge's secondment at any time?

(2) Are the requirements referred to in Question 1 breached in a situation where the parties can lodge an extraordinary appeal against a judgment handed down in court proceedings such as those described in Question 1, and this extraordinary appeal is lodged with a court such as the Sąd Najwyższy (Supreme Court, Poland), the decisions of which cannot be the subject of appeal under national law, and national law imposes on the president of the organisational unit of that court (chamber) competent to hear the appeal the obligation to allocate cases in accordance with an alphabetical list of judges of that chamber, expressly prohibiting the omission of any judge, and the judges among whom the cases are allocated include a person appointed upon the motion of a collegiate body such as the Krajowa Rada Sądownictwa (National Council of the Judiciary [Poland]), the members of which are judges:

(a) elected by a chamber of parliament which votes for a list of candidates drawn up in advance by a parliamentary committee from among the candidates nominated by parliamentary factions or a body of that chamber of parliament on the basis of proposals from groups of judges or citizens, and as a result there are three occasions on which the candidates receive support from politicians during the election procedure;

(b) who represent a majority of the members of that collegiate body sufficient to take decisions on submitting motions for appointments to judicial positions as well as other binding decisions required under national law?

(3) From the point of view of EU law, including the provisions and requirements referred to in Question 1, what is the effect of a judgment handed down in court proceedings such as those described in Question 1, and of a judgment handed down in proceedings before the [Sąd Najwyższy] Supreme Court, if the person referred to in Question 2 participates in the handing-down of that judgment?

(4) Does EU law, including the provisions referred to in Question 1, make the effects of the judgments referred to in Question 3 conditional upon whether the court in question has ruled in favour of or against the accused person?

17. By decision of the President of the Court of 25 October 2019, Cases C-748/19 to C-754/19 were joined for the purposes of the written and oral proceedings and for the judgment.

18. By decision of the President of the Court of 2 December 2019, the application of the expedited procedure set out in Article 105(1) of the Rules of Procedure of the Court of Justice, requested in the orders for reference, was rejected.

19. On 31 July 2020, the Court addressed a request for information to the referring court, which was answered by letter of 3 September 2020.

20. Written observations have been submitted by the Prokuratura Regionalna w Warszawie ('Prosecutor of the Warsaw Province'), the Prokuratura Regionalna w Lublinie ('Prosecutor of the Lublin Province'), the Polish Government and the European Commission.

IV. Analysis

21. This Opinion is structured as follows. First, I shall deal with the objections to jurisdiction and admissibility submitted by the interested parties (A). Having suggested that, in line with the traditional approach of this Court and its case-law, the referring court's first question is indeed admissible, I shall, second, turn to the issue on which the objections to the jurisdiction of the Court and the admissibility of the questions referred are based: the nature and limits of the second subparagraph of Article 19(1) TEU (B). Finally, I shall provide an assessment of the merits of the first question raised by the referring court, relating to the system of delegation of judges that affects the judicial panels called on to adjudicate in the main proceedings (C).

A. Jurisdiction and admissibility

22. A number of arguments have been put forward by some of the parties submitting observations, objecting to the jurisdiction of the Court and/or the admissibility of the requests for preliminary rulings. Although these parties have merged their arguments on both issues, I will nevertheless examine them separately.

23. First, I shall address the arguments relating to the jurisdiction of the Court which, in my view, deserve short shrift (1). Second, I shall turn to the various arguments put forward concerning the admissibility of the requests altogether, or more specifically of certain questions. Indeed, some arguments raise rather complex issues which ought to be examined in detail (2).

1. Jurisdiction of the Court

24. The Polish Government, the Prosecutor of the Warsaw Province and the Prosecutor of the Lublin Province argue that the Court does not have jurisdiction to reply to the questions referred. In their view, the organisation of justice and, more precisely, matters such as the appointment of judges, the composition of judicial panels, the delegation of judges from one court to another and the legal effects of the decisions of national courts, all fall within the exclusive competence of the Member States. To the extent that the main proceedings concern national criminal law in sectors that have not been harmonised at EU level, those cases are – according to those parties – purely internal to Poland.

25. Moreover, according to the Prosecutor of the Warsaw Province and the Prosecutor of the Lublin Province, that position also flows from paragraph 29 of the judgment of the Court in *Associação Sindical dos Juizes Portugueses*. (8) Some versions of that judgment in languages other than English indicate that, in order to be applicable, Article 19(1) TEU requires that a Member State act, in the specific case, within the scope of EU law.

26. In my view, those arguments cannot be upheld.

27. First, as the Court has consistently held, although the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law, including those stemming from Article 2 and Article 19(1) TEU. (9) Those obligations may relate to any feature of national structures or procedures used for the national enforcement of EU law. The object of the present requests for preliminary rulings concerns precisely the obligations of the Member States that flow from those provisions, and whether the national provisions at issue in fact comply with those obligations. As such, the Court has jurisdiction to interpret Article 2 and Article 19(1) TEU and to provide a ruling on the issues raised in the questions referred. (10)

28. Second, contrary to the arguments submitted by the Prosecutor of the Warsaw Province and the Prosecutor of the Lublin Province, I do not see any meaningful difference between the various language versions – including, most importantly, the Portuguese version, since that was the language of procedure – of paragraph 29 of the judgment of the Court in *Associação Sindical dos Juizes Portugueses*. That passage concerned the difference between the scope of the second subparagraph of Article 19(1) TEU and that of the Charter. The Court stated that Article 19(1) TEU applies to all 'fields covered by Union law', given that that provision does not contain any limitation such as that set out in Article 51(1) of the Charter. For the purposes of that case, the Court did not elaborate further on that point. (11)

29. However, the exact meaning of that passage was made abundantly clear in the case-law of the Court thereafter. The difference in the material scope of the two provisions mentioned above means that Article 19(1) TEU is applicable where a national body *may* rule, as a court or tribunal, on questions concerning the application or interpretation of EU law, and which thus fall within the fields covered by EU law. (12) In other words, national courts must comply with the standards laid down in that provision whenever they are, as a matter of principle, ruling on matters governed by EU law. Conversely, it is not necessary that the specific cases at issue in fact concern EU law.

30. As regards the present cases, there is little doubt, as the Commission rightly noted, that the judicial body whose independence is at issue in the present proceedings – the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) – is a body that may be called upon to rule, as a court or tribunal, on questions concerning the application or interpretation of EU law. Furthermore, it is common ground that the Court has jurisdiction to interpret the provisions of Directive 2016/343, as well as Article 2 and Article 19(1) TEU.

31. As a result, the Court clearly has jurisdiction to rule on the present cases.

2. Admissibility

32. With regard to the admissibility of the questions referred, I will first address the objections raised against Questions 2, 3 and 4 since those questions are, in my view, inadmissible (a). I will then turn to the admissibility of Question 1, which, on the contrary, requires a more in-depth discussion (b).

33. However, before embarking on that analysis, an objection specific to the admissibility of the request for a preliminary ruling in Case C-754/19 must be dealt with. The Prosecutor of the Warsaw Province submits that the referring court did not suspend the case giving rise to that request and, in fact, subsequently adopted a final decision on 11 December 2019.

34. It follows from established case-law that, if no dispute is pending before the referring court, and so an answer to the question referred is of no use for the resolution of a dispute, the Court must find that there is no need to provide a ruling on the request for a preliminary ruling. (13)

35. Accordingly, if – as the Prosecutor of the Warsaw Province argues – the main proceedings in Case C-754/19 were not in fact suspended, and a final decision has been adopted, then the request for a preliminary ruling has lost its purpose. In those circumstances, it would no longer be necessary for the Court to rule on the questions referred in that case.

36. That being said, the referring court has neither informed the Court of any supervening relevant fact, nor withdrawn its reference. Moreover, since the questions referred in that case are *identical* to those raised in the other six cases at issue in this Opinion, in which it is undisputed that those cases are still pending before the national court, it is unnecessary to investigate this matter any further.

37. I shall now turn, therefore, to the specific arguments put forward concerning the admissibility of the various questions referred.

(a) Questions 2, 3 and 4

38. By its second question, the referring court asks essentially whether certain provisions of EU law are infringed in circumstances where the parties are able to lodge an extraordinary appeal against the judgment to be handed down in the main proceedings, when that appeal is to be heard by a court – the Sąd Najwyższy (Supreme Court) – whose independence is doubted by the referring court.

39. The third question concerns the legal effects of a future decision delivered by the referring court, as well as the legal effects of the rulings of the Sąd Najwyższy (Supreme Court) in the potential appeals that may ultimately be brought against the decisions to be handed down in the main proceedings.

40. In close connection with that question, the fourth question asks whether under EU law the consequences of the judgment handed down in that extraordinary appeal by the Sąd Najwyższy (Supreme Court) depend on whether that court rules in favour of or against the accused person.

41. In line with the submissions of the Polish Government, the Prosecutor of the Warsaw Province and the Prosecutor of the Lublin Province, as well as the Commission, I am of the view that those three questions are inadmissible.

42. In so far as those questions are based on the premiss that in the present cases an extraordinary appeal will be lodged in the future before the Sąd Najwyższy (Supreme Court), those questions rely on a purely *hypothetical* event. It should be recalled, in that context, that, according to settled case-law, the purpose of a request for a preliminary ruling cannot be to obtain advisory opinions on general or hypothetical questions. (14)

43. Similarly, in as much as Questions 3 and 4 also refer to the possible effects of the judgments that the referring court will deliver, those questions are *premature* and *insufficiently motivated*. They are premature because they relate to proceedings that may take place at a later date before a different court, but do not relate to the current stage of proceedings of the cases. Moreover, as the referring court explains, should the Court decide that the national measures at issue do not comply with Article 19(1) TEU, there are other courses of action that are available to it in order to remedy the situation. Therefore, the problem raised by the referring court may never materialise. Those questions also fall short of the requirements of Article 94 of the Rules of Procedure of the Court of Justice since the referring court does not provide any detail as to how the allegedly defective composition of the judicial panels, destined to perhaps hear the cases at some point in the future, can specifically affect the lawfulness of the decisions

to be delivered by the referring court.

44. Without in any way neglecting the general national context, which is indeed problematic and complex to say the least, there nevertheless remain well-established limits to what may be asked in a request for a preliminary ruling. Put simply, the questions referred should relate to the present (or past circumstances clearly having an impact on the present (15)) case before the referring court. Even if that condition has been interpreted broadly and leniently in the traditional case-law of the Court, the main point is that the guidance sought must be capable of being taken into account by the referring court for the decision that it will deliver. That excludes conjecture about future events that may never materialise.

45. Therefore, in my view, Questions 2, 3 and 4 are indeed inadmissible.

(b) Question 1

46. By its first question, the referring court asks, in essence, whether EU law precludes national provisions according to which the Minister for Justice/General Prosecutor may, on the basis of criteria that are not made public, second judges to higher courts for an indefinite period and, may, at any time, terminate that secondment at his own discretion. In particular, the referring court makes reference to the second subparagraph of Article 19(1) TEU, in conjunction with Article 2 TEU and the principle of the rule of law enshrined therein, and Article 6(1) and (2), together with recital 22, of Directive 2016/343.

47. Various objections have been raised in relation to the admissibility of that question. Those objections concern: the concept of 'court or tribunal' within the meaning of Article 267 TFEU (1), compliance with the requirements of Article 94 of the Rules of Procedure of the Court (2), and the necessity and relevance of the question referred (3). I shall examine those issues in turn.

(1) 'Court or tribunal' within the meaning of Article 267 TFEU

48. First, the Prosecutor of the Warsaw Province and the Prosecutor of the Lublin Province point out that the requests for preliminary rulings have been submitted by a single judge – the President of the judicial panel hearing the criminal cases at issue – and not by the panel itself. They argue that, pursuant to Article 29(1) of the Code of Criminal Procedure, appeal proceedings such as those at issue are to be adjudicated by a panel of three judges, except in specific circumstances provided by law. Those specific circumstances are, in their view, absent in the present case. Therefore, the referring body does not fulfil the conditions required to be considered a 'court or tribunal' for the purposes of Article 267 TFEU.

49. It is uncontested that the present requests for preliminary rulings were submitted by the Sąd Okręgowy w Warszawie (X Wydział Karny Odwoławczy) (Regional Court (10th Criminal Appeal Section), Warsaw). The order for reference states that that court is composed of the President of the judicial panel, who also signed that order for reference.

50. In my view, however, this is not enough *automatically* to render the requests for preliminary rulings inadmissible.

51. First, it must be borne in mind that a 'court or tribunal' within the meaning of Article 267 TFEU has always been *defined in an autonomous manner* under EU law and by this Court, independently of denominations and qualifications under national law. In the light of those criteria, there is no doubt (and it is not, in fact, disputed by the parties) that the referring body does tick all the boxes of the so-called *Dorsch* criteria: (16) it is established by law, it is permanent, its jurisdiction is compulsory, its procedures are *inter partes*, it applies rules of law, and is – as a matter of principle – independent and impartial.

52. Second, the concept of 'court or tribunal' within the meaning of Article 267 TFEU is examined at the structural, *institutional* level. In other words, it is examined by looking at the judicial body making the reference as such, while taking into account the function that that body is called upon to perform in the *specific circumstances* of a case. Simply put, a body can be a court even where usually it acts in another (non-judicial) capacity (17) and vice versa.(18) The specific functions that a body is called upon to perform in the main proceedings are thus of the utmost importance. In the present cases, there is no doubt that the referring court acts in a judicial capacity when hearing appeals in criminal proceedings, as well as when possibly verifying the composition of the panel to hear such appeals. Both of these functions are performed in a judicial capacity.

53. Third, the Court's case-law is consistent in stating that it is not 'for the Court to determine whether the order for reference was made in accordance with the rules of national law governing the organisation of the courts and legal proceedings.' (19) According to that case-law, 'the Court must abide by the decision from a court of a Member State requesting a preliminary ruling in so far as that decision has not been overturned in any appeal procedures provided for by national law'. (20)

54. Thus, from the above it follows rather clearly that, if the body making the request is a court acting in a judicial capacity, both of those concepts being defined autonomously under EU law, it is not the role of this Court to start double-checking compliance with all procedural rules of national law: is the seal correct? Is the order in compliance with all requirements of formal and procedural national law? Are all the signatures in the right place?

55. It is perhaps worth recalling that this approach and this case-law originates from a case – *Reina* – in which the admissibility of the request for a preliminary ruling was challenged on the ground that the referring court was incorrectly composed. (21) Furthermore, in *San Giorgio*, the Court expressly rejected an objection similar to the one being made in the present proceedings. The Italian Government contested the admissibility of the request for a preliminary ruling (submitted by the President of the referring court) arguing that, under national law, the decision fell within the jurisdiction of the full court. The Court swiftly brushed aside that objection, emphasising that, in accordance with settled case-law, any national court is 'entitled to request a preliminary ruling ... regardless ... of the stage reached in the proceedings pending before it and regardless of the nature of the decision which it is called upon to give'. (22)

56. The Court did not follow that approach only where the referring court *manifestly* lacked jurisdiction to hear the case, as in the recent *Di Girolamo* cases. (23) However, the present cases are clearly different to the *Di Girolamo* cases. It is undisputed that the referring court is competent to deal with the cases at issue in the main proceedings. The sole issue concerns the body, within that same court, authorised to refer a question to the Court under Article 267 TFEU. The present cases are thus much more comparable to those examined by the Court in *Reina* and *San Giorgio*.

57. Fourth, the fact that the referring court, in order to submit a question to the Court under Article 267 TFEU, would – according to the Prosecutor of the Warsaw Province and the Prosecutor of the Lublin Province – have to disregard certain rules of its internal legal order is, even if it were confirmed, immaterial. There are numerous examples in the Court's case-law where national courts were, under EU law, allowed, or even required, to override national procedural rules curtailing their prerogatives to submit requests for preliminary rulings to the Court. (24)

58. A recent case in which the situation was quite similar to the present cases is *A. K. and Others*. In that case, the Polish Government argued that the national proceedings were invalid because they disregarded the rules relating to the *composition and jurisdiction of courts*. According to that government in that case, the proper composition to deal with the case under national law was that of a single judge rather than a panel of three judges who referred the questions. (25) The Court concluded, however, that 'the questions referred precisely concern the question of whether, notwithstanding rules of national law in force in the Member State in question attributing jurisdiction, a court such as the referring court has the obligation, under the provisions of EU law to which those questions refer, to disapply those rules of national law and to assume, where relevant, jurisdiction for the actions in the main proceedings. A judgment in which the Court were to uphold the existence of such an obligation would be binding on the referring court and all other bodies of the Republic of Poland, and could not be affected by the provisions of domestic law relating to the invalidity of proceedings or by the distribution of jurisdiction between the courts to which the Polish Government refers'. (26)

59. Fifth, to accept the objections put forward by the Polish Government – according to which, in order to comply with national law, a question such as the present one may be submitted only by the full panel – would give rise, in my view, to two additional problems.

60. On the one hand, issues relating to the correct composition of judicial panels would be unlikely ever to reach the Court, or to reach it in a timely fashion. Indeed, the judges allegedly appointed incorrectly are unlikely to agree with the need to send a question for a preliminary ruling to the Court as to whether they were correctly appointed to deal with that case. In those circumstances, such an issue could be raised only if and when an appeal against the decision adopted by the (possibly unlawfully composed) court is lodged. Therefore, in the best-case scenario, the issue arrives before the Court rather late. In the worst-case (or rather realistic) scenario, it never arrives at all.

61. On the other hand, embracing the logic suggested by the Polish Government would lead to another paradox. Should the doubts expressed by the referring court be well founded on the merits, it may be assumed that one of the members of those panels is not independent. Thus, in the rather unlikely scenario that such a member of the panel

were ready to sign an order for reference calling into question his own independence, would such a reference then be admissible? Would the referring body in that composition not fail to fulfil the criterion of independence inherent to the concept of 'court or tribunal' within the meaning of Article 267 TFEU?

62. This clearly emphasises two points. First, to reiterate, issues concerning the proper composition of a judicial panel may never in fact be raised by that panel itself. Second, making the admissibility of requests for a preliminary ruling, and the autonomous criterion of Article 267 TFEU, conditional on the fulfilment of all procedural elements under national law is not only illogical, but also dangerous in systemic terms.

63. Sixth, the judge making the request in the present cases is not just *any* judge of the panel hearing the cases: she is the *President* of that panel. Presidents of judicial bodies are not only endowed with additional powers, but they are also entrusted with extra responsibilities. They are in fact called upon to act as 'guardians of the independence and impartiality of judges and of the court as a whole'. (27) Within smaller compositions of a court, or as far as specific proceedings are concerned, those functions are generally performed by the President of the composition (or Chamber), who has the role of presiding on the panel and directing the work thereof. (28) They are typically expected to oversee both the procedure and the internal deliberations of the panel over which they preside. Accordingly, I do not find it unusual (let alone unlawful) that, as President of the panel, the referring judge considers that she is obliged to ensure the correct composition thereof.

64. Finally, there is another consideration connected to that last point: what is in fact the exact procedure for which the referring court seeks guidance from the Court? Certainly, one way of looking at the issue is to consider that the relevant procedure is the criminal proceedings before a panel of three judges who will take a decision on the merits in relation to the criminal charge.

65. However, there is also another way of looking at the same issue. That would be to focus on *the specific incident of procedure* and the actual decision that must be handed down in response to that incident. In that case, the proceedings in respect of which the guidance from the Court is sought does not constitute *the entire criminal proceedings*, but only a *preliminary issue* concerning the correct composition of the panel hearing that case. With regard to that part of the proceedings, and also in view of the type of (preliminary) procedural decision to be taken within it, it is the referring judge, in her capacity as President of the panel, who actually rules as a single judge within that part of the overall proceedings. In the context of this preliminary incident of procedure, which must be settled *before* the case can properly be heard by an EU law-compliant judicial panel, the referring judge is the one and only judge who can, and by all means should, address the issue before the cases can proceed.

66. I am of course not suggesting that the Court should accept requests for preliminary rulings from judges (or panels) that are manifestly incompetent to deal with the cases at issue in the main proceedings, that are misusing their capacity to make a reference under Article 267 TFEU or that, in relation to the main proceedings, do not fulfil the *Dorsch* criteria. The present cases do not, however, fall into any of those situations: the referring court is a 'court or tribunal' for the purposes of Article 267 TFEU, it has jurisdiction to deal with the cases at issue and those cases are genuine, as is the issue raised *in limine litis*.

(2) Lack of sufficient detail

67. The Polish Government, as well as the Prosecutors of the Warsaw and Lublin Provinces, argue that the requests for preliminary rulings do not meet the requirements of Article 94 of the Rules of Procedure. They submit that those requests do not provide sufficient detail as to the link between the provisions of EU law the interpretation of which is required and the pending cases.

68. In that regard, it must be acknowledged that, at least as far as that question refers to the provisions of Directive 2016/343, the orders for reference are concise. It could be argued that the national court could have made a greater effort in clarifying the factual context. In particular, more details could have been provided as to how the Member States' obligations relating to the burden of proof, set out in Article 6 of Directive 2016/343, may affect the procedures at issue in the main proceedings.

69. That notwithstanding, I do not think that the referring court's 'verbal parsimony' may be considered to fall short of the requirements of Article 94 of the Rules of Procedure. Indeed, Directive 2016/343 (i) is applicable to the cases at hand, and (ii) appears relevant.

70. As regards the first point, it is clear from the order for reference that, in the main proceedings, the accused

persons must undergo a criminal trial, and that a final decision on their guilt has not yet been taken. The provisions of Directive 2016/343 are thus applicable. In accordance with its Article 2, that directive applies to natural persons who are suspects or accused persons in criminal proceedings. It applies at all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until a final decision on whether that person has committed the criminal offence concerned has become definitive. (29) It is hardly necessary to add, in this context, that that directive is also applicable in proceedings that are 'purely internal' to one Member State.

71. As regards the second point, it suffices to note that an issue with the presumption of innocence or the burden of proof may arise where one or more of the judges sitting on a judicial panel hearing a criminal case has ties to one of the parties, namely the side of the prosecution. If a judge's secondment to, and his or her position in, a higher court is possibly conditional on the prosecutorial side being satisfied with his or her performance, since otherwise it may at any moment be revoked, the question arises whether that is capable of casting doubts on the independence and impartiality of the seconded judge. It may be put as an issue of judicial impartiality (if approached from a structural point of view) or possibly as an issue relating to the presumption of innocence or the burden of proof (if approached from the point of view of the accused, who might believe that a panel thus composed may have a tendency to side with the prosecution).

72. In any event, the requirements of Article 94 of the Rules of Procedure are complied with in so far as the second subparagraph of Article 19(1) TEU is concerned. Indeed, the factual and contextual framework necessary for the Court to carry out its assessment on the basis of that provision does not require further information on the specifics of the main proceedings. The orders for reference set out, concisely but exhaustively, the national legal framework that governs the secondment of judges, the specific issues faced by the referring court in the composition of the panel called on to adjudicate in the main proceedings, as well as the reasons for which that court doubts the compatibility with EU law of that framework. Those factors, taken together, allow the Court to understand the question being asked by the referring court and the reasoning behind it.

(3) The relevance and necessity of the question

73. The Polish Government, as well as the Prosecutors of the Warsaw and Lublin Provinces, submit that an answer to the question is not necessary or relevant for the adjudication in the main proceedings. In essence, they argue that the question is purely hypothetical. From a procedural point of view, it would be impossible for the referring court to apply the response of this Court concerning the interpretation of Article 19(1) TEU in the main proceedings. Under national law, that court has – they contend – no power to 'correct' the potential flaws stemming from the national procedural rules at issue. It would be, where appropriate, for another judicial body (namely, a different panel) to take action in order to decide on the exclusion of one of the sitting judges in the referring court. Moreover, those parties point out that the accused have not raised any issue concerning the formation of the panel. They also contend that the orders for reference do not present the national rules concerning judicial secondments in a complete and impartial manner, and invoke the judgments of the Court in *Foglia*. (30)

74. For its part, the Commission notes the succinct nature of the orders for reference. However, it does not consider the question to be inadmissible: a question referred, which is of a procedural nature, may in fact be identified in the main proceedings which, in order to be dealt with, may require the Court to provide an answer to the question raised.

75. On this matter, I agree with the Commission. I also take the view that the first question is indeed admissible. That question raises an issue *in limine litis* of compatibility between national law and EU law that the referring court is *required* to address before it may (lawfully) rule in the main proceedings. That conclusion is borne out by the Court's well-established case-law regarding the relevance and necessity of the question referred (i), and is not called into question by some recent case-law of the Court (ii), from which the present cases may be easily distinguished (iii).

(i) The established case-law on 'relevance' and 'necessity'

76. According to settled case-law, 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 that it submits to the Court. It follows that questions referred by national courts enjoy a *presumption of relevance* and that the Court may refuse to rule on those questions only where it is quite obvious that the interpretation 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 those questions. (31)

77. Relevance and necessity are, therefore, two sides of the same coin: a question is relevant if the answer to it is necessary in order for the national court to be able to rule in the main proceedings, and vice versa. The Court has consistently found questions to be admissible when an answer thereto is necessary to enable the referring courts to 'give judgment' in the cases before them. (32) This has traditionally been understood as requiring, in principle, that two conditions are met: (a) there must be a case *pending* before the referring court, (33) and (b) the decision to be given by that court must be capable of *taking account* of the preliminary ruling. (34)

78. As far as the first condition is concerned, it is common ground that in all the cases referred, except possibly the one at issue in Case C-754/19, (35) there is an ongoing criminal procedure before the referring court. The key issue is, therefore, whether the second condition is fulfilled: is the referring court able to *take into account* the Court's reply to the question referred?

79. When the facts of the present cases are assessed in the light of the Court's traditional case-law, the answer to that question is clearly in the affirmative. That established case-law shows why the objections put forward by the Polish Government, as well as by the Prosecutors of the Warsaw and Lublin Provinces, are without merit.

80. First, it is hardly necessary to point out that a question referred for a preliminary ruling need not be directly relevant for the adjudication of the case *on the merits*. The case-law contains many examples of preliminary rulings concerning procedural questions of various kinds. (36) In fact, there is a particularly rich strand of case-law which concerns the scope of the principle of procedural autonomy and the limits thereof, especially those flowing from the need to ensure the effectiveness of EU law. (37) Some of the questions dealt with by the Court relate, for example, to procedural limitations imposed on national courts by national rules, (38) or of procedural issues that the referring court has to deal with before a decision on the merits can be taken. (39) Some questions referred have concerned, like in the present cases, certain aspects of the national rules on judicial organisation. (40)

81. In fact, the present cases distinctly resemble the situation at issue in *A. K. and Others*. In that case, the Court found cases to be admissible where the referring court 'wished to be instructed not as to the substance of the cases before it which do in turn raise other questions of EU law, but as regards a procedural problem which it must answer *in limine litis*, since that problem relates to the jurisdiction of that court to hear and rule those cases'. (41)

82. There are also examples of cases in which the Court has examined, in the context of a preliminary ruling procedure, the issue of independence in relation to a specific composition of a judicial panel. For example, in *Ognyanov*, the Court assessed whether EU law precluded a national rule which required a judicial panel to be disqualified because it had expressed, in the request for a preliminary ruling addressed to the Court, a provisional opinion on the substance of a case. (42)

83. Second, the fact that the answer to be provided by the Court in the present proceedings cannot be applied by the referring court in a decision that takes the form of a *judgment* (or a decision on the merits of the case) is immaterial.

84. According to settled case-law, the admissibility of a request for a preliminary ruling is subject to the referring court being 'called upon to give judgment in proceedings intended to lead to a decision of a judicial nature'. (43) This means that a reference received from a national court that, exceptionally, intervenes in a procedure of an administrative nature is not admissible. (44) By contrast, that does not mean that the decision which the referring court is to take, in the main proceedings, on the specific issue raised in the context of its questions referred must relate to the closure of the procedure, let alone take the form of a judgment. The Court has consistently stated that questions are admissible when they concern issues of procedure relating to 'the whole procedure leading to the referring court's judgment'. The requirement in question must in fact be 'interpreted broadly in order to prevent many procedural questions from being regarded as inadmissible and from being unable to be the subject of interpretation by the Court and the latter from being unable to interpret all procedural provisions of EU law that the referring court is required to apply'. (45)

85. Indeed, there is no shortage of examples where the answer of the Court intended to assist the referring court could not be applied in a decision taking the form of a judgment (or any other decision on the merits). For example, in *VB Pénzügyi Lízing*, one of the questions asked about the obligation for national courts, when making a request for a preliminary ruling, to inform the Minister for Justice at the same time that a reference had been made. (46) In *Eurobolt*,

the Court did not hesitate to answer a question asking whether, pursuant to Article 267 TFEU, a national court is entitled to approach the EU institutions that have taken part in drawing up a piece of secondary EU legislation, the validity of which is being contested before that court. (47) In *Salvoni*, the Court provided the national court with the interpretation of the relevant EU rules sought, precluding that court from having an *ex parte* communication with one of the parties. (48) Similarly, in a number of cases relating to the interpretation of EU instruments adopted in the field of judicial cooperation, the Court interpreted the relevant provisions of EU law in order to assist the referring courts in their task of completing the forms provided for in the annexes to those instruments. (49)

86. Thus again, there are many examples of answers provided for in the case-law that relate to various procedural, structural, or institutional issues, and which help a referring court to settle other issues arising before, at that time, or even after the final decision on merits. (50)

87. Third, the situation, as alleged by the Polish Government, whereby under national law, the referring court would have *no power to correct* the potential flaws stemming from the possible incompatibility of the national procedural rules at issue with EU law, is immaterial.

88. On the one hand, that argument is contested by the referring court. In its reply of 3 September 2020 to a question of the Court on this point, the referring court stated that, should the Court find an incompatibility between the national rules at issue and EU law, it had three options available to it in order to remedy that incompatibility, or at least to limit partially the effects thereof. First, under Article 41(1) of the Code of Criminal Procedure, a judge can request to be excluded from a case. Second, as President of the panel adjudicating in the cases at issue, the referring judge could lodge a request to the President of her court, requesting to apply Article 47b of the Law on the organisation of ordinary courts, which could lead to a change in the composition of the judicial panel. Third, pursuant to Article 37 of the Code of Criminal Procedure, the referring court could ask the Sąd Najwyższy (Supreme Court) to allocate the cases to another court of the same rank where the interests of justice so require.

89. In the light of this divergence of opinions, I must again recall that, it is for the referring court to define the relevant factual and legislative context. The Court has repeatedly stressed that it is not for it, in the context of a request for a preliminary ruling, to rule on the interpretation of national provisions or to decide whether the referring court's interpretation of such provisions is correct, since such an interpretation falls within the exclusive jurisdiction of the referring courts. (51) It is thus not for this Court to arbitrate on what is the correct content or interpretation of national law.

90. On the other hand, and in any event, the requirement of necessity has consistently been assessed by the Court *irrespective of* the legal avenues available under *national law* to remedy the potential incompatibility between national law and EU law. It is established case-law that 'any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of [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 directly applicable [Union] rules from having full force and effect are incompatible with the requirements which are the very essence of [Union] law'. (52)

91. The arguments raised by the Polish Government cannot be reconciled with the consistent case-law of the Court as regards direct effect and primacy. If the national courts' obligations to uphold EU law were limited to that which national law expressly allows them to do, there would not be much EU law to start with. If there is a problem of EU law before the referring court, that court is required to do whatever is possible to eliminate the (potential) incompatibility in order to reach compliance as soon as possible. The referring court may, to that end, interpret national rules in conformity with EU law or, where appropriate, disapply the national provisions which prevent it from ensuring compliance. (53) The fact that the problem could hypothetically be resolved, at least in accordance with the letter of national law, at a later stage by another court (or another panel), is not a valid objection, least of all in the eyes of EU law.

92. Consequently, the fact that, according to the Polish Government, the referring court may be unable to take any specific action to remedy the potential incompatibility of the national rules with EU law – even if it were to be confirmed, which, in my view, is not the case – would in any event not render the question referred inadmissible. After all, when requests for preliminary rulings are aimed at clarifying the obligations and the powers that national courts derive from EU law, the issue of whether one or more national procedural rules are compliant with EU law becomes the central *question of merits* in the case. That is not a matter of admissibility.

93. A confirmation of these principles may be found, once again, in *A. K. and Others*. There, the Court expressly

stated: 'the fact that national legislation ... provides for discontinuance of cases such as those in the main proceedings cannot, in principle and without a decision of the referring court ordering such discontinuance or to the effect that there is no need to rule on the cases in the main proceedings, lead the Court to find that it is no longer necessary for it to answer the questions before it which were referred for a preliminary ruling.' (54) The Court recalled the wide discretion of national courts in submitting a request for a preliminary ruling and concluded that 'a rule of national law thus cannot prevent a national court, where appropriate, from exercising that discretion, or complying with that obligation'. (55)

94. Fourth, the fact that the persons subject to the criminal proceedings before the referring court have *not challenged* the compatibility of the national rules at issue with EU law does affect either the relevance of the question, or its admissibility. It is common ground that the fact that the parties to the main action did not raise a point of EU law before a national court does not preclude the latter from bringing the matter before the Court. Article 267 TFEU is not restricted to cases where one or another of the parties to the main action has taken the initiative of raising a point concerning the interpretation or the validity of EU law, but also extends to cases where a question of this kind is raised by the referring court of its own motion. (56) That is all the more important in a case where serious doubts arise as to the correct composition of the panel of judges hearing the case. (57)

95. Nor are the present cases 'contrived cases' bearing any resemblance to the *Foglia* cases. (58) It is common ground that the criminal proceedings before the referring court are genuine disputes. There is absolutely nothing to indicate that the parties have artificially orchestrated those proceedings in order to seek the Court's guidance on the interpretation of certain provisions of EU law. (59)

96. Fifth and finally, in terms of a preliminary assessment, it seems to me that the present cases exhibit all the components required for Article 19(1) TEU to be applicable.

97. To begin with, the issues raised by the present proceedings are hardly negligible or ancillary in nature, either in relation to the cases at issue in the main proceedings, or for the national legal system in general. Indeed, since the issues raised with regard to the correct composition of the judicial panels are not specific to the main proceedings, but stem from national legislation of general application, the Court's answer to the question referred is liable to have significant repercussions in a number of other cases.

98. As far as the nature of the issue in the main proceedings is concerned, in *Simpson*, the Court emphatically stated: 'the guarantees of access to an independent and impartial tribunal previously established by law, and in particular those which determine what constitutes a tribunal and how it is composed, represent *the cornerstone of the right to a fair trial*. That right means that *every court is obliged to check* whether, as composed, it constitutes such a tribunal where a serious doubt arises on that point. That check is necessary for the confidence which the courts in a democratic society must inspire in those subject to their jurisdiction. In that respect, such a check is an essential procedural requirement, compliance with which is a matter of public policy and must be *verified of the court's own motion*'. (60) Therefore, provided it harbours genuine doubts about its lawful composition, the referring court can and should raise such an issue before it proceeds to assess the substance of the cases before it.

99. Moreover, in terms of what can be taken from the context of the present cases, as well as from a number of other cases concerning the same Member State, recently giving rise to a number of cases in the docket of this Court, the legal system at issue is unlikely to offer adequate mechanisms of self-correction of the potential issue raised by the referring court. The issue identified by the referring court is not merely one singular and unfortunate mishap in an otherwise adequately functioning system.

100. In conclusion, it seems to me that the first question is, in the light of the Court's well-established case-law, admissible. By that question, the referring court inquires as to the proper interpretation of Article 19(1) TEU – a provision clearly applicable in the present cases – in order to resolve an issue of a procedural nature, so that the main proceedings can be carried out in a manner that is compliant with EU law.

101. The arguments concerning an alleged lack of relevance or necessity of the question are, in the light of the Court's traditional case-law, unpersuasive. The recent decisions of the Court delivered within the specific context of the independence of the national judiciary and the admissibility of such questions do not alter that conclusion.

(ii) *The recent case-law: Miasto Łowicz and its progeny*

102. In *Miasto Łowicz*, (61) the Court was asked whether the new regime for disciplinary proceedings against judges in

Poland satisfied the requirements of judicial independence under the second subparagraph of Article 19(1) TEU. The Court, however, did not address the merits of the questions referred, finding the questions referred to be inadmissible.

103. In reaching that conclusion, the Court first emphasised that, for the purposes of establishing ‘necessity’ within the meaning of Article 267 TFEU, there must be a *connecting factor* between the dispute before the referring court and the provisions of EU law whose interpretation is sought, ‘by virtue of which that interpretation is objectively required for the decision to be taken by the referring court’. (62) The Court went on to identify several situations in which questions referred comply with that condition. The Court provided a taxonomy of the ‘type of situations’ in which a request for a preliminary ruling has a sufficient connecting factor in order to ensure its relevance for the purposes of Article 267 TFEU. That connecting factor exists where: (i) the dispute is *substantively* connected to EU law; (63) (ii) the question concerns the interpretation of *EU provisions of a procedural nature* that may be applicable; (64) or (iii) the answer sought from the Court appears capable of providing the referring court with an interpretation of EU law which allows it to resolve *procedural questions of national law* before being able to rule on the substance. (65)

104. The Court then concluded that no such connecting factor could be identified in the cases at hand, since they did not fall into any of the situations outlined above. In fact, the Court found that any answer to be given would have no bearing on the judicial procedures pending before the referring courts.

105. In my view, the Court’s findings in *Miasto Łowicz* are hardly surprising.

106. First, I do not consider that judgment to be introducing limitations to, or derogations from, the principles flowing from previous case-law. In my view, it seems broadly to reflect the thrust of that case-law: the need to ensure that the referring court is able to *take into account*, in the main proceedings, the answers that are sought from the Court. The impact on those proceedings may concern – as the Court expressly held – either substantive or procedural aspects thereof. However, in one form or the other, that impact must be specific and foreseeable, and cannot be hypothetical, theoretical or merely speculative.

107. Second, the application of the principles flowing from its traditional case-law to the specific situations at issue in *Miasto Łowicz* also appears reasonable. There was a significant disconnection between the facts at issue before the referring courts and the rather general question that was posed by those courts. (66) It was unclear – also in the light of the limited detail provided in the orders for reference (67) – how the Court’s findings on the compatibility of the new regime for disciplinary proceedings against judges in Poland could have had an actual impact of a procedural or substantive nature in the main proceedings. Those proceedings concerned different matters. (68)

108. Third, in contrast to some scholarly voices, (69) I do not think that such a requirement of at least some base-line direct relevance for the decision to be taken by the referring court in the main proceedings is a departure from the traditional case-law of the Court. I suspect that part of the issue might simply be the consequence of an ‘optical illusion’. Before the existence of a distinct obligation flowing directly from Article 19(1) TEU was affirmed by the Court, in order to fall within the jurisdiction of the Court, the case had to be within the scope of EU law in the traditional sense. That requirement automatically limited the range of questions that could be asked because some discernible connection to a provision of EU legislation or at least a broader conflict with one of the EU law freedoms or principles was needed. (70) Assessed against that (naturally narrower) gateway, the issue of relevance and necessity did not arise often or appeared to be too onerous.

109. By contrast, once the second subparagraph of Article 19(1) TEU was no longer confined to the requirement that the case in the main proceedings fall within the scope of EU law in the traditional sense, the second (narrower, substantive) gateway was effectively removed. Now what stands in full sight is the first gateway of necessity/relevance, which has always been there, without anyone really paying it much attention, and for a rather understandable reason: one tends to pay attention, intuitively, to the narrower, not the broader, gateways. However, now that that is effectively the only gateway, it may be perceived as a new or a more stringent limitation, simply because it is the only one left standing.

110. The Court’s approach in *Miasto Łowicz* has subsequently been applied in *Prokuratura Rejonowa w Słubicach*, (71) which concerned national proceedings and questions rather similar to those at issue in *Miasto Łowicz*. By contrast, *Maler*, (72) as well as *Land Hessen*, (73) raise somewhat different issues on admissibility or jurisdiction.

111. In *Maler*, the request for a preliminary ruling was made due to a difference of opinion within the *Verwaltungsgericht Wien* (Administrative Court, Vienna, Austria) between the referring court (sitting as a single judge)

and the President of that court. The referring court considered that the allocation of one specific case, made on the basis of that court's internal rules on the allocation of cases, gave rise to issues under Article 83 of the Bundes-Verfassungsgesetz (Austrian Federal Constitutional Law) according to which, inter alia, no one may be removed from the jurisdiction of his or her lawful judge. As a result of the alleged conflict with the principle of the lawful judge, the referring court also expressed doubts as to whether it could be considered to be 'independent enough' to deal with the case under the standards laid down in Article 6 of the European Convention on Human Rights ('ECHR'), in Article 19(1) TEU, and in Article 47 of the Charter.

112. Applying *Miasto Łowicz*, the Court declared the reference inadmissible in its entirety, insisting that the case was not substantively connected to the second subparagraph of Article 19(1) TEU and that the answer of the Court could not provide the referring judge with an interpretation of EU law that would allow him to resolve the issues pending before him. (74)

113. Two other elements are perhaps worthy of mention in this context. First, the issue raised by the referring judge was a rather technical one within an area where a number of potential approaches are conceivable. Indeed, no one is likely to claim that as a matter of EU law, there is only one specific way in which cases might be allocated within a court in order to ensure compliance with the right to a lawful judge or, more broadly, the right to a fair trial. Second, and perhaps more importantly, the order for reference did not point to any elements that, either in isolation or taken together, could cast any doubt on the independence and impartiality of the judicial bodies involved in the case, or on the general health of the judicial system. In particular, no structural, systemic or other issues relating to the rule of law were brought to the attention of the Court in that case. On the contrary, the facts of the case showed that the national system did in fact offer some avenues for remedying the alleged infringement of the law, in the event that one existed. In fact, the referring court even made use of those avenues, but appeared to be dissatisfied with their ultimate outcome. (75)

114. In such circumstances, not dealing with the reference on the merits may be considered to be in line with established case-law according to which, in the absence of any indication to the contrary, it is not for the Court to infer that the national provisions ensuring the courts' independence and impartiality may be applied in a manner contrary to the principles enshrined in the domestic legal order or the principles of a State governed by the rule of law. (76) Put simply, no serious issue, possibly arising under Article 19(1) TEU, was detected that could suggest that the national legal system at issue were not able to 'auto-remedy'.

115. Finally, in *Land Hessen*, the referring court had asked the Court a question concerning its own status as a 'court or tribunal' within the meaning of Article 267 TFEU, read in the light of Article 47 of the Charter. The Court noted that, by that question, the referring court was, in essence, inviting the EU judiciary to examine the admissibility of its request for a preliminary ruling. Indeed, given that being a 'court or tribunal' within the meaning of Article 267 TFEU is a condition of admissibility of the reference, the fulfilment of that condition could be regarded as a prerequisite for the interpretation by the Court of the provision of EU law specified in the other question raised by the national court.

116. The Court analysed thoroughly the concerns raised by the referring court as regards admissibility and concluded that that body complied with the requirements of Article 267 TFEU. (77) However, the Court closed the section on admissibility by stating that 'that conclusion has no effect on the examination of the admissibility of the second question referred for a preliminary ruling, which, as such, is inadmissible. Since that question concerns the interpretation of Article 267 TFEU itself, which is not at issue for the purposes of resolving the dispute in the main proceedings, the interpretation requested by that question is not objectively required for the decision which must be made by the referring court'. (78)

117. The approach followed by the Court in its judgment and the wording of certain passages thereof may, at least at first sight, appear intriguing. However, upon closer inspection, it may perhaps be understood as follows.

118. The Court intended simply to indicate that when issues as to whether the conditions set out in Article 267 TFEU for the admissibility of the references arise, the examination of those issues pertains, rather obviously, to the admissibility of the reference, and not to its merits. Therefore, if doubts arise as to whether the body making a reference is a 'court or tribunal' for the purposes of Article 267 TFEU (for allegedly not being adequately independent, as was the case in *Land Hessen*, or for any other reason), that problem constitutes a preliminary issue of procedure, regardless of whether it was presented to the Court in terms of admissibility or made the object of a specific question referred. (79)

119. It is true that the Court's position on that issue has not been entirely consistent over the years. Indeed, the

judicial nature of the body making the request for a preliminary ruling has been assessed both in terms of jurisdiction of the Court, (80) and in terms of admissibility of the reference. (81) Furthermore, unlike in *Land Hessen*, the Court has in some cases answered questions concerning the concept of 'court or tribunal' within the meaning of Article 267 TFEU and whether the national body making the request in a case could be considered as such. (82)

120. However, I do not believe that much emphasis ought to be placed on the inevitable heterogeneity of the case-law assembled over the years since it is naturally likely to be very case-dependent. While of course such a proposition is probably unsatisfactory from a theoretical point of view, I do not consider it to give rise to any specific problem. In so far as the Court carries out a verification of the judicial nature of a national body making a request, whether it does so in the context of jurisdiction, admissibility, or (eventually) even merits, is of limited practical significance. The national court obtains the clarification sought and, where the Court detects a problem, the request is refused on procedural grounds, without any consideration of the substance of the questions referred. (83)

121. I do not consider, therefore, that the judgment of the Court in *Land Hessen* constitutes a departure from the case-law outlined above. In any event, the present cases can easily be distinguished from those examined in *Miasto Łowicz*, *Maler* and *Land Hessen*, an issue to which I now turn.

(iii) *The present cases are unlike those previously outlined*

122. First, in contrast with the situation in *Miasto Łowicz*, the reply given by the Court to the first question can indeed be taken into account as it concerns the correct composition of the adjudicating panel. From that point of view, the relevance of the first question is connected to the need to solve a specific and real problem that directly affects the proceedings before the referring court. In that regard, the President of the panel has various options available to her in order to remedy the situation of non-compliance.

123. By reference to the taxonomy referred to in *Miasto Łowicz*, I consider the present cases to fall squarely within the *third category*: the referring court seeks an answer from the Court in order to resolve a procedural question of national law before being able to rule on the substance of the cases before it.

124. At the same time, the present cases also fall within the *second category*: the referring court relies on the provisions of Directive 2016/343, a piece of EU legislation laying down rules of a procedural nature which appear to be applicable in the main proceedings, both *ratione personae* and *ratione materiae*. (84)

125. Against that background, and in the light of the alleged links between certain judges sitting on the panels destined to adjudicate in the main proceedings and the Minister for Justice/General Prosecutor, it stands to reason that the referring court may wonder whether the national measures at issue are compatible with the provisions of Directive 2016/343. Article 3 of that directive lays down the principle that 'Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law'. In that regard, it should be noted that the presumption of innocence is enshrined in Article 48 of the Charter, which corresponds to Article 6(2) and (3) ECHR, as is apparent from the Explanations relating to the Charter. (85) In turn, Article 6 of Directive 2016/343, echoing recital 22, provides essentially that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution, and that any doubt in that regard should benefit the suspect or accused persons.

126. Whether the provisions of Directive 2016/343 *in fact preclude* national measures such as those at issue in the present proceedings is thus an issue that relates to the *merits*, and not to the admissibility, of the first question.

127. Second, unlike in *Maler*, the issue raised by the referring court concerns the compatibility of certain national measures with provisions of EU primary and secondary law. In other words, the present cases are not merely a (faded) reflex of what is essentially a problem internal to the national legal system. In addition, the substance of the matter concerns a rather basic element, that of judicial impartiality, not merely a technical matter on which no unified approach is present in EU law. Moreover, *prima facie*, those potential issues are of a certain gravity and are likely to have significant systemic repercussions. Finally, these cases have been referred from within a specific legal context, within which the ability of such a system to 'auto-remedy' is far from obvious.

128. Third, in *Land Hessen*, the Court did provide the clarifications sought from the referring court. The existential ('am I a court or tribunal?') and the metaphysical ('I use the Article 267 TFEU procedure in order to check whether I can use that procedure') elements underlying the second question referred did not preclude the Court from examining the issues raised. The Court's *obiter dictum* in paragraph 62 of the judgment has, by and large, a pedagogic function. In the present cases, if the Court were to find the requests to be inadmissible in their entirety, the referring court would

receive no guidance on the issue raised.

129. Therefore, far from casting doubt on my conclusion on the admissibility of the first question referred, the Court's most recent case-law in fact reveals why an answer to that question is necessary for the referring court to give judgment in the cases pending before it.

B. The nature and the limits of Article 19(1) TEU

130. In the previous section of this Opinion, I sought to explain why I believe that, in line with the application of the traditional case-law of the Court regarding its jurisdiction and the admissibility of requests for a preliminary ruling, the referring court's first question is admissible. I also attempted to systemise the more recent case-law of the Court, demonstrating why nothing therein has in fact altered that traditionally open approach.

131. At present, it is nonetheless necessary to turn to the (new) elephant in the room: the second subparagraph of Article 19(1) TEU. There is no disguising that the unease felt as regards the assessment of admissibility in the present cases, as well, perhaps, as in other cases recently brought or currently pending before the Court, derives, to some extent, from the 'generous' approach that the Court has adopted with regard to the interpretation of Article 19(1) TEU. Indeed, once the substantive limits of needing to be 'within the scope' of EU law for the jurisdiction of the Court to be triggered fell away in the case of Article 19(1) TEU, concerns about the potential over-extensive application of the second subparagraph of Article 19(1) TEU logically arose.⁽⁸⁶⁾ Sooner or later, there may even be a temptation to reintroduce those limits in terms of admissibility. ⁽⁸⁷⁾

132. One cannot deny that the approach adopted in *Associação Sindical dos Juizes Portugueses* is quite far-reaching: the scope of Article 19(1) TEU is broad, both *ratione materiae* (encompassing all fields covered by EU law, irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) of the Charter in the individual case), and *ratione iudicis* (encompassing any national body that may rule, as a court or tribunal, on questions concerning the application and interpretation of EU law). As I noted in my *AFJR* Opinion, it is indeed rather difficult to find a national court or tribunal which may never, by definition, be called upon to rule on matters of EU law. ⁽⁸⁸⁾

133. On that basis, it could be argued that, given the broad scope of Article 19(1) TEU, a more restrictive approach to the *admissibility* of cases raising issues under that provision is warranted. In such a scenario, the criteria on admissibility would constitute the floodgates that prevent the Court from being submerged by countless references concerning a variety of aspects that, in the mind of some national courts, could raise issues of independence of the national judiciary.

134. In this section, I shall explain why I do not share that view. In fact, I am convinced that the Court's approach on this issue – when correctly framed and applied – is sound. For that purpose, it is necessary to outline the true nature of the second subparagraph of Article 19(1) TEU: it is simply an extraordinary remedy for extraordinary cases. Therefore, the access threshold in terms of admissibility is and ought to remain low, while the substantive threshold for its breach is relatively high (1). In that way, Article 19(1) TEU complements, but eventually may go beyond two other key Treaty provisions which also reflect the principle of judicial independence: Article 47 of the Charter and Article 267 TFEU (2).

(a) The nature and scope of Article 19(1) TEU

135. At the outset, it must be emphasised that the Court's reading of the provision is reflected in the text of Article 19(1) TEU, which requires Member States to 'provide remedies sufficient to ensure effective legal protection *in the fields covered by Union law*'. The obligation laid down therein is extensive and unqualified. It is area-based, not case-dependent.

136. It is also hardly disputable that a minimum of guarantees of judicial independence must be ensured, as a matter of principle, for all courts and as regards all their activities. It is absurd to claim that a national rule on judicial organisation would be unproblematic in purely domestic cases while potentially being an issue each time a provision or principle of EU law becomes applicable. (In)dependence is about control, pressure, and leverage. It is structural. It must be guaranteed transversally. Certainly, a person influencing or even controlling a judge or a court might decide not to exercise his or her influence in an individual case. However, that would hardly mean that that judge is in general 'independent'.⁽⁸⁹⁾ For that reason, there is simply no 'judicial independence within the scope of EU law' as opposed to 'judicial independence in purely national cases'. ⁽⁹⁰⁾ There is no 'part-time' judicial independence. ⁽⁹¹⁾

137. Furthermore, it is often impossible to identify, at the beginning of a procedure, whether or not a provision or principle of EU law may turn out to be applicable in the course of a given procedure. Moreover, many judicial decisions may, at some point after delivery, enter the EU 'judicial space' for one reason or another. Mutual recognition, not to mention mutual trust, would hardly work if national authorities were required to check, each time, whether a court of another Member State was 'independent enough' when they dealt with a (initially) purely internal case that, subsequently, crossed the border (metaphorically speaking) in order to deploy certain legal effects in another Member State.

138. That problem is nonetheless not limited to the horizontal dimension of mutual cooperation between Member States. (92) In a system such as that of the European Union, where the law is the main vehicle for achieving integration, the existence of an independent judicial system (both centrally and nationally), capable of ensuring the correct application of that law, is of paramount importance. Quite simply, without an independent judiciary, there would no longer be a genuine legal system. If there is no 'law', there can hardly be more integration. The aspiration of creating 'an ever closer union among the peoples of Europe' is destined to collapse if legal black holes begin to appear on the judicial map of Europe.

139. In view of the foregoing reasons, it is vital for the European judicial system categorically to insist on minimal guarantees of judicial independence and impartiality for all its constituent members, *irrespective of* whether in the individual case before a given court, EU law is in fact being applied.

140. However, all such structural arguments as to *why* reveal relatively little as to *how*. To start with, does Article 19(1) TEU have a *limitless* scope, thereby catching any potential problem relating to the judicial organisation of the Member States, their procedures and their practice? In other words, is Article 19(1) TEU like a powerful electron microscope, capable of detecting even the smallest particles that may (or may not) affect the 'health' of the national judiciary?

141. The answer must, in my view, be in the negative. The *material* scope of Article 19(1) TEU does not yet determine the *threshold* required for its *breach*. The former is the *area* that is 'covered' by the principles enshrined in the EU law provision: national measures that fall into that area can, accordingly, be subject to an evaluation of compatibility with the principles flowing therefrom. The latter is the *yardstick* to be used in order to carry out that evaluation.

142. That proposition requires a number of clarifications.

143. First, what in fact is the *yardstick* for a potential infringement of the second subparagraph of Article 19(1) TEU? Again, the text of Article 19(1) TEU lays down the obligation of the Member State and, accordingly, when that obligation is not complied with. It is only where Member States do not 'provide remedies sufficient to ensure effective legal protection' that they breach that provision.

144. I therefore agree with Advocate General Tanchev that Article 19(1) TEU is a provision concerned mainly with the structural and systemic elements of the national legal frameworks. (93) Those elements, irrespective of whether they stem from acts of the national legislature or the executive, or from a judicial practice, may call into question the ability of a Member State to ensure effective judicial protection for individuals. In other words, what is relevant under Article 19(1) TEU is whether a Member State's judicial system complies with the principle of the rule of law, one of the Union's founding values, which is also to be found in Article 2 TEU.

145. This is, I believe, a proposition that the Court has so far neither expressly embraced, nor refuted. In fact, the Court has not elaborated on this point, as it was not necessary for it to decide on the cases before it.

146. Second, if that were indeed the case, then the threshold for admissibility with regard to Article 19(1) TEU is not, and need not be, placed higher than usual. In this regard, the traditional case-law and approach on admissibility, as outlined in detail in the previous section of this Opinion, are sufficient. Indeed, the second subparagraph of Article 19(1) TEU already has a built-in and a rather high *substantive* threshold for its breach.

147. Article 19(1) TEU contains an extraordinary remedy for extraordinary situations. Its purpose is not to catch all possible issues arising with regard to the national judiciary, but only those of a certain gravity and/or of a systemic nature, to which the internal legal system is unlikely to offer an adequate remedy.

148. By *gravity and systemic nature*, I do not mean to say that, to fall foul of that provision, a problem must necessarily arise in a significant number of cases, or affect large parts of the national judicial system. The crucial issue is rather whether the (one-off or recurring) problem brought to the attention of the Court is likely to threaten the proper

functioning of the national judicial system, thereby jeopardising the capacity of the Member State in question to provide sufficient remedies to the individuals.

149. Viewed from that perspective, there is no shortage of situations within the national judicial systems that may concern individual errors, or even repetitive and thus structural ones, but which will nevertheless still not cross the threshold of Article 19(1) TEU. Examples may range from an incorrect indexation of judicial salaries in a given year; the failure to approve the 'end of year' bonus; the failure to attribute a case to the correct Chamber of the court or to the correct reporting judge; the failure to promote the most qualified person to the position of President of the Chamber; and so on. Conversely, whether a single, but key, judicial appointment was lawfully made might, despite taking place only once, have systemic repercussions that may warrant an examination under Article 19(1) TEU. (94)

150. Another aspect that is, in my view, relevant under Article 19(1) TEU is whether the national system offers, *in law and in fact*, sufficient structural guarantees to *self-correct* the problem once identified. When the general legal framework put in place by a Member State is, as a matter of principle, capable of remedying the potential error, instances of individual *misapplication* of that framework do not automatically lead to a breach of Article 19(1) TEU. It is not for the Court to monitor meticulously the compliance of national courts with their own national rules. (95) Therefore, elements pointing to wider implications aside, a single, isolated case of alleged error in the interpretation or application of a national provision, *in an otherwise healthy* legal system that is compliant with EU law, does not infringe Article 19(1) TEU.

151. Again, it is almost stating the obvious to say that not all matters possibly concerning the rules that govern the judiciary or court proceedings are an issue relating to the rule of law. (96) The review that the Court must carry out of national measures which allegedly affect the independence of the national judiciary cannot but be limited to *pathological* situations.

152. Third, as part of that assessment, it is crucial not only to examine the 'law on the books', but also to include the 'law on the ground'. The Court has consistently examined the compatibility with EU law of national laws and regulations since those are applied in practice, (97) in the light of the interpretation given to them by national courts (98) and, as the case may be, taking into consideration the general legal principles of the national legal system. (99) It is for this reason that the Court has insisted that alleged breaches of Article 19(1) TEU must always be examined in their context, by looking *at all relevant elements*. The technical aspects of the problem brought to the Court's attention cannot be examined in 'clinical isolation' from the broader legal and institutional landscape. (100)

153. The Court thus clearly looks beyond the individual provision. That scrutiny is not limited only to closely-related national law provisions, but extends in fact to the broader legal and institutional landscape. (101) Put simply, any potential ailment of an individual 'patient' is to be assessed by taking into account their overall 'health' with regard to judicial independence.

154. From that perspective, I remain puzzled as to how the approach to Article 19(1) TEU outlined in this section could be at odds with the equality of the Member States or could be setting any double standards. The standard is exactly the same and is required of everyone. However, the state of individual patients is objectively very different. (102) Equality of the Member States can hardly be approached in the form of purely formal, so as not to say formalist, equality: everyone must be treated exactly the same, *irrespective of* the situation and the context in which they find themselves. Senseless automaticity is not (material) equality, which indeed requires treating the same alike, but also different situations differently. (103)

155. Fourth and finally, the consequence of such an interpretation of Article 19(1) TEU is that the assessment of whether a national measure complies with the standards of Article 19(1) TEU would not be carried out when determining the *admissibility* of the questions ('does Article 19(1) TEU apply to the case at issue?'), but at the stage of assessing the *merits* of the questions ('does the national measure at issue comply with the standards set out in Article 19(1) TEU?').

156. That in turn raises yet another important question, but of a more pragmatic nature: does this approach risk creating problems for the Court's docket?

157. I do not think so.

158. On the one hand, the existing case-law on admissibility allows the Court to dismiss, rather swiftly, artificial or hypothetical cases, and also cases where, despite the issue falling *ratione materiae* under Article 19(1) TEU, the national

court would be unable to take into account (as in *Miasto Łowicz*) the Court's answer to the question(s) referred. (104) Similarly, cases where the basic requirements of Article 19(1) TEU appear to be lacking, and/or the referring court has not explained why an issue under Article 19(1) TEU may possibly arise, can be rejected in so far as the conditions of relevance and necessity of the question are not satisfied.

159. As I sought to explain, the *threshold* for a breach of Article 19(1) TEU is relatively high. Where the contested national measures, irrespective of their lawful or unlawful character, do not exhibit any genuine rule of law-related issue (regard being had to the gravity and systemic repercussions of the alleged breach or the inability of the system to self-correct), an assessment of the merits of the case does not appear to be more complex or time-consuming for the EU judiciary than that which focuses on its admissibility. (105)

160. Accordingly, an orthodox application of the Court's traditional case-law on admissibility as regards cases in which the questions referred for a preliminary ruling concern the interpretation of Article 19(1) TEU does not create, in my view, any risk of opening the Court's floodgates in respect of odd, ill-chosen or dishonest references. It also does not require the Court to 'tweak' its usual assessment of the 'necessity' criterion, in order to reject more cases than it normally would.

(b) Article 19(1) TEU, Article 47 of the Charter, and Article 267 TFEU: the same content, but a different purpose

161. There is one final element relating to the second subparagraph of Article 19(1) TEU that ought to be discussed: what relationship does that provision have with the other Treaty provisions which also enshrine the principle of judicial independence, in particular Article 47 of the Charter and Article 267 TFEU? (106) Indeed, the interrelationship between those provisions has been a source of some confusion for the parties, as well as for a number of referring courts. Do those provisions lay down different types of 'judicial independence'? Is it possible that a national court can be independent for the purposes of one of these provisions, while not independent enough for another? Are there, as a consequence, different 'judicial independencies' in EU law?

162. In my view, the simple answer is 'no': there is *only one and the same principle* of judicial independence. Quite apart from being self-evident in terms of logic, this consideration is also demonstrated by the fact that the Court has referred to that concept in the same manner, regardless of the EU provision being applied in the case at hand. (107) Thus, I cannot but fully agree with Advocates General Tanchev and Hogan that the content of both Article 19(1) TEU and Article 47 of the Charter, in terms of judicial independence, is, in essence, the same. (108)

163. That being said, the same content does not necessarily mean the same outcome in an individual case. The three provisions are different as to their scope and purpose within the structure of the Treaties. This difference means that a slightly different type of examination must be carried out under each of the three provisions.

164. Article 19(1) TEU has a broad scope, going beyond situations in which an individual case is governed, in the traditional view, by EU law. It requires Member States to ensure that the organisation and functioning of their judicial bodies, given their central role within the EU legal system, comply with the values of the Union, especially the rule of law. The threshold for its infringement is rather high: only issues of a systemic nature or of a certain gravity that are unlikely to be self-corrected by the domestic system of remedies, give rise to an infringement. The Court's analysis, in that context, clearly goes beyond the individual file, and includes the broad institutional and constitutional structure of the national judiciary.

165. Article 47 of the Charter is a provision that enshrines a subjective right of any party to proceedings – to an effective remedy and a fair trial – that comes into play only when a case falls within the scope of EU law under Article 51(1) of the Charter. Within that ambit, all parties are entitled to invoke a breach of Article 47 of the Charter. The verification of the 'independence' of a court, in that context, requires a detailed and case-specific assessment of all the relevant circumstances. Issues linked to some structural or systemic feature of the national judicial system are relevant only in so far as they may have had an impact on the individual proceedings. The intensity of the Court's review with regard to the independence of the judicial body in question is moderate in this context: not all breaches of the law amount to an infringement of Article 47 of the Charter. A certain gravity is required to that end. However, once the required standard of gravity is met, that is sufficient to give rise to an infringement of Article 47 of the Charter, since no other condition needs to be satisfied in order to uphold the individual right stemming from EU law.

166. Finally, Article 267 TFEU has a broad material scope, encompassing all situations in which any EU provision may be applicable, but extending also to certain situations that fall outside the scope of EU law. (109) The concept of 'court or tribunal' (which, by definition, requires the independence of the members thereof) has, in that provision, a

functional nature: it serves to identify the national bodies which can become the interlocutors of the Court in the context of a preliminary ruling procedure. An analysis under Article 267 TFEU is focused on a structural issue, at a rather general level: the position of that body within the institutional framework of the Member States. The intensity of the Court's review with regard to the independence of the body is, within that context, not that intensive. After all, the purpose of Article 267 TFEU is simply to identify the proper institutional interlocutors with regard to admissibility.

167. This differentiation has rather important consequences for the parties and the referring courts alike.

168. First, a potential issue resulting in a breach of Article 47 of the Charter can be raised only with regard to an individual right guaranteed under EU law. (110) That is likely to exclude reliance upon that provision in circumstances where questions are raised by national judges themselves concerning the compatibility of their system with the EU law principle of judicial independence, since judges themselves are unlikely to have a right stemming from EU law which is at stake in cases before them. By contrast, issues raised by judges themselves are indeed possible and admissible under Article 19(1) TEU and Article 267 TFEU. (111)

169. Second, the type of review, threshold and intensity, may eventually lead to different outcomes in terms of (in)compatibility. In particular, it is certainly plausible that one and the same issue may constitute a breach under Article 47 of the Charter, while not posing an issue under Article 19(1) TEU, (112) as well as the possibility of there being a breach of Article 19(1) TEU, while none under Article 47 of the Charter. (113)

170. Having concluded that the first question is admissible, I shall now turn to the merits.

C. Merits

171. By its question, the referring court asks the Court whether the second subparagraph of Article 19(1) TEU, in conjunction with Article 2 TEU and the principle of the rule of law enshrined therein, and Article 6(1) and (2), in conjunction with recital 22, of Directive 2016/343 must be interpreted as precluding national provisions according to which the Minister for Justice/General Prosecutor may, on the basis of criteria that are not made public, second judges to higher courts for an indefinite period and, at any time, may terminate that secondment at his own discretion.

172. According to a well-established line of case-law, the concept of judicial independence has two aspects to it: external and internal.

173. The *external* aspect (or independence *stricto sensu*) requires the court to be protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. As Advocate General Hogan aptly put it in a recent Opinion, independence *stricto sensu* requires that a national court is able to 'exercise its functions wholly autonomously, without being subject to any hierarchical constraint or being subordinated to any other body and without taking orders or instructions from any source whatsoever'. (114)

174. The *internal* aspect is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests as regards the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. As Advocate General Ruiz-Jarabo Colomer emphasised in *De Coster*, impartiality requires from the judges a 'psychological attitude of initial indifference' with regard to the disputes, in order to be (and appear) equidistant from the parties. (115)

175. As the Court has consistently stated, those two requirements call for 'rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it'. (116)

176. Against that background, the relevant question in the present cases seems to be the following: do the national measures at issue – in particular, those affecting the *composition* of judicial panels in criminal proceedings – offer sufficient guarantees regarding the independence and impartiality of each and every member of such panels, in order to dispel any doubt, in the mind of the individuals, that those members could be influenced by external factors or have some vested interest in the outcome of the proceedings?

177. It seems to me that the answer to that question is clearly in the negative. Indeed, the national measures at issue appear highly problematic in view of both the internal and external aspect of independence.

178. At the outset, I must stress that, under EU law, Member States are not required to adopt any particular constitutional model governing the relationship and interaction between the various branches of the State, provided of course that some basic separation of powers characteristic of the rule of law is maintained. (117) Accordingly, there is nothing in EU law that may preclude Member States from having recourse to a system according to which judges may, in the interest of service, be temporarily seconded from a court to another, either at the same level of jurisdiction or to a higher court. (118)

179. In systems where the Ministry of Justice is in charge of organisational and staff matters concerning the judiciary, decisions on secondment of individual judges are likely to fall within the competence of the Minister. Provided that the statutory procedures are followed, all the appropriate consents required under national law have been given, (119) and the *ordinary rules* on appointments, tenure and removal of judges *continue to apply during secondment*, that aspect too is in itself not problematic.

180. However, that clearly does not appear to be the case under the national rules at issue in the present cases. The seconded judges are, in many respects, not subject to the ordinary rules, but to a rather special – and very troubling – legal regime.

181. First, it seems to me that, in a system that is compliant with the rule of law, there should be at least some transparency and accountability with regard to the decisions on the secondment of judges. To be clear, I do not think that those decisions need necessarily be subject to some form of (direct) judicial review. Yet, other forms of review ought to exist, in order to avoid arbitrariness and the risk of manipulation. (120)

182. In particular, any decision relating to a secondment of a judge (initiation or termination) should be made on the basis of some *ex ante* known criteria and should be duly motivated. In my view, neither the abstract criteria, nor the specific motivation, need be of particular detail. Nevertheless, they must be capable of offering a minimum degree of clarity as to why and how a given decision was taken, in order to ensure some form of oversight. (121)

183. However, no such feature can be found in the national measures at issue. As the referring court explained, the criteria used by the Minister for Justice/General Prosecutor to second judges and to terminate their secondment, if they exist, are in any event not made public. I also understand that those decisions do not include any statement of reason. It is hard to speak of some form of transparency, accountability and control in these circumstances.

184. Second, the fact that the secondment is for an indefinite period and may be terminated at any time at the discretion of the Minister for Justice/General Prosecutor is a source of major concern. In fact, it is hard to imagine a more obvious example of a direct clash with the principle of the irremovability of judges. In that regard, I tend to consider that a (judicial) secondment should normally be for a fixed period of time, determined in terms of a given duration, or until another objectively ascertainable event occurs (for example, when the regular workforce of the court is again at full strength, or when the outstanding backlog of cases is cleared, depending on the exact reason for the secondment in the first place). (122)

185. Surely, some flexibility in that regard – concerning both the circumstances justifying a secondment or its termination, and the duration thereof – must be possible. However, the exercise of unfettered, unreviewable and non-transparent discretion permitted to the Minister for Justice/General Prosecutor to second judges and *to remove them* at any time as he sees fit appears to go far beyond what could be considered reasonable and necessary to ensure the smooth functioning of, and workflow within, the national judicial structure. As the European Parliament once noted, ‘discretion may be a necessary evil in modern government; absolute discretion coupled with an absolute lack of transparency, however, is fundamentally contrary to the rule of law’. (123)

186. Third, not only is the power to exercise that unfettered discretion assigned to a member of the government (and not, for example, to a judicial self-governing body, which to a certain extent may have mitigated the problem), but that member of the government also wears ‘a double hat’. Indeed, within the national constitutional set-up currently in place, the Minister for Justice also holds the office of the (Public) General Prosecutor. This seems to me to be one of the most – if not the most – disturbing feature of the national legal framework.

187. In that capacity, the Minister for Justice is the chief prosecutorial body within the Member State and has authority over the entire body of public prosecution services. He has broad powers over the subordinate prosecutors. Among other things, national law grants him the power to make decisions ‘concerning the content of an act in court’ by a subordinate prosecutor, who is required to act in accordance with such decisions. (124)

188. This produces an 'unholy' alliance between two institutional bodies which, normally, should function separately. As regards, in particular, the issue of secondment of judges, in effect it allows the hierarchical superior of one party to criminal proceedings (the prosecutor) to compose (part of) the panel which will hear the cases brought by his or her subordinate prosecutors.

189. The consequence is, quite obviously, that some judges may have an incentive (to say the least) to rule in favour of the prosecutor or, more generally, in favour of the Minister for Justice/General Prosecutor. Indeed, judges of lower courts may be tempted by the possibility of being rewarded with a secondment to a higher court, with possibly improved career prospects and a higher salary. In turn, seconded judges may be discouraged from acting independently, in order to avoid the risk that their secondment may be terminated by the Minister for Justice/General Prosecutor.

190. Fourth and finally, the situation described above is further aggravated by the fact that some of the seconded judges also hold the position of disciplinary agents attached to the Disciplinary Officer for Ordinary Court Judges. It is certainly not far-fetched to believe that judges may be reluctant to disagree with colleagues who, one day, may bring disciplinary proceedings against them. Moreover, in structural terms, such persons may very well be perceived as exercising a 'diffuse control and supervision' within the judicial panels and the courts to which they have been seconded due to the context and the parameters of their secondment.

191. Unsurprisingly, the Court is currently seised with several proceedings in which the compatibility with EU law of the Polish disciplinary regime for judges is being questioned. (125) In its order of 8 April 2020, the Court identified a number of potential issues in that regard. (126) It is also a well-known fact that, recently, several disciplinary proceedings have been opened in Poland against judges who merely made use of the possibility, provided for by Article 267 TFEU, to send a request for a preliminary ruling to this Court.

192. In brief, the national provisions at issue give rise, on the one hand, to a rather worrisome network of connections between the seconded judges, the prosecutors and (one member of) the government; and, on the other hand, to an unhealthy confusion of roles between judges, ordinary prosecutors and disciplinary agents.

193. Before concluding on this point, I must add that I do not find the arguments put forward on this point by the Prosecutor of the Lublin Province convincing. I fail to see how the fact that a system of secondment of judges was introduced long before the current government took office could affect an examination of whether or not that system complies with EU law. Nor is the fact that a secondment is only permitted with the consent of the judge in question (since the Polish Constitutional Court found a secondment without consent to be unconstitutional), (127) capable of calling into question any of the above findings.

194. I cannot but again emphasise that there is no issue whatsoever from the point of view of EU law with the secondment of judges per se, provided that during their secondment within the national judicial structures, those judges enjoy the same type of guarantees in terms of irremovability and independence as any other judges within that court. Nonetheless, for the reasons that I have discussed in detail in this section, that is very clearly not the case in the present cases.

195. In conclusion, I take the view that, in circumstances such as those at issue in the main proceedings, the minimum guarantees necessary to ensure the indispensable separation of powers between the executive and the judiciary are no longer present. The national rules at issue do not offer sufficient safeguards to inspire in the individuals, especially those subject to criminal proceedings, reasonable confidence that the judges sitting on the panel are not subject to external pressure and political influence, and have no vested interest in the outcome of the case.

196. Those national rules are therefore incompatible with the second subparagraph of Article 19(1) TEU. As the Court recently noted in *A.B. and Others*, that provision imposes on the Member States a clear and precise obligation as to the results to be achieved and that obligation is not subject to any condition as regards the independence to be met by the courts called upon to interpret and apply EU law. (128) In other words, that provision is endowed with direct effect and thus entitles a national court, by virtue of the principle of primacy of EU law, to do whatever is in its power to secure the compliance of national law with EU law. (129)

197. In the light of the above, I consider it unnecessary to dwell on the reasons as to why the national provisions at issue also infringe the provisions of Directive 2016/343. In the context of such a serious infringement of Article 19(1) TEU, it is of little added value to engage in further discussions on whether the burden of proof for establishing the guilt of suspects and accused persons is still on the prosecution, or whether the benefit of doubt is in fact given to

suspects or accused persons. The very core of the principle of the presumption of innocence is undermined when one and the same person – the Minister for Justice/General Prosecutor – may, in criminal cases, exert influence on both the prosecutors and certain judges on the bench. Consequently, a simultaneous infringement of the provisions of Directive 2016/343 appears to me to be inevitable.

V. Conclusion

198. I propose that the Court answers the questions referred for a preliminary ruling by the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) as follows:

– The second subparagraph of Article 19(1) TEU in conjunction with Article 2 TEU, and Article 6 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, are to be interpreted as precluding national rules according to which the Minister for Justice, who is at the same time the General Prosecutor, may, on the basis of criteria that are not made public, second judges to higher courts for an indefinite period and, at any time, may terminate that secondment at his own discretion;

– Questions 2, 3 and 4 are inadmissible.

1 Original language: English.

2 Judgments 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) (*'A. K. and Others'*); of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234) (*'Miasto Łowicz'*); of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535) (*'Land Hessen'*); and order of 2 July 2020, *S.A.D. Maler und Anstreicher* (C-256/19, EU:C:2020:523) (*'Maler'*).

3 OJ 2016 L 65, p. 1.

4 Consolidated text published in Dz. U. of 2019, item 52, as amended.

5 Consolidated text published in Dz. U. of 2020, item 30.

6 Articles 200, 280, 177, 296 of the Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny (Law of 6 June 1997 establishing the Criminal Code, consolidated version Dz. U. 2019, position 1950).

7 Article 62(2) of the Ustawa z dnia 10 września 1990 r. – Kodeks karny skarbowy (Law of 10 September 1990 establishing the Criminal Fiscal Code, consolidated version, Dz. U. 2020, position 19).

8 Judgment of 27 February 2018 (C-64/16, EU:C:2018:117).

9 See, to that effect, *A. K. and Others*, paragraphs 75, 84, and 86 and the case-law cited.

10 See, to that effect, judgment of 7 March 2017, *X and X* (C638/16 PPU, EU:C:2017:173, paragraph 37); *A. K. and Others*, paragraph 74; *Land Hessen*, paragraph 41; and judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 69).

11 See, for further detail in that regard, my Opinion in *Torubarov* (C-556/17, EU:C:2019:339, point 54).

12 See judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 51); *A. K. and Others*, paragraph 83; and judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 111).

13 See, for example, judgments of 3 July 2014, *Da Silva* (C-189/13, EU:C:2014:2043, paragraphs 34 and 35), and of 26 February 2015, *Matei* (C-143/13, EU:C:2015:127, paragraph 38).

14 See, for a recent example, judgment of 3 October 2019, *A and Others* (C-70/18, EU:C:2019:823, paragraph 73 and the case-law cited).

15 See, in this regard, for instance, judgment of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626). Strictly speaking, the question raised by the referring court concerned a presumption about the future treatment of a case by a national administrative authority in the event of its annulment by the national court. However, in view of the fact that the national administrative authority already disregarded the previous decisions of the national court, the treatment of the case in the *past* clearly made the question about the *future* much less hypothetical and justified.

16 Judgment of 17 September 1997, *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraph 23). More recently, *Land Hessen*,

paragraph 43 and the case-law cited).

17 See, for example, judgment of 17 July 2014, *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088, paragraphs 15 to 30).

18 See to that effect, judgment of 31 January 2013, *Belov* (C-394/11, EU:C:2013:48, paragraph 40 and the case-law cited).

19 Judgment of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 30 and the case-law cited).

20 Judgment of 16 July 2020, *Governo della Repubblica italiana (Status of Italian magistrates)* (C-658/18, EU:C:2020:572, paragraph 61 and the case-law cited).

21 Judgment of 14 January 1982 (65/81, EU:C:1982:6, paragraph 6).

22 Judgment of 9 November 1983, *San Giorgio* (199/82, EU:C:1983:318, paragraphs 7 to 10).

23 See orders of 6 September 2018, *Di Girolamo* (C-472/17, not published, EU:C:2018:684), and of 17 December 2019, *Di Girolamo* (C-618/18, not published, EU:C:2019:1090).

24 See, among many, judgments of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraphs 21 to 32 and the case-law cited), and of 15 January 2013, *Križan and Others* (C-416/10, EU:C:2013:8, paragraphs 62 to 73 and the case-law cited).

25 *A. K. and Others*, paragraph 110.

26 *Ibid.*, paragraph 112.

27 See, for example, Council of Europe, Consultative Council of European Judges (CCJE), Opinion N 19 (2016) of 10 November 2016, 'The Role Of Court Presidents' (CCJE(2016)2), p. 2.

28 See, for illustration, Article 11(4) of the Rules of Procedure of the Court.

29 See judgment of 5 September 2019, *AH and Others (Presumption of innocence)* (C-377/18, EU:C:2019:670, paragraph 32).

30 Judgments of 11 March 1980, *Foglia* (104/79, EU:C:1980:73), and of 16 December 1981, *Foglia* (244/80, EU:C:1981:302).

31 See, among many, judgments of 1 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraphs 26 and 27), and of 1 October 2019, *Blaise and Others* (C-616/17, EU:C:2019:800, paragraph 35).

32 See, inter alia, judgment of 17 February 2011, *Weryński* (C-283/09, EU:C:2011:85, paragraph 35).

33 See, notably, judgments of 21 April 1988, *Pardini* (338/85, EU:C:1988:194, paragraphs 10 and 11), and of 16 July 1992, *Lourenço Dias* (C-343/90, EU:C:1992:327, paragraph 18).

34 See, inter alia, judgments of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 24), and of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 31).

35 See above, points 33 to 36 of this Opinion.

36 See, recently, judgments of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30), and of 19 December 2019, *Deutsche Umwelthilfe* (C-752/18, EU:C:2019:1114).

37 See, among many, judgment of 4 December 2018, *The Minister for Justice and Equality and Commissioner of the Garda Síochána* (C-378/17, EU:C:2018:979). Specifically on that issue, and with numerous references to the case-law, see also my Opinion in *An tAire Talmhaíochta Bia agus Mara and Others* (C-64/20, EU:C:2021:14 and the case-law cited).

38 See, by way of example, judgment of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626).

39 See, inter alia, my Opinion in *Asociația "Forumul Judecătorilor din România" and Others* (C-83/19, C-127/19, C-195/19, C-291/19 and C-355/19, EU:C:2020:746 point 92 and the case-law cited) ('AFJR').

40 See, in particular, judgment in *A. K. and Others*.

41 *Ibid.*, paragraphs 99 and 100.

42 Judgment of 5 July 2016 (C-614/14, EU:C:2016:514).

43 See, inter alia, judgment of 28 January 2021, *Spetsializirana prokuratura (Letter of rights)* (C-649/19, EU:C:2021:75, paragraph 34 and the case-law cited).

44 See, for example, judgment of 19 October 1995, *Job Centre* (C-111/94, EU:C:1995:340).

45 See, inter alia, judgment of 28 February 2019, *Gradbeništvo Korana* (C-579/17, EU:C:2019:162, paragraph 35 and the case-law

cited).

46 Judgment of 9 November 2010 (C-137/08, EU:C:2010:659, paragraphs 31 and 32).

47 Judgment of 3 July 2019 (C-644/17, EU:C:2019:555, paragraph 27).

48 Judgment of 4 September 2019 (C-347/18, EU:C:2019:661).

49 See, inter alia, judgments of 2 March 2017, *Henderson* (C-354/15, EU:C:2017:157), and of 24 October 2019, *Gavanozov* (C-324/17, EU:C:2019:892).

50 See, for example, from amongst many, judgment of 20 March 1997, *Hayes* (C-323/95, EU:C:1997:169) (on security for costs being required under national law before any assessment on the merits may take place); judgment of 27 June 2013, *Agrokonsulting-04* (C-93/12, EU:C:2013:432) (a preliminary issue of exclusive jurisdiction in a Member State needing to be settled before any assessment on merits can take place).

51 See, recently, judgments of 3 July 2019, *UniCredit Leasing* (C-242/18, EU:C:2019:558, paragraphs 46 and 47), and of 25 November 2020, *Sociálna poisťovňa* (C-799/19, EU:C:2020:960, paragraphs 44 and 45).

52 See, for instance, judgments of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraphs 22 and 23), and of 8 September 2010, *Winner Wetten* (C-409/06, EU:C:2010:503, paragraphs 56 and 57).

53 See, with further references, judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 50 et seq.).

54 *A. K. and Others*, paragraph 102.

55 *Ibid.*, paragraph 103. The same logic was most recently confirmed yet again in judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153). Indeed, in that case, the referring court also found itself in a situation where, in essence, it had no jurisdiction to act *under national law* in order to secure compliance with Article 19(1) TEU.

56 See, inter alia, judgment of 16 June 1981, *Salonia* (126/80, EU:C:1981:136, paragraphs 5 to 7). More recently, judgment of 1 February 2017, *Tolley* (C-430/15, EU:C:2017:74, paragraphs 30 to 33).

57 To that effect, judgment of 26 March 2020, *Review Simpson and HG v Council and Commission* (C-542/18 RX-II and C-543/18 RX-11, EU:C:2020:232, paragraphs 57 and 58).

58 See above, footnote 30 of this Opinion.

59 See, for example, judgment of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, especially paragraphs 12 and 26).

60 Judgment of 26 March 2020, *Review Simpson and HG v Council and Commission* (C-542/18 RX-II and C-543/18 RX-11, EU:C:2020:232, paragraph 57). My emphasis.

61 Judgment in *Miasto Łowicz*.

62 *Ibid.*, paragraph 48.

63 *Ibid.*, paragraph 49, with reference to the judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117).

64 *Ibid.*, paragraph 50, with reference to the judgment of 17 February 2011, *Weryński* (C-283/09, EU:C:2011:85, paragraphs 41 and 42).

65 *Ibid.*, paragraph 51, with reference to the judgment in *A. K. and Others*.

66 See, for further detail in that regard, my Opinion in *Statul Român – Ministerul Finanțelor Publice* (C-397/19, EU:C:2020:747, points 33 and 34).

67 Opinion of Advocate General Tanchev in Joined Cases *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2019:775, points 115 to 126).

68 Judgment in *Miasto Łowicz*, paragraphs 45 to 53.

69 See, for example, Platon, S., 'Court of Justice, Preliminary references and rule of law: Another case of mixed signals from the Court of Justice regarding the independence of national courts: *Miasto Łowicz*', *Common Market Law Review*, vol. 57, Issue 6, 2020, pp. 1843 to 1866.

70 For a more detailed discussion, see my Opinion in *TÜV Rheinland LGA Products and Allianz IARD* (C-581/18, EU:C:2020:77) – on the scope of EU law in the more traditional, free movement cases, and my Opinion in *Ispas* (C-298/16, EU:C:2017:650) – on the scope of

EU law within the meaning of Article 51(1) of the Charter.

71 Order of 6 October 2020 (C-623/18, EU:C:2020:800).

72 Order of 2 July 2020 (C-256/19, EU:C:2020:523).

73 Judgment of 9 July 2020 (C-272/19, EU:C:2020:535).

74 *Maler*, paragraphs 46 to 48.

75 *Ibid.*, see paragraphs 7 to 27, in particular paragraph 16.

76 See already judgment of 4 February 1999, *Köllensperger and Atzwanger* (C-103/97, EU:C:1999:52, paragraph 24).

77 Land Hessen, paragraphs 42 to 61.

78 *Ibid.*, paragraph 62.

79 Cf. Iannuccelli, P., 'L'indépendance du juge national et la recevabilité de la question préjudicielle concernant sa propre qualité de «jurisdiction»', *Il Diritto dell'Unione Europea*, 2021, pp. 823 to 841.

80 See, inter alia, judgment of 6 October 2015, *Consorti Sanitari del Maresme* (C-203/14, EU:C:2015:664, paragraphs 16 to 31).

81 See, inter alia, judgment of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17, paragraphs 51 to 80).

82 See, inter alia, judgments of 27 April 1994, *Almelo* (C-393/92, EU:C:1994:171, paragraphs 21 to 24); of 4 June 2002, *Lyckeskog* (C-99/00, EU:C:2002:329, paragraphs 10 to 19); and of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, paragraphs 54 to 63).

83 See also Opinion of Advocate General Wahl in *Gullotta and Farmacia di Gullotta Davide & C.* (C-497/12, EU:C:2015:168, points 15 and 25).

84 As set out above in points 69 to 71 of this Opinion.

85 See, for example, judgment of 25 February 2021, *Dalli v Commission* (C-615/19 P, EU:C:2021:133, paragraph 223).

86 As already set out in my Opinion in *AFJR*, points 212 and thereafter.

87 At that moment, the scholarly warnings quoted above could indeed be correct – see above, points 108 and 109 and footnote 69.

88 See my Opinion in *AFJR*, point 207.

89 Intriguingly, ideas not too dissimilar about 'sectoral independence' were in fact advanced after 1989 in a number of former Communist States as a means of judicial self-justification and continuity, suggesting that in some areas (such as 'politics-free civil law'), the judges were in effect (already) independent, largely because in those areas, there were no (longer) attempts to influence the outcome of individual cases. For an excellent and readable account in English of how the system genuinely operated (and how flawed that logic is in terms of genuine judicial independence), see, for example, Markovits, I., *Justice in Lüritz: Experiencing Socialist Law in East Germany*, Princeton University Press, 2010.

90 On this issue, see also my Opinion in *Torubarov* (C-556/17, EU:C:2019:339, points 54 and 55).

91 Or indeed 'area-of-law-based': the idea that while perhaps there may be some issues in 'political cases', the more 'technical areas of EU law', say VAT law or environmental law, would still be applied properly, may be entertained only by somebody without any idea or historical memory of how a captured judicial system works (or, rather, does not work).

92 In that context, see particularly judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586), and of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)* (C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033).

93 See, in particular, Opinions of Advocate General Tanchev in *Commission v Poland (Independence of ordinary courts)* (C-192/18, EU:C:2019:529, point 115), and in Joined Cases *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2019:775, point 125).

94 See, in this regard, my Opinion in *AFJR*, points 265 to 279 (concerning the improper appointment of the head of the Judicial Inspection).

95 For a similar view, in another context, see European Court of Human Rights ('the ECtHR') judgment of 1 December 2020, *Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418, § 209 and the case-law cited); (*Ástráðsson*).

- 96 See, by analogy, judgment of 26 March 2020, *Review Simpson and HG v Council and Commission* (C-542/18 RX-II and C-543/19 RX-11, EU:C:2020:232, paragraphs 71 to 76). See also, in a different context, ECtHR judgment in *Ástráðsson*, § 234.
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- 97 See, to that effect, judgment of 27 November 2003, *Commission v Finland* (C-185/00, EU:C:2003:639, paragraph 109).
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- 98 See, to that effect, judgment of 13 December 2007, *Commission v Ireland* (C-418/04, EU:C:2007:780, paragraph 166).
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- 99 See, to that effect, judgment of 26 June 2003, *Commission v France* (C-233/00, EU:C:2003:371, paragraph 84).
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- 100 See, with further references, my Opinion in *AFJR*, especially points 243 and 244.
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- 101 See, for example, *A. K. and Others*, paragraph 142, or judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraphs 98 to 106, and 163).
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- 102 Returning to the metaphor of the patient, the suggestion that the objective context does not matter in such cases makes one think of a requirement that a first response medical team, having just arrived at the scene of a car crash, is to examine not only the passengers travelling in the vehicles which were part of the collision, but also all the passengers in all the other cars present, including those who were not involved in the collision, but who had simply stopped to observe what was happening. After all, they are *all car passengers* and all of them must be *treated exactly the same*, no matter the circumstances.
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- 103 Bartlett, R.C., and Collins, S.D., *Aristotle's Nicomachean Ethics: A New Translation*, University of Chicago Press, 2011.
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- 104 For a recent example, see the Opinion of Advocate General Pikamäe in *IS (Illegality of the order for reference)* (C-564/19, EU:C:2021:292, points 85 to 92).
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- 105 In this regard, the reasoning set out by the Court in *Maler* as to the admissibility of the request for a preliminary ruling could very well be made, in respect of the same scope and detail, as a decision on merits.
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- 106 Leaving aside other specific (typically secondary law) regimes that also embrace and further develop the concept of judicial independence and which may also come into question in specific scenarios, such as Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56). In detail, see my Opinion in *AFJR*, points 183 to 225.
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- 107 See, inter alia, judgment of 16 February 2017, *Margarit Panicello* (C-503/15, EU:C:2017:126, paragraphs 37 and 38) (regarding Article 267 TFEU); *A. K. and Others* (paragraphs 121 and 122) (regarding Article 47 of the Charter); judgments of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraphs 71 to 73) (regarding Article 19(1) TEU); and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 143).
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- 108 See Opinion of Advocate General Hogan in *Repubblika* (C-896/19, EU:C:2020:1055, points 45 and 46), and Opinion of Advocate General Tanchev in *A. K. and Others*, EU:C:1019:551, point 85.
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- 109 See, in particular, judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraphs 50 to 53). With respect to certain specific issues raised in that regard, see recently my Opinion in *J & S Service* (C-620/19, EU:C:2020:649, points 27 to 74).
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- 110 A case apart are situations in which the scope of EU law under Article 51(1) of the Charter is triggered by a specific regime of EU secondary law, which then renders Article 47 of the Charter applicable. See my Opinion in *AFJR*, points 196 to 202.
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- 111 See also, in this regard, Opinion of Advocate General Hogan in *Repubblika* (C-896/19, EU:C:2020:1055, points 33 to 47).
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- 112 There has been an individual breach of Article 47 of the Charter that does not reach the gravity threshold of Article 19(1) TEU.
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- 113 The type of breach has reached the threshold of Article 19(1) TEU, but there were no individual rights stemming from EU law at stake under Article 47 of the Charter (most recently, in essence, the scenario in the judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, in particular paragraph 89).
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- 114 Opinion of Advocate General Hogan in *Repubblika* (C-896/19, EU:C:2020:1055, point 58).
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- 115 C-17/00, EU:C:2001:366, point 93, with reference to the writings of jurist P. Calamandrei.
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- 116 See, more recently, *Land Hessen*, paragraph 52 and the case-law cited, and judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 117).
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- 117 *A. K. and Others*, paragraph 130 and the case-law cited. In detail, with further references, see my Opinion in *AFJR*, point 230.
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- 118 Similarly, ECtHR judgments of 25 October 2011, *Richert v. Poland* (CE:ECHR:2011:1025JUD005480907, § 44), and of 20 March 2012, *Dryzek v. Poland* (CE:ECHR:2012:0320DEC001228509, § 49).
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- 119 For example, by the judiciary self-governing body, and/or the presidents or the councils of the courts involved, and/or the

judge in question.

120 See ECtHR judgment of 25 October 2011, *Richert v. Poland* (CE:ECHR:2011:1025JUD005480907, §§ 42 and 44 and the case-law cited).

121 Of whatever form appropriate: be it by other members of the government and/or the national parliament; supervision by the media and public opinion; or ultimately also for a potential litigant who might entertain doubts as to the proper composition of the panel called on to adjudicate on his or her case and might wish to raise that issue in the course of the proceedings in his or her case.

122 See ECtHR judgment of 25 October 2011, *Richert v. Poland* (CE:ECHR:2011:1025JUD005480907, § 45).

123 European Parliament (2006) Report on the Commission's 21st and 22nd Annual reports on monitoring the application of Community law (A6-0089/2006 final) p. 17.

124 For more detail and an evaluation, see Venice Commission, Opinion on the Act on the Public Prosecutor's Office, as amended (2017) Opinion 892/2017.

125 See especially Case C-791/19, *Commission v Poland (Disciplinary regime for judges)*. See the Opinion of Advocate General Tanchev in that case (C-791/19, EU:C:2021:366).

126 Order of 8 April 2020, *Commission v Poland* (C-791/19 R, EU:C:2020:277).

127 Judgment of 15 January 2009, No K 45/07, OTK ZU No 1/a/2009, position 3.

128 Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 146).

129 See, recently, for example, judgment of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána* (C-378/17, EU:C:2018:979, paragraph 36 and the case-law cited).

JUDGMENT OF THE COURT (Grand Chamber)

16 November 2021 (*)

(References for a preliminary ruling – Rule of law – Independence of the judiciary – Second subparagraph of Article 19(1) TEU – National legislation providing the possibility for the Minister for Justice to second judges to higher courts and to terminate those secondments – Adjudicating panels in criminal cases including judges seconded by the Minister for Justice – Directive (EU) 2016/343 – Presumption of innocence)

In Joined Cases C-748/19 to C-754/19,

SEVEN requests for a preliminary ruling under Article 267 TFEU from the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), made by decisions of 2 September 2019 (C-749/19), 16 September 2019 (C-748/19), 23 September 2019 (C-750/19 and C-754/19), 10 October 2019 (C-751/19) and 15 October 2019 (C-752/19 and C-753/19), received at the Court on 15 October 2019, in the criminal proceedings against

WB (C-748/19),

XA,

YZ (C-749/19),

DT (C-750/19),

ZY (C-751/19),

AX (C-752/19),

BV (C-753/19),

CU (C-754/19),

other parties:

Prokuratura Krajowa,

formerly

Prokuratura Rejonowa w Mińsku Mazowieckim (C-748/19),

Prokuratura Rejonowa Warszawa-Żoliborz w Warszawie (C-749/19),

Prokuratura Rejonowa Warszawa-Wola w Warszawie (C-750/19, C-753/19 and C-754/19),

Prokuratura Rejonowa w Pruszkowie (C-751/19),

Prokuratura Rejonowa Warszawa-Ursynów w Warszawie (C-752/19),

as well as **Pictura sp. z o.o.** (C-754/19),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, K. Jürimäe, C. Lycourgos, E. Regan, S. Rodin and I. Jarukaitis (Rapporteur), Presidents of Chambers, J.-C. Bonichot, P.G. Xuereb, N. Piçarra, L.S. Rossi and A. Kumin, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Prokuratura Rejonowa w Mińsku Mazowieckim, by J. Ziarkiewicz, Regional Public Prosecutor, Lublin,
- the Prokuratura Rejonowa Warszawa-Żoliborz w Warszawie, the Prokuratura Rejonowa Warszawa-Wola w Warszawie, the Prokuratura Rejonowa w Pruszkowie and the Prokuratura Rejonowa Warszawa-Ursynów w Warszawie, by A. Szeliga and F. Wolski, Regional Public Prosecutors, Warsaw,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by K. Herrmann, P.J.O. Van Nuffel, R. Troosters and H. Krämer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 May 2021,

gives the following **Judgment**

1 These requests for a preliminary ruling concern the interpretation of the second subparagraph of Article 19(1) TEU, read in the light of Article 2 TEU, and of Article 6(1) and (2) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the

right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1), read in the light of recital 22 of that directive.

2 The requests have been made in criminal proceedings brought against WB (C-748/19), XA and YZ (C-749/19), DT (C-750/19), ZY (C-751/19), AX (C-752/19), BV (C-753/19) and CU (C-754/19).

[text deleted – see AG reference for details of Legal context]

Jurisdiction of the Court

34 According to the Polish Government, the Prokuratura Regionalna w Lublinie (Regional Public Prosecutor's Office, Lublin, Poland) and the Prokuratura Regionalna w Warszawie (Regional Public Prosecutor's Office, Warsaw, Poland), which have submitted observations to the Court on behalf of the district public prosecutor's offices which initiated the criminal proceedings at issue in the main proceedings, the legal and factual contexts concerned by the questions referred do not fall within the scope of EU law. They argue that the drafting of provisions of national law concerning the organisation of justice, in particular the procedure for appointing judges, the composition of councils of the judiciary or the secondment of judges to a court other than that in which they usually sit, and the legal effects of judgments of the national courts, fall within the exclusive competence of each Member State.

35 The Regional Public Prosecutor's Office, Lublin, and the Regional Public Prosecutor's Office, Warsaw, emphasise, in particular, that the Court has no power to establish the conditions under which the secondment of judges may be allowed or to assess the effectiveness of the appointment of a person to the post of judge; nor does it have the power to decide whether that person is a judge or to rule on the existence of a decision of a national court. Therefore, the Court does not have jurisdiction to answer the questions referred for a preliminary ruling that have been raised in the cases in the main proceedings.

36 In that regard, it must be noted that, although it is true that the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and that that may be the case, in particular, as regards national rules relating to the adoption of decisions appointing judges and, where applicable, rules relating to the judicial review that applies in the context of such appointment procedures (judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 75 and the case-law cited). The same is true of national rules relating to the adoption of decisions seconding judges so that they may exercise judicial functions in another court.

37 In addition, the objections thus raised by the Polish Government, the Regional Public Prosecutor's Office, Lublin, and the Regional Public Prosecutor's Office, Warsaw, relate, in essence, to the actual scope of the provisions of EU law mentioned in the questions referred and, therefore, to the interpretation of those provisions. Such an interpretation clearly falls within the jurisdiction of the Court under Article 267 TFEU (see, by analogy, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 76 and the case-law cited).

38 It follows from the foregoing that the Court has jurisdiction to rule on the present requests for a preliminary ruling.

The first question

39 By its first question, the referring court asks, in essence, whether the second subparagraph of Article 19(1) TEU, read in the light of Article 2 TEU, and Article 6(1) and (2) of Directive 2016/343 are to be interpreted as precluding provisions of national legislation pursuant to which the Minister for Justice of a Member State may, on the basis of criteria which have not been made public, second a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by way of a decision which does not contain a statement of reasons, terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period.

Admissibility

40 The Polish Government, the Regional Public Prosecutor's Office, Lublin, and the Regional Public Prosecutor's Office, Warsaw, contend that that question is inadmissible.

41 In that regard, in the first place, the Regional Public Prosecutor's Office, Lublin, and the Regional Public Prosecutor's Office, Warsaw, remark that the decisions to submit the present requests for a preliminary ruling to the

Court were adopted by the Chair of the adjudicating panel, ruling without the participation of the other two members of that panel. However, according to Article 29 § 1 of the Code of Criminal Procedure, an appeal court must sit in a panel of three judges unless otherwise provided for by law, and there is nothing in the cases in the main proceedings to justify the use of another adjudicating panel. Thus, the Chair of the adjudicating panel has no jurisdiction to rule alone on any question whatsoever, whether principal or incidental, so that the Court cannot be regarded as having been seised by a 'court or tribunal' of a Member State, within the meaning of Article 267 TFEU.

42 In that regard, it should be borne in mind, first of all, that, in accordance with the settled case-law of the Court, in order to determine whether a body making a reference is a 'court or tribunal', within the meaning of Article 267 TFEU, which is a question governed by EU law alone, and therefore to determine whether the request for a preliminary ruling is admissible, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (judgment of 9 July 2020, *Land Hessen*, C-272/19, EU:C:2020:535, paragraph 43).

43 In this instance, the present requests for a preliminary ruling were lodged by the Tenth Division (Appeals in Criminal Matters) of the Sąd Okręgowy w Warszawie (Regional Court, Warsaw), by way of the Chair of the adjudicating panels in the seven cases in the main proceedings. Moreover, it is not disputed that the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) meets the requirements set out in paragraph 42 of this judgment.

44 It follows from settled case-law that, in the context of a preliminary ruling procedure referred to in Article 267 TFEU, it is not for the Court, in view of the distribution of functions between itself and the national court, to determine whether the order for reference was made in accordance with the rules of national law governing the organisation of the courts and their procedure. The Court is therefore bound by an order for reference made by a court or tribunal of a Member State, in so far as that order has not been rescinded on the basis of a means of redress provided for by national law (judgment of 14 January 1982, *Reina*, 65/81, EU:C:1982:6, paragraph 7).

45 Thus, none of the arguments put forward by the Regional Public Prosecutor's Office, Lublin, and the Regional Public Prosecutor's Office, Warsaw, as set out in paragraph 41 of this judgment, is such as to call in question the fact that the first question has been put by a 'court or tribunal', within the meaning of Article 267 TFEU.

46 In the second place, the Polish Government emphasises that the cases in the main proceedings fall within the scope of criminal law and criminal procedure, that is to say, areas which are not harmonised by EU law. The link with EU law which the referring court is attempting to establish and which, in its view, results from the fact that it is called upon to examine criminal cases, that the rights of defence of each accused person must be respected, and that those persons are also protected under Directive 2016/343, is not sufficiently real to permit the inference that an answer to that question is necessary to resolve the disputes before it.

47 In that regard, it should be pointed out that, by its first question, the referring court seeks to ascertain, even before the cases in the main proceedings are dealt with on the merits, whether the national rules on the basis of which a seconded judge forms part of the adjudicating panels called upon to hear and determine those cases are compatible with the principle of the independence of judges.

48 The Court has already emphasised that it may be necessary to answer questions referred in order to be able to provide referring courts with an interpretation of EU law that enables them to settle procedural questions of national law before they can rule on the substance of disputes pending before them (see, to that effect, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court - Appointment)*, C-487/19, EU:C:2021:798, paragraph 94 and the case-law cited).

49 In this instance, the first question referred concerns the interpretation of provisions of EU law and their effects, in view, in particular, of the primacy of that law, on the regularity of the composition of the adjudicating panels hearing the cases in the main proceedings. An answer from the Court is therefore required in order to enable the referring court to settle a question raised *in limine litis* before the adjudicating panels rule on the substance of the disputes in the main proceedings.

50 In those circumstances, the Polish Government's objection must be dismissed.

51 In the third place, the Polish Government argues that the question referred is hypothetical, since the Court's answer to that question can have no bearing on the outcome of the criminal cases in the main proceedings. From a procedural point of view, even if the Court were to find that the provisions at issue relating to the secondment of judges

are contrary to EU law, the Chair of the adjudicating panel would be unable to apply such an interpretation, since she is not entitled to deprive another member of that panel of the right to give a ruling, including on the basis of EU law.

52 In that regard, it should be emphasised that, in accordance with the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in 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 EU law, the Court is in principle required to give a ruling (judgment of 24 November 2020, *Openbaar Ministerie (Forgery of documents)*, C-510/19, EU:C:2020:953, paragraph 25 and the case-law cited).

53 Next, it has been recalled in paragraph 36 of this judgment that, when exercising their competence in the field of the organisation of justice, the Member States are required, in particular when drawing up national rules relating to the secondment of judges in order that they may exercise judicial functions in another court or relating to the review of the regularity of the adjudicating panel, to comply with their obligations deriving from EU law.

54 In that regard, it must be pointed out that the arguments put forward by the Polish Government relate, in essence, to the scope and thus to the interpretation of the provisions of EU law with which the first question is concerned, and to the likely effects of those provisions in view, in particular, of the primacy of that law. Such arguments, which concern the substance of the question referred, cannot therefore, by their very nature, entail the inadmissibility of that question (see, to that effect, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 90 and the case-law cited).

55 In the fourth and last place, the Polish Government, the Regional Public Prosecutor's Office, Lublin, and the Regional Public Prosecutor's Office, Warsaw, argue that the requests for a preliminary ruling do not contain the information referred to in Article 94 of the Rules of Procedure. They maintain that, in those requests, the referring court has not defined the subject matter of the disputes in the main proceedings or the relevant facts; nor has it set out, even in summary form, the factual information on which the questions referred are based.

56 Moreover, the requests for a preliminary ruling do not contain an adequate statement of reasons as regards, in particular, the reasons for the choice of the provisions of EU law in respect of which interpretation is sought and proof of the existence of a link between those provisions and the national rules applicable in the main proceedings. The referring court has merely cited provisions of EU law and set out in summary form the interpretation of some of those provisions, without examining either their interdependence or the relevance of the various rules in respect of which interpretation is sought for resolving the disputes in the main proceedings.

57 In that regard, it is apparent from the elements referred to in paragraphs 5 to 14 and 16 to 19 of this judgment that the requests for a preliminary ruling, as clarified by the referring court in its response to a request for information put to it by the Court, contain all the necessary information, including the content of the provisions of national legislation that may be applicable in this instance, the reasons which have led the referring court to question the Court regarding the interpretation of the provisions referred to in paragraph 39 of this judgment, and the link established by that court between those provisions and the national rules relied on, so that the Court is in a position to rule on the first question.

58 In the light of all the foregoing considerations, it must be held that the first question referred is admissible.

Substance

59 Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and the judicial protection that individuals derive from EU law to national courts and tribunals and to the Court of Justice (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 108 and the case-law cited).

60 In that regard, as provided for by the second subparagraph of Article 19(1) TEU, it is for the Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 109 and the case-law cited).

61 As is apparent from settled case-law, the principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 110 and the case-law cited).

62 As regards the material scope of the second subparagraph of Article 19(1) TEU, that provision refers to the 'fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 111 and the case-law cited).

63 Under the second subparagraph of Article 19(1) TEU, every Member State must thus in particular ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, are liable to rule, in that capacity, on the application or interpretation of EU law meet the requirements of effective judicial protection (judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 104 and the case-law cited).

64 In this instance, it is common ground that the Polish ordinary courts, which include regional courts such as the Sąd Okręgowy w Warszawie (Regional Court, Warsaw), may be called upon to rule on questions relating to the application or interpretation of EU law and that, as 'courts or tribunals' within the meaning of EU law, they fall within the Polish judicial system in the 'fields covered by Union law', within the meaning of the second subparagraph of Article 19(1) TEU, with the result that they must meet the requirements of effective judicial protection (see, to that effect, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 106 and the case-law cited).

65 To guarantee that such courts are in a position to ensure the effective legal protection thus required under the second subparagraph of Article 19(1) TEU, maintaining their independence is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy (judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 107 and the case-law cited).

66 As the Court has emphasised on several occasions, that requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 108 and the case-law cited).

67 It is settled case-law that the guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 109 and the case-law cited).

68 In particular, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must in particular be ensured in relation to the legislature and the executive (judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 127 and the case-law cited).

69 In that regard, it is necessary that judges be protected from external intervention or pressure liable to jeopardise their independence. The rules applicable to the status of judges and the exercise of their judicial functions must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned, and thus preclude a lack of appearance of independence or impartiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals (judgment of 6 October 2021, *W.Ż. (Chamber*

of *Extraordinary Control and Public Affairs of the Supreme Court – Appointment*), C-487/19, EU:C:2021:798, paragraph 110 and the case-law cited).

70 In this instance, the referring court's doubts concern the possibility for the Minister for Justice of a Member State, on the basis of criteria which have not been made public, to second a judge to another criminal court for a fixed or indefinite period and, at any time, by way of a decision which does not contain a statement of reasons, to terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period.

71 In that regard, as has been recalled in paragraph 67 of this judgment, the guarantees of independence and impartiality which courts that may be called upon to rule on the application or interpretation of EU law are required to provide under EU law presuppose, inter alia, rules as regards the composition of the body concerned and the appointment, length of service and grounds for dismissal of its members that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. Such rules necessarily include those concerning the secondment of judges, since, as is the case with the provisions of Article 77 of the Law on the organisation of the ordinary courts, those rules are liable to affect both the composition of the body which is called upon to hear and determine a case and the length of service of the judges thus seconded. They also provide for the possibility of terminating the secondment of one or more of the members of that body.

72 It is true that the Member States may have recourse to a system according to which judges may, in the interests of the service, be temporarily seconded from one court to another (see, to that effect, ECtHR, 25 October 2011, *Richert v. Poland*, CE:ECHR:2011:1025JUD005480907, § 44, and 20 March 2012, *Dryzek v. Poland*, CE:ECHR:2012:0320DEC001228509, § 49).

73 However, compliance with the requirement of independence means that the rules governing the secondment of judges must provide the necessary guarantees of independence and impartiality in order to prevent any risk of that secondment being used as a means of exerting political control over the content of judicial decisions (see, by analogy, judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 198 and the case-law cited).

74 It will ultimately be for the referring court to rule, in the light of all the principles recalled in paragraphs 59 to 73 of this judgment, having made the assessments required for that purpose, on whether the conditions under which the Minister for Justice may second a judge to a higher court and terminate that secondment, taken as a whole, are such as to lead to the conclusion that, during the period of those judges' secondment, they are not guaranteed to be independent and impartial (see, by analogy, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 131).

75 Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and of acts adopted by the EU institutions, providing, inter alia, the referring court, on the basis of the material in the case file, with interpretations of EU law which may be useful to the referring court in assessing the effects of one provision of EU law or another (see, to that effect, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraphs 132 and 133 and the case-law cited).

76 In that regard, it is true that the fact that, in accordance with Article 77 § 1 of the Law on the organisation of the ordinary courts, the Minister for Justice may not second a judge to another court for the purpose of exercising judicial functions or performing administrative tasks without that judge's consent constitutes an important procedural safeguard.

77 However, as regards the Polish rules governing the secondment of judges and the very conditions under which judges have been seconded to the Sąd Okręgowy w Warszawie (Regional Court, Warsaw), the referring court mentions a number of factors which, in its view, empower the Minister for Justice to influence those judges, so that doubts may arise as to their independence.

78 In the first place, as has been stated by the referring court, the criteria applied by the Minister for Justice for the purpose of seconding judges are not made public. In addition, the Minister for Justice has the power to terminate such secondments at any time, without the criteria that may be associated with that power being known and without the reasons for such a decision being stated.

79 In order to avoid arbitrariness and the risk of manipulation, the decision relating to the secondment of a judge and the decision terminating that secondment, in particular where a secondment to a higher court is involved, must be taken on the basis of criteria known in advance and must contain an appropriate statement of reasons.

80 In the second place, it is apparent from Article 77 § 4 of the Law on the organisation of the ordinary courts that the Minister for Justice may terminate the secondment of a judge irrespective of whether that secondment is for a fixed or indefinite period, and that, in the specific case where the judge has been seconded for a fixed period, the termination may even take place without prior notice. That provision thus allows the Minister for Justice to decide to terminate the secondment of a judge at any time. Moreover, that provision does not lay down specific conditions governing the termination of the secondment.

81 Thus, the possibility available to the Minister for Justice to terminate the secondment of a judge at any time, in particular in the case of a secondment to a higher court, could give an individual the impression that the assessment to be carried out by the seconded judge who is to hear and determine his or her case will be influenced by the fear of termination of the secondment.

82 Furthermore, that possibility to terminate the secondment of a judge at any time and without any publicly known reason could also give the seconded judge the feeling of having to meet the expectations of the Minister for Justice, which could give rise to the impression on the part of the judges themselves that they are 'subordinate' to the Minister for Justice, in a manner incompatible with the principle of the irremovability of judges.

83 Lastly, as the termination of the secondment of a judge without that judge's consent is liable to have effects similar to those of a disciplinary penalty, the second subparagraph of Article 19(1) TEU requires that the regime applicable to such a measure provide all the necessary guarantees to prevent any risk of such a regime being used as a means of exerting political control over the content of judicial decisions, which means, inter alia, that it must be possible for that measure to be legally challenged in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter (see, to that effect, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraphs 115 and 118).

84 In the third place, while the Minister for Justice may, as has been recalled in paragraph 80 of this judgment, by terminating a judge's secondment, take a decision which has an effect on the composition of an adjudicating panel, that same minister also, pursuant to Article 1 § 2 of the Law on the Public Prosecutor's Office, occupies the position of Public Prosecutor General and, in that capacity, pursuant to Article 13 § 2 of that law, has authority over, inter alia, public prosecutors attached to the ordinary courts. Thus, the Minister for Justice has, in any given criminal case, power over both the public prosecutor attached to the ordinary court and the seconded judges, which is such as to give rise to reasonable doubts in the minds of individuals as to the impartiality of those seconded judges when they rule in such a case.

85 In the fourth place, it is apparent from the statements made by the referring court that the seconded judges in the adjudicating panels called upon to rule in the disputes in the main proceedings continue to perform, in parallel, the duties – which they were performing prior to their secondment – of the deputies of the Disciplinary Officer, who is the person responsible for investigating, if necessary under the authority of the Minister for Justice, disciplinary proceedings that may be brought against judges (see, to that effect, judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 233).

86 As has also been noted, in essence, by the Advocate General in point 190 of his Opinion, the fact that one and the same person performs the duties of a seconded judge and those of a deputy of the Disciplinary Officer, in a context where, under Article 112 of the Law on the organisation of the ordinary courts, the deputies of the Disciplinary Officer are also appointed by the Minister for Justice, is such as to give rise to reasonable doubts in the minds of individuals as to the imperviousness of the other members of the adjudicating panels concerned to external factors, for the purposes of the case-law referred to in paragraphs 67 and 68 of this judgment, given that those members are likely to fear that the seconded judge is involved in disciplinary proceedings concerning them.

87 It is apparent from all those elements that, taken together, the facts referred to in paragraphs 76 to 86 of this judgment are, subject to the final assessments which are to be carried out by the referring court in that regard, such as may lead to the conclusion that the Minister for Justice – who is also the Public Prosecutor General – has, on the basis of criteria which are not officially known, the power to second judges to higher courts and to terminate their secondment, at any time and without being required to give reasons for that decision, with the result that, during the period of those judges' secondment, they are not provided with the guarantees and the independence which all judges

should normally enjoy in a State governed by the rule of law. Such a power cannot be considered compatible with the obligation to comply with the requirement of independence, in accordance with the case-law referred to in paragraph 73 of this judgment.

88 Furthermore, as regards the presumption of innocence, to which recital 22 and Article 6 of Directive 2016/343 – provisions which are also mentioned in the first question referred for a preliminary ruling – refer, it presupposes that the judge is free of any bias and any prejudice when examining the criminal liability of the accused. The independence and impartiality of judges are therefore essential conditions for guaranteeing the presumption of innocence.

89 However, in this instance, it appears that, in circumstances such as those at issue in the main proceedings, described in paragraph 87 of this judgment, the independence and impartiality of judges and, accordingly, the presumption of innocence may be jeopardised.

90 In the light of the foregoing considerations, the answer to the first question is that the second subparagraph of Article 19(1) TEU, read in the light of Article 2 TEU, and Article 6(1) and (2) of Directive 2016/343 must be interpreted as precluding provisions of national legislation pursuant to which the Minister for Justice of a Member State may, on the basis of criteria which have not been made public, second a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by way of a decision which does not contain a statement of reasons, terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period.

The second, third and fourth questions

91 By its second question, the referring court asks, in essence, whether the requirements of effective judicial protection, which include the independence of the judiciary, and those arising from the presumption of innocence, are infringed where, in the event that the judgments to be delivered in the cases in the main proceedings are the subject of appeals before the Sąd Najwyższy (Supreme Court), those appeals may be assigned to a judge appointed on a proposal from the KRS. By its third question, the referring court questions the Court of Justice, in essence, as to the legal effects of those judgments in the event that they are handed down by an adjudicating panel including one or more judges seconded by the Minister for Justice and, in the event of an appeal, as to the legal effects of a decision of the Sąd Najwyższy (Supreme Court) adopted with the involvement of a judge appointed on a proposal from the KRS. By its fourth question, the referring court asks, in essence, whether the fact that the court concerned has ruled in favour of or against the accused person may have a bearing on the answer to be given to the third question.

92 As the admissibility of those questions is disputed by the Polish Government, the Regional Public Prosecutor's Office, Lublin, the Regional Public Prosecutor's Office, Warsaw, and the European Commission, it should be borne in mind that the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of 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 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 27 and the case-law cited).

93 In this instance, the second, third and fourth questions raised are purely hypothetical, in so far as they assume that an appeal will be brought before the Sąd Najwyższy (Supreme Court) against the judgments to be delivered in the cases in the main proceedings. In addition, in so far as the third and fourth questions concern the legal effects of those judgments, the Court does not have before it the factual or legal material necessary to give a useful answer to those questions, since the referring court has failed to specify the possible relevance of such an answer for the decisions to be taken by it in the cases in the main proceedings.

94 It follows that the second, third and fourth questions referred are inadmissible.

Costs

95 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

The second subparagraph of Article 19(1) TEU, read in the light of Article 2 TEU, and Article 6(1) and (2) of

Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings must be interpreted as precluding provisions of national legislation pursuant to which the Minister for Justice of a Member State may, on the basis of criteria which have not been made public, second a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by way of a decision which does not contain a statement of reasons, terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period.

[Signatures]

* Language of the case: Polish.

OPINION OF ADVOCATE GENERAL BOBEK

delivered on 17 June 2021(1)

Case C-55/20

Ministerstwo Sprawiedliwości

joined parties:

Pierwszy Zastępca Prokuratora Generalnego, Prokurator Krajowy,

Rzecznik Dyscyplinarny Izby Adwokackiej w Warszawie

(Request for a preliminary ruling from the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Disciplinary Court of the Bar Association in Warsaw, Poland))

(Reference for a preliminary ruling – Freedom to provide legal advice – Disciplinary proceedings against a lawyer – Respective scopes of application of Directive 2006/123/EC and Directive 98/5/EC – Applicability of Directive 2006/123/EC to disciplinary proceedings – Authorisation schemes – Concept of ‘court or tribunal’ – Local Bar Association Disciplinary Court composed of non-professional judges – Article 47 of the Charter of Fundamental Rights and Article 19(1) TEU – Powers of lower courts where a higher national court lacks independence)

I. Introduction

1. In July 2017, the Prokurator Krajowy – Pierwszy Zastępca Prokuratora Generalnego (Public Prosecutor – First Deputy of the General Prosecutor) (‘the National Prosecutor’) requested the Rzecznik Dyscyplinarny Izby Adwokackiej w Warszawie (Disciplinary Agent of the Bar Association in Warsaw, Poland) (‘the Disciplinary Agent of the Bar Association in Warsaw’ or ‘the Disciplinary Agent’) to initiate disciplinary proceedings against the lawyer of the former President of the European Council, Donald Tusk. In the view of the National Prosecutor, the statements made by that lawyer when publicly commenting on the possibility of his client being charged with a criminal offence amounted to unlawful threats and disciplinary misconduct. Twice, the Disciplinary Agent either refused to initiate such proceedings or decided to discontinue them. Twice, the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Disciplinary Court of the Bar Association in Warsaw, Poland) (‘the Disciplinary Court’), following an appeal lodged by the National Prosecutor or the Minister of Justice, overturned those decisions and remitted the case back to the Disciplinary Agent.

2. The present request for a preliminary ruling has been made in a third ‘round’ of those proceedings, within which the Disciplinary Court is examining the decision of the Disciplinary Agent to discontinue once more the disciplinary inquiry against that lawyer, following an appeal lodged again by the National Prosecutor and the Minister of Justice. The referring court seeks to know whether Directive 2006/123/EC (‘the Services Directive’) (2) and Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’) are applicable to disciplinary proceedings pending before it. However, it appears that the crux of the matter before the referring court lies elsewhere: what concrete consequences, in procedural terms, is the referring court to draw from the Court’s judgment in *A. K. and Others*, (3) in view of the fact that its ruling might be subsequently appealed before the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court, Poland)? How can that court, in specific and practical terms, ensure compliance with EU law?

II. Legal framework

A. EU law

1. The Services Directive

3. Recital 33 of the Services Directive states that ‘the services covered by this Directive concern a wide variety of ever-changing activities ... The services covered are also services provided both to businesses and to consumers, such as legal or fiscal advice ...’.

4. Pursuant to recital 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. ...'.

5. Article 1(5) of the Services Directive provides that:

'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. Article 4 of the Services Directive contains a number of definitions for the purposes of that directive. Under Article 4(6), 'authorisation scheme' is defined 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'.

7. Article 9(3) of the Services Directive, which is part of section 1, entitled 'Authorisations', within Chapter III on the 'Freedom of establishment for providers', provides that that section shall not apply to those aspects of authorisation schemes which are governed directly or indirectly by other Community instruments.

8. Article 10 of the Services Directive, which is entitled 'Conditions for the granting of authorisation', reads as follows:

'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. ...

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. ...'

B. National law

1. General provisions on the Bar Association

9. By virtue of Article 9 of ustawa z dnia 26 maja 1982 r. – Prawo o adwokaturze (Law of 26 May 1982 on Advocates) ('the Law on Advocates'):

'1. The following are the bodies of the Bar: the National Bar Assembly, the Supreme Bar Council, the Higher Disciplinary Court, the Bar Disciplinary Agent and the Higher Audit Committee.

2. Only lawyers may be members of the bodies of the Bar.'

10. Article 11 of the Law on Advocates provides that:

'1. Elections to the bodies of the Bar and to the bodies of the Bar Associations and Bar Chambers shall be conducted by secret ballot with an unlimited number of candidates.

2. The term of office of the bodies of the Bar and of the bodies of the Bar Associations and Bar Chambers shall be four years, but they are obliged to operate until such time as newly elected bodies have been established. ...

4. Individual members of the bodies referred to in paragraph 1 may be dismissed before the expiry of their term of office by the body which elected them. ...'

11. Under Article 58 of the Law on Advocates:

'The following matters shall come within the scope of the Supreme Bar Council: ...

(13) suspension of the right to perform functions for breach of the essential obligations of individual members of the bodies of Bar Associations and bodies of Bar Chambers, with the exception of members of Disciplinary Courts, and applying to the competent bodies for revocation thereof; ...'

2. Provisions regarding disciplinary misconduct

12. Under Article 80 of the Law on Advocates:

'Lawyers and trainee lawyers shall be subject to disciplinary liability for conduct contrary to the law, ethical principles or dignity of the profession or for infringement of their professional obligations ...'

13. Article 81(1) of the Law on Advocates reads as follows:

'The disciplinary penalties are as follows:

- (1) caution;
- (2) reprimand;
- (3) fine;
- (4) suspension of the right to engage in professional activity for a period of between three months and five years;
- ...
- (6) expulsion from the Bar.'

14. In accordance with Article 82(2) of the Law on Advocates:

'Expulsion from the Bar shall entail removal from the register of lawyers with no right to apply for re-registration in that register for a period of 10 years from the date on which the ruling imposing expulsion from the Bar becomes final.'

3. Provisions regarding the administration of justice by the Bar Association Disciplinary Courts

15. Pursuant to Article 40, point 2, of the Law on Advocates:

'The scope of the activities of the General Assembly of the Bar Association shall include ... selection of the chairperson, the president of the Disciplinary Court, the Disciplinary Agent, the chairperson of the audit committee and the members and alternate members of the district Bar Council, Disciplinary Court and audit committee.'

16. Under Article 91 of the Law on Advocates:

'1. The following shall adjudicate in disciplinary cases:

- (1) a Disciplinary Court of the Bar Association;
- (2) the Higher Disciplinary Court.

2. The Disciplinary Court of the Bar Association shall hear all cases as the court of first instance, with the exception of the cases specified in Article 85(3) and hearings of an appeal against a decision of a Disciplinary Agent not to initiate disciplinary proceedings or to discontinue disciplinary proceedings.

3. The Higher Disciplinary Court shall hear:

- (1) as the court of second instance, cases heard at first instance by Disciplinary Courts of the Bar Association;
- (2) as the court of first instance, disciplinary cases of members of the Supreme Bar Council and regional bar councils;
- (3) other cases provided for in this Law. ...'

17. Under Article 89(1) of the Law on Advocates:

'A Disciplinary Court shall be independent as regards its rulings.'

4. Provisions regarding the procedure before the Disciplinary Courts of the Bar Association

18. Under Article 88a(4) of the Law on Advocates:

'The parties to the proceedings and the Minister for Justice shall have the right to lodge an appeal against rulings and decisions terminating disciplinary proceedings within 14 days of the date of delivery of a copy of the ruling or decision, together with a statement of grounds, and instruction regarding the time limit for, and manner of lodging an appeal.'

19. Under Article 91c of the Law on Advocates:

'An appeal on a point of law shall be lodged to the Supreme Court through the Higher Disciplinary Court within 30 days of the date of delivery of the ruling, together with the statement of grounds.'

20. Under Article 95n of the Law on Advocates:

'In cases not governed by this Law, the provisions of the following provisions shall apply *mutatis mutandis* to disciplinary proceedings:

- (1) the Code of Criminal Procedure;
- (2) Chapters I to III of the Criminal Code.'

21. Under Article 100 § 8 of the Kodeks postępowania karnego ('the Code of Criminal Procedure'):

'After pronouncement or delivery of the ruling and order, the parties to the proceedings shall be instructed regarding their right to lodge an appeal, and the time limit for, and manner of doing so, or that the ruling or order is not amenable to appeal.'

22. Under Article 521, paragraph 1, of the Code of Criminal Procedure:

'The Public Prosecutor General and also the Ombudsman may lodge an appeal on a point of law against any final ruling of the court terminating proceedings.'

III. Facts, national proceedings and the questions referred

23. On 20 July 2017, the National Prosecutor requested the Disciplinary Agent of the Bar Association in Warsaw to initiate disciplinary proceedings against R.G., the lawyer of the former President of the European Council, Donald Tusk. In the opinion of the National Prosecutor, R.G. had gone beyond the limits of an advocate's freedom of expression when he publicly commented on 10 and 11 October 2016 on the possibility that his client would be charged with a criminal offence. From the point of view of the National Prosecutor, the statements made by R.G. could be construed as unlawful threats and disciplinary misconduct.

24. On 7 November 2017, the Disciplinary Agent of the Bar Association in Warsaw refused to launch a disciplinary inquiry. On 23 May 2018, on appeal by the National Prosecutor, that decision was overturned by the Disciplinary Court of the Bar Association in Warsaw. The case was referred back to the Disciplinary Agent.

25. On 18 June 2018, the Disciplinary Agent initiated a disciplinary inquiry vis-à-vis R.G. for the abovementioned facts. On 28 November 2018, the Disciplinary Agent decided to discontinue the inquiry after finding that R.G.'s actions did not amount to disciplinary misconduct. On 13 June 2019, following an appeal by the National Prosecutor and by the Minister for Justice, that decision was overturned by the Disciplinary Court. The case was referred back, for the second time, to the Disciplinary Agent for reconsideration.

26. On 8 August 2019, the Disciplinary Agent discontinued once again the disciplinary inquiry into R.G. Both the National Prosecutor and the Minister for Justice appealed against that decision. Accordingly, it appears that the Disciplinary Court is currently seised with that matter for a third time.

27. In those factual and legal circumstances, the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Disciplinary Court of the Bar Association in Warsaw) 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 Chapter III of [the Services Directive], including Article 10(6) of the Services Directive,

applicable to proceedings concerning the disciplinary liability of Polish advocates and foreign lawyers registered with a Bar Association, in connection with which liability an advocate may, inter alia, be fined, suspended, or expelled from the bar, and a foreign lawyer may, inter alia, be fined, have his right to provide legal assistance in the Republic of Poland suspended, or be prohibited from providing legal assistance in the Republic of Poland? If the answer to the above question is in the affirmative, do the provisions of the [the Charter], including Article 47 thereof, apply to the above proceedings before Bar Association courts in cases where there is no right of appeal against the rulings of those courts to national courts or where such rulings are subject only to an extraordinary appeal, such as an appeal on a point of law to the Sąd Najwyższy (Supreme Court), also in cases where all the essential elements are present within a single Member State?

(2) In a case where, in the proceedings referred to in Question 1, under the national legislation in force the body competent to hear an appeal on a point of law against a ruling or decision of a Bar Association disciplinary court or an objection to an order refusing such an appeal on a point of law is a body that, in the view of that court, which is consistent with the view expressed by the Sąd Najwyższy (Supreme Court) in its judgment of 5 December 2019, case reference III PO 7/18, is not an independent and impartial tribunal for the purposes of Article 47 of the Charter, is it necessary to disregard the national provisions establishing the jurisdiction of that body and is it the duty of the Bar Association disciplinary court to refer such an appeal on a point of law or objection to a judicial body which would have jurisdiction if those national provisions had not precluded it?

(3) In a case where – in the proceedings referred to in Question 1 – no appeal on a point of law can be lodged against a ruling or decision of a Bar Association disciplinary court, according to the position of that court, either by the Public Prosecutor General or the Ombudsman, and that position is:

(a) contrary to the position expressed in the resolution of 27 November 2019, case reference II DSI 67/18, adopted by a seven-judge panel of the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court), that is, the body which, under the national legislation in force, is competent to hear an objection to an order refusing an appeal on a point of law, but which, in the view of the Bar Association disciplinary court, which is consistent with the view expressed by the Sąd Najwyższy (Supreme Court) in its judgment of 5 December 2019, case reference III PO 7/18, is not an independent and impartial tribunal for the purposes of Article 47 of the Charter;

(b) consistent with the position previously expressed by the Izba Karna Sądu Najwyższego (Criminal Chamber of the Supreme Court [Poland]), that is, the judicial body that would have jurisdiction to hear such an objection if those national provisions had not precluded it;

may (or should) the Bar Association disciplinary court disregard the position expressed by the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court)?

(4) If in the case referred to in Question 3, an appeal by the Minister for Justice has been lodged with a Bar Association disciplinary court, and:

(a) one of the factors which in the view of the Sąd Najwyższy (Supreme Court) as expressed in its judgment of 5 December 2019, case reference III PO 7/18, as well as in the view of the Bar Association disciplinary court, justify the assumption that the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court), that is, the body referred to in Question 3(a), is not an independent and impartial tribunal for the purposes of Article 47 of the Charter, is the influence of the executive, including the Minister for Justice, on its composition;

(b) the function of Public Prosecutor General, who – according to the position expressed by the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court), that is, the body referred to in Question 3(a), would be entitled to lodge an appeal on a point of law against the decision made on appeal, and according to the position of the Izba Karna Sądu Najwyższego (Criminal Chamber of the Supreme Court), that is, the judicial body referred to in Question 3(b), and also according to the position of the Bar Association disciplinary court, is not entitled to lodge such an appeal, is by operation of law actually performed by the Minister for Justice,

should the Bar Association disciplinary court ignore that appeal if it is the only way in which it can ensure that the proceedings are compatible with Article 47 of the Charter and, in particular, prevent interference in those proceedings by a body which is not an independent and impartial tribunal for the purposes of that provision?

28. Written observations were submitted by the National Prosecutor, the Netherlands and Polish Governments, and the European Commission.

29. On 16 February 2021, the Disciplinary Court responded to the Court's request for clarification made in accordance with Article 101 of the Rules of Procedure of the Court of Justice.

IV. Assessment

30. This Opinion is structured as follows. I shall first examine whether the Disciplinary Court of the Bar Association in Warsaw is a 'court or tribunal' within the meaning of Article 267 TFEU (A). I shall then address Question 1 regarding the applicability of the Services Directive and of Article 47 of the Charter to disciplinary proceedings against lawyers (B) before turning to Questions 2 to 4 concerning the powers of the Disciplinary Court to ensure compliance with EU law (C).

A. *Is the Disciplinary Court a court or tribunal within the meaning of Article 267 TFEU?*

31. It is established case-law that, in order to assess whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, which is a question governed by EU law alone, the Court will take into account the following factors: whether the body is established by law; whether it is permanent; whether its jurisdiction is compulsory; whether its procedure is *inter partes*; whether it applies rules of law; and whether it is independent. (4)

32. The Disciplinary Court fulfils most of these conditions. As explained in its order for reference, and not contested by any of the interested parties, the Disciplinary Court was established by the Law on Advocates; it is permanent; it applies procedural rules laid down in the Law on Advocates and in the Code of Criminal Procedure; its decisions are binding and enforceable. In addition, the Disciplinary Court appears to have compulsory jurisdiction over the disciplinary disputes entrusted to it by national law.

33. However, while the Commission considers that the Disciplinary Court is therefore a 'court or tribunal' within the meaning of Article 267 TFEU, both the National Prosecutor and the Polish Government disagree with that conclusion.

34. According to the National Prosecutor, the Disciplinary Court is not a court or tribunal in view of the stage reached by the disciplinary proceedings at issue and the subject matter of the dispute. Within the main proceedings, the Disciplinary Agent of the Warsaw Bar Association has not yet charged R.G. with having committed a disciplinary offence. As such, the part of the proceedings designated for hearing each side of the argument has not been opened. In addition, when reviewing the decision of the Disciplinary Agent to discontinue the disciplinary proceedings, the Disciplinary Court is not to decide on R.G.'s right to exercise his professional activity under Chapter III of the Services Directive, but simply to verify whether the decision preventing a ruling on the disciplinary liability of R.G. was well founded.

35. According to the Polish Government, not only is the Disciplinary Court not a court within the meaning of Article 179 of the Polish Constitution, it also cannot be considered independent for the purposes of Article 267 TFEU. First, its members are elected, for a renewable mandate of four years, by the General Assembly of the Bar Association concerned. Accordingly, the judges sitting on the Disciplinary Court adjudicate on disciplinary cases which relate to their own colleagues, through the support of whom they were elected and may potentially be renewed. Second, members of the Disciplinary Court do not benefit from any guarantee regarding their tenure. They can be removed before the end of their mandate by the body that elected them, namely the General Assembly comprising all the lawyers of the Bar Associations concerned. Third, it is doubtful that judges sitting on the Disciplinary Court are impermeable to external elements. In the present case, the President of the Disciplinary Court, although not a member of the chamber, would have informed the parties to the case that they could challenge the staying of the proceedings for the purposes of the request for a preliminary reference, while the adjudicating chamber took the view that the order for reference could not be challenged.

36. In short, while the National Prosecutor contests the existence of a genuine *inter partes* dispute pending before the Disciplinary Court, the Polish Government considers that body not to be *independent*. I shall deal with those two points in turn.

1. *A dispute inter partes?*

37. In order for there to be a court or tribunal within the meaning of Article 267 TFEU, that provision requires there to be a dispute *inter partes*. Although forming part of the *Dorsch* criteria, (5) it is perhaps fair to acknowledge that that condition has not been an insurmountable one – the Court has repeatedly stated that it is not an absolute criterion. (6)

38. Moreover, a national court may refer a question to the Court only if there is a case *pending* before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. (7) Within those limits, it is nonetheless for the national court alone to decide when exactly, in terms of the stage of the main proceedings, it deems it appropriate to refer a question to the Court of Justice for a preliminary ruling. (8) The Court requires only that the dispute be pending at the time of the request for a preliminary ruling. (9)

39. In the present case, the National Prosecutor claims that the proceedings before the Disciplinary Court are not *inter partes* because the 'dispute' concerns the decision (of the Disciplinary Agent) to discontinue the disciplinary inquiry (as opposed to a decision opening such proceedings or imposing an actual disciplinary sanction). In this way, it appears to be suggested that the stage of proceedings is an earlier one, with no direct exchange between R.G. and the competent disciplinary bodies having yet taken place. There is thus no genuine dispute pending.

40. I disagree.

41. The National Prosecutor appears to conflate two matters: there being *inter partes* proceedings between *some* parties and there needing to be a very specific dispute concerning two *concrete* parties. On that basis, the National Prosecutor in essence suggests that, because there is no 'full trial' on merits as part of disciplinary proceedings between two specific parties, there is accordingly no real dispute and, thus, no *inter partes* proceedings.

42. However, in order for there to be a dispute *inter partes*, the case-law outlined above simply requires a genuine dispute about the law and its application between some parties. (10) Seen in this light, an *inter partes* dispute of such type is clearly present since the parties consist of the Disciplinary Agent, on the one hand, and the National Prosecutor and the Minister for Justice, on the other, and the dispute is being brought before a third party, namely the Disciplinary Court. Whether R.G. is, technically speaking, a party to that dispute already, and the stage at which under national law he is allowed to have full party rights as the accused party, is, in terms of there being a genuine dispute *inter partes*, irrelevant.

43. The same is true with regard to the stage of the proceedings: again, also in terms of admissibility, the case-law of the Court does not limit the exact stage of the national proceedings at which a request for a preliminary ruling might be made. All that is required is that there be a genuine dispute (11) between some parties, which, for the purposes of the main proceedings, clearly appears to be the case.

44. In my view, therefore, there is no doubt that an *inter partes* dispute within the meaning of Article 267 TFEU is present in the main proceedings.

2. Independence

45. The concept of 'independence' has two features. First, as regards *external* independence, it is settled case-law that the body concerned must be able to exercise its functions wholly autonomously, without being subject to any hierarchical constraint or being subordinate to any other body, and without taking orders or instructions from any source whatsoever, being thus protected against external interventions or pressure liable to impair the independent judgment of its members and influence their decisions. (12)

46. The irremovability of the members of the body concerned constitutes a guarantee that is essential to judicial independence in that it serves to protect the person who has the task of adjudicating in a dispute. (13) The guarantee of irremovability of the members of a court or tribunal thus requires that dismissals of members of that body should be determined by specific rules, by means of express legislative provisions offering safeguards that go beyond those provided for by the general rules of administrative law and employment law which apply in the event of an unlawful dismissal. (14) Those guarantees of independence require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. (15)

47. The second, *internal*, aspect of the concept of independence mostly relates to impartiality. It seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. Thus, the concept of 'independence', which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision. (16)

48. In the present case, two elements relating to the composition of the Disciplinary Court have been singled out, in essence, by the Polish Government as potentially problematic from the point of view of independence: the alleged lack of irremovability of its members and the fact that it is composed of lawyers, members of the Bar, acting, in a way, as ‘lay judges’ rather than professional judges.

49. I cannot but agree with the Polish Government as regards the importance of judicial independence and the imperative for a body, if it wishes to be called a ‘court’ worthy of the name, to comply with all requirements relating to both the *external* and *internal* dimensions of the concept of judicial independence. However, in the present case, following clarifications made by the referring court, I fail to see why the Disciplinary Court would not fulfil those criteria if assessed for the purposes of Article 267 TFEU.

50. First, starting with the alleged lack of irremovability of members of the Disciplinary Court, on its text, Article 11(4) of the Law on Advocates indeed states that the individual members of the bodies of the Bar, thus including the Disciplinary Court, which is one of those bodies, may be dismissed before the expiry of their term of office by the body that elected them, namely the General Assembly of the Bar Association. (17)

51. There appear to be, nonetheless, no further legal provisions, or at least none that have been brought to the attention of this Court by any of the interested parties, that would give specific expression as to when, how or why the members of the Disciplinary Court may be removed. The absence of any such provisions may suggest that the arrangements for the removal of members have not been determined by specific rules and instead the general rules of administrative law and employment law apply. As a consequence, the removal of its members would not be limited to certain exceptional cases, as is required by the Court’s case-law in order to be characterised as a ‘court or tribunal’. (18)

52. However, at the Court’s request for clarification, the Disciplinary Court stated that Article 11(4) of the Law on Advocates has always been a dead letter of the law and never implemented. There is no provision that would specify how and when the General Assembly of the Bar Association could dismiss a member of the Disciplinary Court before the expiry of his or her mandate. According to the Disciplinary Court, it also follows from Article 58, point 13, of the Law on Advocates that a person sitting on the Disciplinary Court cannot be removed before the end of his or her mandate. By the same token, the rules of procedure of the National Bar Assembly do not contain any provision concerning the removal of members of the Disciplinary Court. Finally and in any event, the Warsaw Bar Assembly has never dismissed a member of the Disciplinary Court.

53. In my view, the Disciplinary Court has provided enough to establish that Article 11(4) of the Law on Advocates is ineffective. It would thus appear that the members of the Disciplinary Court are indeed irremovable and, consequently, the external independence of that court in terms of irremovability of its members is not an issue.

54. Second, it has also been suggested, this time around with regard to internal independence and impartiality, that the Disciplinary Court is not independent because it is composed of lawyers, members of the Bar, and not professional judges. For this reason, the Disciplinary Court does not represent an independent third party, but rather a collection of individuals which are both elected and renewed, and therefore possibly influenced by their peers.

55. Indeed, there are concerns that are occasionally voiced with regard to proceedings, in particular disciplinary proceedings, which are carried out by one’s peers. They range from allegations of corporatism within a profession to the likelihood of conflicts of interests. On one side of the spectrum, a ‘false professional solidarity’ is reproached, in particular by the outside world, occasionally unhappy with the outcome of individual disciplinary proceedings, often believing the sanctions to be too lenient, even suggesting that no independent trial exists within such systems due to the ‘mutually assured protection’ within that profession. On the other side of that spectrum, it is sometimes suggested, more frequently perhaps from within the profession itself, that a disciplinary body composed in this way was in a concrete case not impartial due to personal affections, connections, or grudges, resulting in a vested interest in seeing a colleague sanctioned.

56. Unless and until any of those general allegations are established, either at the level of the law, or in practice and application of the law, (19) allowing for the independence of a judicial body to be questioned, I consider such insinuations or conjectures to be of little relevance for the purposes of assessing whether or not a national body might be qualified as a court or tribunal within the meaning of Article 267 TFEU. As I have recently suggested, the assessment of independence under Article 267 TFEU requires that the concept of a court or tribunal be examined at the structural, institutional level. It is examined by looking at the judicial body making the reference as such, while taking into account the function that that body is called to exercise in the specific circumstances of a case. (20)

57. I fail to see why, in structural terms, judicial bodies composed of ‘non-professional judges’ could not be seen *per se* as courts or tribunals within the meaning of Article 267 TFEU, provided of course that, as part of their judicial activity, they meet all the requirements of judicial independence. In other words, the requirement of independence is *exactly the same for any court*, whether it is composed of ‘professional judges’ or ‘lay judges’, or a combination of both.

58. It might be recalled that the structure of the national judicial system is by default a matter of choice for each Member State. (21) In that regard, it is certainly the case in a number of Member States that matters concerning the discipline of members of certain professions are adjudicated upon by the members of those very professions, and hence ‘non-professional’ judges. That tends to be the case for a number of ‘liberal’ professions, such as doctors, veterinarians, dentists, architects, pharmacists or, in the present case, lawyers. The benefits of such institutional choice are rather clear: the necessary expertise in matters of professional requirements and discipline in the relevant, often complex, field. (22)

59. In the past, the Court did not hesitate to answer requests for a preliminary ruling by such bodies if the requirements of Article 267 TFEU were found to have been met. In some cases, the Court did engage in a detailed discussion about the nature of the body in question, for example, with regard to the Netherlands Commissie van Beroep Huisartsgeneeskunde (Appeals Committee for General Medicine) (23) or the Italian Consiglio Nazionale Forense (National Bar Council). (24) In other cases, the Court answered the question(s) raised without first examining whether they were raised by a ‘court or tribunal’. That was the case, for instance, with regard to the Oberste Berufungs- und Disziplinarkommission für Rechtsanwälte (Appeals and Disciplinary Board for Lawyers, Austria), (25) a ‘Local Disciplinary Chamber of Dentists’ in France, (26) or a Belgian ‘Appeals Committee of the Association of Architects’. (27) However, the Court did not hesitate to reject a request for a preliminary ruling where it found the referring body wanting in terms of independence. (28)

60. The bottom line of all these cases, with regard to judicial bodies composed of ‘non-professional judges’ (29) is the reason for which the assessment of the criterion of independence is carried out under Article 267 TFEU. That assessment, although having at its heart the same criterion of independence as other provisions of EU law, is not, as opposed to Article 47 of the Charter for example, concerned with a meticulous identification of any individual breach of individual rights stemming from EU law. (30) The purpose of that assessment under Article 267 TFEU is to identify appropriate institutional partners in the Member States that may enter into a dialogue with the Court in order to ensure the uniform interpretation of EU law. It is indeed in order to ensure the proper functioning of the EU legal order that the Court should have an opportunity to rule on issues of interpretation and validity of EU law arising from national proceedings which may affect the exercise of rights granted by EU law. (31)

61. Against that background, the Polish Government did not explain, beyond mere abstract statements based on conjectures, why the Disciplinary Court does not satisfy the independence requirement, integral to the concept of a ‘court or tribunal’ within the meaning of Article 267 TFEU. Following clarification provided by the Disciplinary Court, it does not appear that the latter lacks independence (external or internal) so that it would be unable to seise the Court by way of request for a preliminary ruling.

62. I am therefore of the view that the Disciplinary Court (of the Bar Association in Warsaw) is entitled to refer the dispute in the main proceedings to the Court of Justice under Article 267 TFEU.

B. Question 1: the Services Directive and Article 47 of the Charter

1. Admissibility

63. It is worth recalling at the outset that according to established case-law, questions referred for a preliminary ruling 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 this Court to determine, enjoy a *presumption of relevance*. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of 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. (32)

64. In this context, both the National Prosecutor and the Polish Government consider that the present request for a preliminary ruling is inadmissible because an answer is not necessary for settling the dispute in the main proceedings. Those parties maintain that Questions 2 to 4 are inadmissible because the referring court is only concerned with the

subsequent stage of the main proceedings, namely a hypothetical appeal to the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court). As far as Question 1 is concerned, both interested parties submit that it is also inadmissible because that question has only been asked for the purposes of receiving an answer to Questions 2 to 4. Furthermore, no EU law provision in fact applies to the present case and therefore EU law is of no use to R.G.

65. I disagree. In my view, Question 1 is clearly admissible.

66. First, at a conceptual level, I cannot embrace the ‘inadmissibility by association’ effectively being suggested by the National Prosecutor and the Polish Government. In the past, the Court has traditionally looked at each of the questions asked by referring courts independently, certainly to the extent that such questions can logically be dissociated. Each question is examined separately as regards its own merits, which often leads to (as is frequently the case in the case-law) some of the questions being answered while others are declared inadmissible within one and the same proceedings. There is no vicarious (in)admissibility.

67. Second, the case-law embraces a rather generous approach to admissibility. (33) When it comes to the repartition of roles between the national courts and the Court of Justice, it is not the role of this Court to second-guess the ulterior motives of a national court. It is even far less appropriate to imply bad faith on the part of a national court and, on the basis of that conjecture, refuse to provide an answer to a question referred.

68. Third, as concerns the content of Question 1 for the purposes of admissibility, there is a sufficient link between the facts of this case and the national provisions at issue, on the one hand, *and* the Services Directive, on the other hand – the interpretation of which is sought by the referring court. It cannot be held that Question 1 seeks an interpretation which has manifestly no relation to the facts of the main action or its purpose. In other words, Question 1 is substantively connected to a clearly identified EU law instrument, the interpretation of which is being sought by the referring court. (34)

69. Fourth, whether or not the applicant in the main proceedings will be able to draw an actual benefit from the Court’s answer, once a final decision on merits is handed down by the referring court, is not relevant for the purposes of admissibility. (35) Making admissibility dependent on a certain answer on merits means placing the proverbial cart before the horse. (36)

70. In summary, it certainly does not appear to me that the answer to the first question raised by the referring court concerning the Services Directive is of no relevance whatsoever for the decision to be taken by that court in the main proceedings. It follows, without prejudice to the forthcoming assessment of admissibility of Questions 2, 3 and 4, that Question 1 is admissible.

2. Applicability of the Services Directive

71. By the first part of its first question, the referring court seeks to know whether the Services Directive, in particular due to Article 10(6) thereof, is applicable to proceedings concerning the disciplinary liability of a lawyer that could ultimately lead to a decision such as one which results in his or her removal from the bar. In the event that an answer in the affirmative is provided, the referring court asks, in the second part of its question, whether the Charter, including Article 47 thereof, applies to such proceedings before courts of the Bar Association.

72. In my view, the answer to both parts of that question ought to be in the affirmative. In order to explain why I believe that to be the case, I shall first examine the respective scopes of application of the Services Directive and Directive 98/5/EC (37) (a), before turning to the applicability of the Services Directive to legal services and, in particular, to disciplinary proceedings against lawyers (b).

(a) The respective scopes of the Services Directive and Directive 98/5

73. According to the Polish Government, EU law does not apply to the present case. In particular, the Services Directive is not applicable because Directive 98/5 serves as a *lex specialis* and that *lex specialis* is not materially applicable to the case.

74. I disagree.

75. Under Article 3(1) of the Services 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 specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions'. Article 3(1) also mentions four such EU secondary acts. (38) Although Directive 98/5 is not one of them, the list of acts mentioned therein is not exhaustive. (39)

76. Indeed, as to its content, Directive 98/5 governs rules of professional conduct (Article 6) and disciplinary proceedings (Article 7) of lawyers practicing in a Member State other than the one in which they obtained their professional qualification. In particular, Article 7 regulates the respective disciplinary powers and duties of the competent home and host authorities. Article 9 thereof requires decisions to cancel the registration of a lawyer and decisions imposing disciplinary measures to state the reasons on which they are based. In addition, a remedy shall be made available against such decisions before a court or tribunal in accordance with the provisions of domestic law.

77. However, other than that, I remain puzzled by the argument put forward by the Polish Government. I have difficulty in seeing how a *lex specialis*, namely Directive 98/5, which is clearly not applicable to a domestic lawyer, could prevent the application of a *lex generalis*, that being the Services Directive, which clearly is applicable, both *ratione personae* and *materiae*.

78. First, Chapter III of the Services Directive, which concerns the freedom of establishment, applies also to purely internal situations, thus to the provision of legal services by lawyers who have not exercised free movement.(40) Thus, by default, as much as it is applicable to legal services as well, Chapter III of the Services Directive applies to *all lawyers*, irrespective of whether they are, as to their qualification, 'purely domestic' or 'cross-border' lawyers.

79. Second, as regards *foreign lawyers* specifically, the Services Directive will be applicable by default *to the extent only* that its general provisions have not been superseded, in line with Article 3(1) of the Services Directive, by a specific provision of Directive 98/5. However, even with regard to foreign lawyers, it is questionable how far Directive 98/5 provides otherwise with regard to the specific guarantees of Articles 9 and 10 of the Services Directive. (41)

80. Third, although it is for the referring court to verify, it does not appear that R.G. is a foreign lawyer, within the meaning of Directive 98/5. (42) As a *domestic lawyer*, the Services Directive would apply to him in any event, while Directive 98/5 would in no way be relevant to the present case.

81. In summary, in either case, Directive 98/5 simply does not provide otherwise. There seems to be no discernible conflict with any specific provision of EU law governing the issue for the purposes of Article 3(1) of the Services Directive.

(b) The Services Directive and disciplinary proceedings against lawyers

82. All interested parties, as well as the referring court, agree that the Services Directive is applicable to legal services and that registration with the bar association in order to be allowed to practice constitutes an authorisation scheme within the meaning of that directive. That being said, there is disagreement as to whether disciplinary proceedings constitute part of such an authorisation scheme. While the referring court and the Commission are of the view that it does, the Netherlands and Polish Governments disagree.

83. Article 2 of the Services Directive, which sets out the material scope of the directive, states that the provisions of legal counsel fall within the scope of the directive. Indeed, legal representation is undoubtedly a specific type of service that, because of its importance for the sound administration of justice, is provided by a closely regulated profession subject to specific deontological rules. (43) The fact remains that, although subject to specific rules, legal representation is a service under the Services Directive.

84. According to Article 9(1), Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme *unless*: (a) that scheme does not discriminate against the provider in question; (b) the need for such a scheme is justified by an overriding reason relating to the public interests; (c) the objective pursued cannot be attained by means of a less restrictive measure.

85. In agreement with all the parties concerned, there is no doubt that rules relating to registration with the Bar Association are part of an authorisation scheme within the meaning of the Services Directive since those rules concern the very *access* to the profession as a lawyer. (44)

86. However, should disciplinary proceedings against a lawyer also be considered as another element of that

authorisation scheme?

87. According to the referring court and the Commission, disciplinary proceedings against a registered lawyer are also part of the scheme since, as a result of such proceedings, lawyers may be suspended, or expelled, and prevented from re-registering for 10 years. Such measures constitute a withdrawal of authorisation for the purposes of Article 10(6) of the Services Directive.

88. By contrast, according to both the Netherlands and Polish Governments, the disciplinary procedure, when taken in isolation, is not an 'authorisation scheme' within the meaning of the Services Directive, nor is it part of the authorisation scheme either. Although a disciplinary sanction may eventually mean that it is impossible to continue carrying out the service, it does not amount to a refusal or a withdrawal of the authorisation. In any event, Article 10(6) of the Services Directive is not applicable in the main proceedings because the present dispute concerns the decision of the Disciplinary Agent to discontinue the proceedings, not a decision to impose a disciplinary sanction. As a result, no decision of suspension or expulsion of the lawyer could be adopted in those proceedings. Furthermore, according to the Netherlands Government, disciplinary rules in general cannot be characterised as 'requirements' within the meaning of Article 4(7) of the Services Directive.

89. I agree with the referring court and the Commission.

90. Admittedly, the Services Directive does not contain any specific provision regarding disciplinary rules or procedures. This is hardly surprising since the Services Directive (in particular, but not limited to, Chapter III) applies horizontally, thus drafted to a large degree in general and abstract terms, and seeks to safeguard the freedom of establishment for providers and free provision of a vast array of services.

91. I agree that disciplinary proceedings against a lawyer, taken in isolation, can hardly amount to an authorisation scheme under the Services Directive. However, I also fail to see the logic as to why such proceedings assessed in the context of the Services Directive should ever been seen as a separate scheme. Instead, from the vantage point of the Services Directive, such proceedings are clearly part of a package of rules concerning access, exercise, and ultimately the forced cessation of the provision of services.

92. Under the Services Directive, Member States shall impede neither the access to an activity covered by the Services Directive, nor the exercise thereof. Although the Services Directive tends to focus on the access, it contains numerous provisions that also concern both access and exercise, (45) or simply the exercise of the freedom of establishment. (46) Disciplinary proceedings aim, in a way, at ensuring the quality of the exercise of the provision of legal counsel. Within that dimension, they indeed could be seen as one element of the broader scheme regulating access to and exercise of that type of service. That would mean that disciplinary rules and the application thereof in the context of specific proceedings must be 'monitored' by virtue of the Services Directive to ensure that they comply with Article 10(2) thereof regarding authorisation schemes.

93. However, in my view, the wording of Article 10(6) of the Services Directive assuages any lingering doubt as to whether or not decisions effectively 'terminating' the access to and exercise of a given type of service are also included. It reads: '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.' (47)

94. Against such wording, and the logic of the Services Directive, I fail to see how one could reasonably claim that a decision disbarring a lawyer does not amount to a withdrawal of his or her authorisation to practice and, thereby, provide legal services. Withdrawal of an authorisation already granted is simply a revocation of the access already granted. This broadly phrased provision not only suggests that any (unfavourable) decision regarding the access to or the exercise of a service falls within the Services Directive, but also that it must be open to challenge.

95. This conclusion is not altered by the reference made by the Polish Government to Article 1(5) of the Services Directive, which states that the latter directive 'does not affect Member States' rules of criminal law'. Disciplinary procedures are not per se identical to criminal law and criminal proceedings. Moreover, even if they were, *quod non*, Article 1(5) specifies that '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'. (48)

96. In a similar vein, I see no traction in the argument advanced by the Polish Government, according to which no

decision removing R.G. from the Bar Association has yet been imposed upon R.G., and that it effectively cannot be imposed in the specific proceedings concerning the review of the decision by the Disciplinary Agent not to pursue an alleged disciplinary offence.

97. In that regard, it suffices to note that the normative scope of an EU law instrument cannot be defined *ex post facto* in an outcome-dependent way, with the case falling either within or out of the scope of EU law depending on whether a person is eventually convicted or acquitted. (49) In general, the fact that certain proceedings fall within the scope of an EU law instrument *rationae materiae* is sufficient for the entirety of those proceedings, irrespective of the ultimate outcome or stage at which they close, also to fall within the scope of EU law.

98. In summary, in answer to the first part of Question 1, Chapter III of the Services Directive applies, as part of an authorisation scheme governing the exercise of the activity of lawyers, also to disciplinary proceedings initiated against lawyers, the result of which may affect the ongoing ability of those lawyers to provide legal services under the Services Directive.

3. Article 47 of the Charter

99. The answer to the second part of Question 1, enquiring about the applicability of the Charter, in particular Article 47, to the proceedings before the referring court, is straightforward.

100. It is established case-law that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law. If national legislation falls within the scope of EU 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. (50)

101. Thus, as long as the Services Directive is applicable, the Charter, including Article 47, is in principle also applicable to the case. This means that the referring court is to apply Article 47 of the Charter in the proceedings pending before it.

102. However, as has been raised by the National Prosecutor and the Polish Government in their submissions regarding admissibility, it is admittedly not entirely clear which exact individual right deriving from EU law could *specifically* be at issue in the case pending before the referring court. Indeed, while the prospective outcome of the main proceedings may eventually have detrimental effects on the legal position of R.G. (by being made subject to disciplinary proceedings as a result), it has been pointed out that R.G. is not yet a party in the main proceedings. The case before the referring court appears to be between the Disciplinary Agent, on the one side, and the National Prosecutor and the Minister for Justice, on the other side. (51) Thus, indeed, it is not immediately apparent which of these (it seems public law entities), would be endowed with fundamental rights under the Charter in the main proceedings.

103. Be that as it may, even if Article 47 of the Charter were not applicable before the referring court due to a lack of any impact upon a specific individual right guaranteed under the Charter, which is for the referring court to ascertain, it is still the case that Article 19(1) TEU, the content of which is essentially the same as Article 47 of the Charter, (52) would still apply. (53) Unlike Article 47 of the Charter, it indeed suffices, for Article 19(1) TEU to apply, that a national court *may be called upon* to rule on questions concerning the application or interpretation of EU law. (54)

104. There is no doubt that, also in view of the foregoing conclusion relating to the applicability of the Services Directive to the proceedings before the Disciplinary Court in general, the referring court may also be called upon to rule on EU law in this regard.

C. Questions 2 to 4: the powers of national courts in securing compliance with EU law

105. By Question 2, the referring court essentially asks the Court whether it should disregard the national provisions establishing the jurisdiction of the body (namely the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court)) that is competent to hear an appeal on a point of law against a decision of that same referring court (or an objection to an order refusing such an appeal on a point of law) when that body is not independent and impartial within the meaning of Article 47 of the Charter. Is it then the duty of the referring court to refer appeals on a point of law to the judicial body which previously had jurisdiction (namely the Izba Karna Sądu Najwyższego (Criminal Chamber of the Supreme Court))?

106. By Question 3, the referring court asks more specifically whether it may (or should) disregard the legal position expressed by the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court) regarding the right of appeal on a point of law of the General Prosecutor (being at the same time Minister for Justice) and the Ombudsman.

107. By Question 4, the referring court essentially wonders whether it should ignore the appeal lodged by the Minister for Justice (being at the same time General Prosecutor) if that is the only way to be sure that the proceedings before it are compatible with Article 47 of the Charter. The referring court points to the risk that, even if the measures referred to in Questions 2 and 3 are carried out, the potential appeal on a point of law brought by the General Prosecutor (being at the same time Minister for Justice) may still end up being heard by the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court).

108. A fair amount of additional information is needed in order fully to appreciate the scope of Questions 2, 3 and 4. Therefore, in the following sections, I shall start by setting out the context and the recent changes made in the national law and procedure (1), before examining the admissibility of those questions (2). Having reformulated those questions, I shall close by recalling the powers of national courts which derive from EU law and ensure effective judicial protection of EU law derived rights at the national level (3).

1. The national legislative and judicial background

109. There are three elements of the national legal context, as presented by the referring court, that should be emphasised.

110. First, the referring court recalls that the Court has already ruled on the question as to whether the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court) is an independent and impartial tribunal for the purposes of Article 47 of the Charter. (55) With reference to that judgment, the Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych) (Supreme Court (Labour and Social Insurance Chamber), Poland) ruled on 5 December 2019 that the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court) was not an independent and impartial tribunal for the purposes of Article 47 of the Charter.(56) One factor leading the Sąd Najwyższy (Supreme Court) to that conclusion was the influence of the executive and, in particular, that of the Minister for Justice over the composition of that body.

111. Second, as far as the role of the General Prosecutor/Minister for Justice (57) is concerned, the referring court notes that his role within the disciplinary proceedings against the members of the Bar Association has recently been expanded, following a controversial interpretation of national law by the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court).

112. According to the referring court, in the case-law of the Izba Karna Sądu Najwyższego (Criminal Chamber of the Supreme Court), and also in legal literature, the position unequivocally held until recently was that neither the Prokurator Generalny (General Prosecutor), nor the Rzecznik Praw Obywatelskich (Ombudsman) had a right, under Article 521 of the Code of Criminal Procedural Code in conjunction with Article 95n(1) of the Law on Advocates to lodge an appeal on a point of law against decisions of the Disciplinary Courts of the Bar Associations to uphold a decision of the Disciplinary Agent to refuse to initiate a disciplinary inquiry or to discontinue such an inquiry. This view is shared in full by the referring court.

113. However, the referring court also points out that a diametrically opposed position has been embraced in resolution of 27 November 2019 of a panel of seven judges of the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court). (58) Under that position, Article 521 of the Code of Criminal Procedure does apply in Bar Association disciplinary proceedings and therefore the General Prosecutor may lodge an appeal on a point of law against a decision of the Disciplinary Court of the Bar Association upholding the decision of a Disciplinary Agent to discontinue a disciplinary inquiry.

114. That resolution was apparently adopted in a different case, albeit concerning the same lawyer, R.G., in which the Disciplinary Agent had also discontinued a disciplinary inquiry and where the Minister for Justice and the National Prosecutor also lodged an appeal against his decision in that matter. In that case, the Disciplinary Court upheld the contested decision but its decision was challenged by the Minister for Justice/General Prosecutor by way of an appeal on a point of law.

115. Although I do not claim to grasp fully all the national procedural details, I understand the bottom line to be that,

following a departure from the previous line of case-law, the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court) effectively gave the right to introduce an appeal to the Minister for Justice/General Prosecutor and, indirectly, itself, the competence to hear appeals on points of law against decisions of the Disciplinary Agent to discontinue disciplinary proceedings.

116. Third, when the two previous elements are combined, a seemingly mundane procedural change in national law takes on an entirely new dimension. By systematically or repeatedly appealing the decisions not to launch disciplinary proceedings, the Minister for Justice/General Prosecutor (or a national prosecutor acting under his instructions) might effectively be able to push for disciplinary proceedings being instigated, or for them to be (possibly endlessly) continued against certain members of the Bar. Such appeals would ultimately be brought before a body that was previously found to be lacking independence precisely because the executive, and in particular the Minister for Justice, was exercising undue influence on its composition. (59)

2. Admissibility

117. The National Prosecutor, the Polish Government and the Commission consider Questions 2 and 3 to be inadmissible. According to the Polish Government in particular, those questions are hypothetical since they are premature. Should an appeal on a point of law against the incoming decision of the Disciplinary Court occur, that appeal should be lodged within the Sąd Najwyższy (Supreme Court), which would then allocate the case to the chamber having jurisdiction to hear it and transfer the file thereto. For its part, the Commission is of the view that the Court should not answer purely hypothetical questions which concern future procedural questions to be examined after the referring court has handed down its decision.

118. All the interested parties are of the view that Question 4 is also inadmissible. For the Polish Government in particular, the right to an effective remedy under Article 47 of the Charter should not be interpreted as setting aside or disabling legal remedies before courts for the alleged purpose of assuring the parties that their cause is heard by an independent court. The referring body would find itself in the position of protecting the interests of one party at the expense of another, thereby breaching the very essence of Article 47 of the Charter.

119. I must admit that the way in which the referring court formulated the questions referred poses some issues as regards the admissibility of Questions 2 to 4.

120. On the one hand, an answer to Questions 2 to 4 may indeed seem superfluous for the purposes of settling the case pending before the referring court. By those questions, the referring court appears to be concerned with the subsequent and potentially last step in the national judicial procedure. That is, nonetheless, conditional upon its impending decision in the present case being subsequently appealed on a point of law before the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court).

121. To that extent, Questions 2 to 4 appear premature. The fact that that court has to examine for the third time, within the same proceedings, a decision of the Disciplinary Agent regarding R.G. does not alter the previous conclusion. In the present case, the referring court is not faced with the problem of the Disciplinary Agent being unwilling to abide by its judicial decision after the case has been remitted back to the latter. The referring court is in fact concerned with whether the (future) prospect of the case will eventually arrive before a *third actor* in the form of the Sąd Najwyższy (Supreme Court) (more specifically, the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court)), should the referring court decide this time to uphold the contested decision of the Disciplinary Agent.

122. Thus, while it is apparent that the referring court finds itself in a sort of recurring loop, Questions 2 to 4 in fact relate to a different type of loop, which has not yet materialised. (60)

123. On the other hand, the referring court has nonetheless established certain relevant links between Questions 2 to 4 *and* the case pending before it.

124. As regards Questions 2 and 3, the referring court stated that it considers an answer from the Court to be necessary so that it is able to clarify which body will have jurisdiction to hear a potential appeal on a point of law against its own rulings (or an objection to a refusal to accept such an appeal on a point of law) because of *the contents of the instruction* which the referring court is obliged to give when delivering its ruling to the parties. By process of national law, the referring court is obliged, in its final decision, to instruct the parties to the proceedings on the time limit for, and manner of, lodging an appeal or to notify them that there is no right of appeal at all. In that respect, the

referring court contemplates the possibility to take into account the judgment of the Sąd Najwyższy (Supreme Court) of 5 December 2019 and, accordingly, instruct the parties that appeals should be brought before the Izba Karna Sądu Najwyższego (Criminal Chamber of the Supreme Court), and not the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court).

125. As regards Question 4, the referring court has suggested that, as an effect of Article 47 of the Charter, it could *itself* refrain from examining the case currently pending before it in order to block the potential subsequent appeal on a point of law to the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court), thereby excluding any possible interference from the latter.

126. It follows that the answers of the Court to Questions 2 to 4 may admittedly have *some* impact on the disposal of the case pending before the referring court. I acknowledge that a number of elements remain unclear, however. For instance, it is not immediately obvious how, in practical terms, the referring court could prevent appeals on points of law from being lodged before the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court); or, indeed, in view of the Polish Government's observations regarding the allocation of cases within the Sąd Najwyższy (Supreme Court), how the referring court would manage to channel a case specifically to the Izba Karna Sądu Najwyższego (Criminal Chamber of the Supreme Court).

127. Finally, one cannot overlook the fact that Questions 2 to 4 are, from a certain perspective, questions relating to the interpretation of the practical consequence(s) of a judgment previously delivered by this Court, namely *A. K. and Others*. Indeed, in that judgment, the Court concluded that EU law precludes 'cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal'. (61) Since, as has been established above, this case falls within the scope of EU law by virtue of the Services Directive, it is legitimate for the referring court to ask essentially: all right, how exactly am I then supposed to go about that? How, in specific and practical terms, can I assure compliance with EU law and follow a previous judgment of the Court?

128. Therefore, to the extent that the scope of Questions 2 to 4 indeed concerns matters that are pending and are relevant for the forthcoming decision of the referring court, then, indeed *to that extent*, those questions are admissible. However, the following characteristics of the preliminary ruling procedure ought to guide the rephrasing of those questions.

129. First, the procedure provided for in Article 267 TFEU is an instrument of cooperation between this Court and the national courts, through which the Court provides the national courts with points of interpretation of EU law needed in order to rule on disputes before them. The preliminary ruling procedure does not allow for advisory opinions to be given in response to general or hypothetical questions. Rather, the answers to the questions referred must be *necessary* for the effective resolution of a dispute, which the national court must be *able to take into account* in the main proceedings. (62)

130. It follows, logically, that the scope of any potential answers that the Court may provide is limited to what the national court might do in a case pending before it. It cannot extend to what other courts or institutions ought to do in the future. That precludes guidance on the *future* potential acts or course of action of *other courts*.

131. Second, any guidance that this Court may provide by way of a preliminary ruling is strictly limited to matters of *interpretation of EU law*, not national law. It is not for this Court to interpret national law, a fortiori to arbitrate between different strands of interpretation of national law that emerge at national level. In particular, it is not for this Court to suggest which of the opposing interpretations of national procedural rules is correct, and which exact rule or route available under national law a referring court must take in order to ensure compliance with EU law.

132. With these limits in mind, I am of the opinion that Questions 2 to 4 are admissible. That said, those questions must be approached from a much higher level of abstraction and one ought to engage only with the EU law side of those questions, an endeavour to which I now turn.

3. The powers of national courts in securing compliance with EU law

133. Through Questions 2 to 4, the referring court is essentially asking whether it has the power, under EU law, to disregard, in order to secure compliance with EU law: (i) national legislation on the attribution of jurisdiction (Question 2); (ii) a (normally binding) legal interpretation of national law handed down by a superior court (Question 3); (iii) the appeal or the submissions made by the Minister for Justice (being at the same time the General Prosecutor) (Question 4).

134. On the first and second points, there in fact is already a rich line of case-law of the Court. First, according to the Court, by virtue of the principle of primacy, a national court must apply EU law in its entirety and protect rights which the latter confers on individuals. Accordingly, it is obliged to set aside any *provision of national law* which may conflict with it, whether introduced prior or subsequent to the EU rule. In other words, any national legal provision and any legislative, administrative or judicial practice which might impair the effectiveness of EU 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 that may prevent EU rules from having full force and effect, are incompatible with those requirements which represent the very essence of EU law. (63) In order to secure such compliance, the referring court may either interpret national rules in conformity with EU law or, where necessary, disapply the national provisions which prevent it from ensuring compliance.(64)

135. Second, as far as legal opinions or judgments of higher courts are concerned, it is indeed also established case-law that national courts must, if necessary, disregard the rulings of a higher court if it considers that they are not consistent with EU law. (65) In a way, the logic and consequence in both scenarios is the same: if the referring court, or any court for that matter, (66) is prevented from ensuring full compliance with EU law, the sources of potential incompatibility, whether they be of legislative origin or of individual judicial origin, may be disregarded, provided of course that the departure from such sources is duly reasoned and explained. (67)

136. Both strands of case-law outlined above have been developed within the context of cases of individual incompatibility, without such cases necessarily having broader structural implications. However, there is no doubt that the same approach is applicable, perhaps even a fortiori, with regard to structural issues, such as those relating to legislation attributing jurisdiction to bodies which structurally lack independence altogether. The most recent case-law of the Court confirms that – indeed, entirely logical – extension.

137. First, in its judgment in *A. K. and Others*, the Court found that Article 47 of the Charter precludes cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal, *in casu* the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court), subject to the national court's verification. Accordingly, the principle of primacy of EU law requires national courts to disapply the provision of national law which reserves jurisdiction to rule on cases to such a court, so that those cases may be examined by a court which meets the requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field. (68)

138. Second, most recently, in *A.B. and Others*, (69) the Court was seised of the question of compatibility with EU law of amendments of national law which deprived the referring court of its jurisdiction. The Court held that, where it is proven that the second subparagraph of Article 19(1) TEU has been breached, the principle of primacy of EU law must be interpreted as requiring the referring court to disapply the amendments at issue, whether they are of a legislative or constitutional origin, and, consequently, to continue to assume the jurisdiction previously vested in it to hear disputes referred to it before those amendments were made. (70)

139. It would thus indeed follow from the outlined case-law of the Court, as confirmed by the most recent judgments regarding specifically the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court), that the referring court must, by virtue of the primacy of EU law, disapply national law, including the case-law of the Izba Dyscyplinarna Sądu Najwyższego (Disciplinary Chamber of the Supreme Court), and apply instead the previous national law on jurisdiction. Although, in both *A. K. and Others* and in *A.B. and Others*, the referring court was not a lower court, (71) I do not think that that difference is of any relevance. The judgment in *A. K. and Others* is equally relevant to the referring court in the present case.

140. In summary, EU law clearly empowers a national court, under the conditions outlined above, to set aside and disregard national legislation or a judicial opinion of a superior court, if that is the only way of securing compliance with EU law.

141. What is indeed novel is the third issue raised by the referring court in Question 4, whereby the referring court appears to be asking whether it could simply ignore the appeal pending before it. I understand that the motive underpinning that proposition is the creation of a certain legal void. Indeed, if there is no decision then nothing can be appealed. Therefore, there is nothing that may potentially progress to a court that is *not* independent.

142. Despite the alluring, radical simplicity of that idea, similarly to the Polish Government in fact, I cannot but suggest a negative answer. Article 47 of the Charter (and, for that purpose, Article 19(1) TEU) safeguards the right to an effective legal remedy. Even if the 'next level' within a judicial hierarchy no longer lives up to that standard, that

provision can hardly be interpreted as having a knock-on effect at the lower level, preventing it from making a decision at all.

143. In my view, the reason for that is rather simple, but very onerous: the prohibition of *denegatio iustitiae*. Since the introduction of Article 4 of the French Civil Code, ‘a judge who refuses to adjudicate, on the pretext that the law is silent, obscure or defective, may be prosecuted on a charge of denial of justice’. (72)

144. Although originally established in the context of civil law, and to my knowledge never proclaimed to be part of EU law, that prohibition is such a fundamental aspect of modern judicial function that even the primacy of EU law cannot alter it. It cannot be the case that a court simply remains intentionally inactive, refusing to hand down any decision, not only because the law is defective, but also because a higher court is apparently defective. Instead, the system already permits a court to express its disagreement by allowing a court to decide on a case and, if need be, not to apply national legislation or the guidance from a superior court, albeit, always by way of a duly reasoned decision.

145. In my view, this is as far as this Court can possibly go in providing (at least) some useful guidance to the referring court, while remaining within the parameters of the preliminary ruling procedure set out above. (73) To reiterate, the role of this Court is to interpret EU law and not national law. Moreover, even if examining the compatibility of certain national rules with EU law in practice, that assessment has also been traditionally limited to negative statements of incompatibility, but without positive statements as to how compatibility is to be achieved in specific terms. The latter is indeed the exclusive power of the referring court or other competent authorities of the Member State concerned.

146. I acknowledge that such a division of competences within the preliminary ruling procedure might not be ideal for dealing with what essentially are pathological situations in a Member State, within which normal rules of legal engagement and fair play appear to be breaking down. However, in realistic terms, the preliminary ruling procedure has inherent limits in terms of its potential for settling institutional stand-offs in such a specific context, wherein one or more actors refuse to follow the guidance issued by the Court. In such cases, a third-party intervention and external enforcement of the judgments of the Court, such as the one provided for in Articles 258 to 260 TFEU, remain a more appropriate, if not the only, remedy.

V. Conclusion

147. I propose that the Court answer the questions referred for a preliminary ruling by the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Disciplinary Court of the Bar Association in Warsaw, Poland) as follows:

- Chapter III of Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market applies, as part of an authorisation scheme governing the exercise of the activity of lawyers, to disciplinary proceedings initiated against lawyers, the result of which may affect the ongoing ability of those lawyers to provide legal services under that directive. As a result, Article 47 of the Charter of Fundamental Rights of the European Union and, as the case may be, Article 19(1) TEU also apply to such proceedings.
- On the basis of the primacy of EU law:
 - A national court is required to set aside the provisions of national law which reserve jurisdiction to rule on cases to a court which is not an independent and impartial tribunal, so that those cases may be examined by a court which meets the requirements of independence and impartiality and which, were it not for those provisions, would have jurisdiction.
 - A national court must, if necessary, disregard the rulings of a higher court if it considers that they are incompatible with EU law, including situations in which incompatibility derives from the lack of independence and impartiality of that higher court.

1 Original language: English.

2 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).

3 Judgment 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).

4 See, for example, judgments of 17 September 1997, Dorsch Consult (C-54/96, EU:C:1997:413, paragraph 23 and the case-law

cited); of 9 October 2014, TDC (C-222/13, EU:C:2014:2265, paragraph 27); of 6 October 2015, Consorci Sanitari del Maresme (C-203/14, EU:C:2015:664, paragraph 17 and the case-law cited); and of 24 May 2016, MT Højgaard and Züblin (C-396/14, EU:C:2016:347, paragraph 23).

5 Judgment of 17 September 1997, Dorsch Consult (C-54/96, EU:C:1997:413) (*Dorsch*). See above, point 31 of this Opinion.

6 See, for example, judgments of 17 September 1997, Dorsch Consult (C-54/96, EU:C:1997:413, paragraph 31), and of 31 January 2013, D. and A. (C-175/11, EU:C:2013:45, paragraph 88).

7 See, for example, judgments of 27 April 2006, Standesamt Stadt Niebüll (C-96/04, EU:C:2006:254, paragraph 13 and the case-law cited); of 16 June 2016, Pebros Servizi (C-511/14, EU:C:2016:448, paragraph 24); and of 4 September 2019, Salvoni (C-347/18, EU:C:2019:661, paragraph 26).

8 See, for example, judgments of 17 July 2008, Coleman (C-303/06, EU:C:2008:415, paragraph 29 and the case-law cited), and of 22 December 2008, Les Vergers du Vieux Tauves (C-48/07, EU:C:2008:758, paragraph 20 and the case-law cited).

9 See, for example, judgment of 13 April 2000, Lehtonen and Castors Braine (C-176/96, EU:C:2000:201, paragraph 19).

10 See, equally, judgment of 25 June 2009, *Roda Golf & Beach Resort* (C-14/08, EU:C:2009:395, paragraph 33 and the case-law cited).

11 *A contrario*, for the purposes of admissibility, contrived cases – see judgments of 11 March 1980, *Foglia (I)* (104/79, EU:C:1980:73), and of 16 December 1981, *Foglia (II)* (244/80, EU:C:1981:302). See also judgment of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, in particular paragraphs 12 and 26).

12 Recently, see, for example, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, in particular paragraphs 117 to 119).

13 See, for example, judgment of 21 January 2020, Banco de Santander (C-274/14, EU:C:2020:17, paragraphs 57 and 58 and the case-law cited).

14 Judgment of 21 January 2020, Banco de Santander (C-274/14, EU:C:2020:17, paragraph 60). See also, to that effect, judgment of 9 October 2014, TDC (C-222/13, EU:C:2014:2265, paragraphs 32 and 35).

15 Judgment of 9 October 2014, TDC (C-222/13, EU:C:2014:2265, paragraph 32).

16 See, for example, judgment of 21 January 2020, Banco de Santander (C-274/14, EU:C:2020:17, paragraphs 61 and 62 and the case-law cited).

17 Reproduced above, in point 10 of this Opinion. See also Article 40(2) of the Polish Law on the Bar, above in point 15 of this Opinion.

18 See, for example, judgments of 9 October 2014, TDC (C-222/13, EU:C:2014:2265, paragraphs 33 to 36), and of 21 January 2020, Banco de Santander (C-274/14, EU:C:2020:17, paragraphs 66 to 68).

19 In detail, see my Opinion in *Asociația “Forumul Judecătorilor din România” and Others* (C-83/19, C-127/19, C-195/19, C-291/19 and C-355/19, EU:C:2020:746, points 240 to 248).

20 See also my Opinion in *Joined Cases WB and Others* (C-748/19 to C-754/19, EU:C:2021:403, points 52 and 166).

21 See, for instance, judgment 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, paragraph 130 and the case-law cited).

22 It might be added that the same is true for judges themselves and judicial discipline: a number of disciplinary panels for judges in the Member States are composed of judges, either exclusively or predominantly. Following the argument of the Polish Government to its (il)logical end, would it then also mean that disciplinary panels for judges cannot be composed of (other) judges because such panels would be composed of one’s peers and would thus also not be independent?

23 Judgment of 6 October 1981, Broekmeulen (246/80, EU:C:1981:218, paragraphs 8 to 17).

24 Judgment of 17 July 2014, Torresi (C-58/13 and C-59/13, EU:C:2014:2088, paragraphs 15 to 30). See also, although impliedly, the previous judgment of 30 November 1995, Gebhard (C-55/94, EU:C:1995:411).

25 Judgment of 22 December 2010, Koller (C-118/09, EU:C:2010:805), in the context of a dispute concerning the rejection of an application relating to admission to the aptitude test for the profession of lawyer.

26 Order of 23 October 2018, Conseil départemental de l’ordre des chirurgiens-dentistes de la Haute-Garonne (C-296/18, not published, EU:C:2018:857), in the context of disciplinary proceedings against a dentist.

27 Judgment of 8 April 1992, Bauer (C-166/91, EU:C:1992:184), in a case where a Belgian resident had unsuccessfully applied to have his name entered on the list of trainees of a local Association of Architects.

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- 28 See, for instance, order of 28 November 2013, *Devilleers* (C-167/13, not published, EU:C:2013:804).
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- 29 Naturally not limited to disciplinary bodies only, but also other judicial bodies. See, for example, judgment of 30 May 2013, *F.*(C-168/13 PPU, EU:C:2013:358), upon reference from the French *Conseil constitutionnel* (Constitutional Council) which, in the course of its history, has mainly been composed of non-professional judges, often even including 'non-lawyers'. See also my Opinion in *Eurobox Promotion and Others* (C-357/19 and C-547/19, EU:C:2021:170, points 215 to 219).
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- 30 See in detail my Opinion in Joined Cases *WB and Others* (C-748/19 to C-754/19, EU:C:2021:403, points 161 to 169).
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- 31 See, to that effect, for example, judgment of 6 October 1981, *Broekmeulen* (246/80, EU:C:1981:218, paragraph 16).
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- 32 See, for example, judgments of 10 December 2018, *Wightman and Others*(C-621/18, EU:C:2018:999, paragraphs 26 and 27), and of 9 July 2020, *Verein für Konsumenteninformation* (C-343/19, EU:C:2020:534, paragraph 19 and the case-law cited).
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- 33 See, for a more recent example, judgment of 1 October 2019, *Blaise and Others* (C-616/17, EU:C:2019:800, paragraphs 31 to 39).
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- 34 See judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 49). See also order of 6 October 2020, *Prokuratura Rejonowa w Słubicach* (C-623/18, EU:C:2020:800).
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- 35 See, for example, to that effect, judgment of 1 June 2010, *Blanco Pérez and Chao Gómez*(C-570/07 and C-571/07, EU:C:2010:300, paragraphs 38 to 40).
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- 36 See also my Opinion in *Bundesrepublik Deutschland (Interpol red notice)* (C-505/19, EU:C:2020:939, point 34).
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- 37 Directive 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 (OJ 1998 L 77, p. 36).
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- 38 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); 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 (OJ, English Special Edition 1971 (II), p. 416); Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23); and 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).
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- 39 As suggested by the wording 'these include', used in Article 3 of the Services Directive, and by the overall purpose of that provision.
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- 40 Judgment of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraph 110).
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- 41 See, in particular and to that effect, Article 9(3) of the Services Directive regarding authorisation schemes: 'this section shall *not* apply to *those aspects* of authorisation schemes which are *governed directly or indirectly by other Community instruments*' (my emphasis), which suggests that it does not apply to *other* aspects of authorisation schemes. See also judgment of 7 May 2019, *Monachos Eirinaios*(C-431/17, EU:C:2019:368, paragraphs 30 and 31), which distinguishes between the (harmonised) registration of foreign lawyers and the (non-harmonised) exercise of the activity within Directive 98/5.
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- 42 As would also be implied, at the end of Question 1 submitted by the referring court, by the reference to 'cases where all the essential elements are present within a single Member State'.
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- 43 Further, see my Opinion in Joined Cases *Uniwersytet Wrocławski and Poland v REA* (C-515/17 P and C-561/17 P, EU:C:2019:774, points 103 and 104).
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- 44 As defined in Article 4(6), read in the light of recital 49, of the Services Directive.
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- 45 For example, Articles 3(1), 5(1), 6(1)(b), 8(1), 9(1), 10(4), 14(1), 15(2) of the Services Directive.
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- 46 Already in Article 1(1) of the Services Directive.
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- 47 My emphasis.
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- 48 See, for example, judgment of 4 July 2019, *Kirschstein* (C-393/17, EU:C:2019:563, paragraphs 61 to 63). See also, although non-binding, the *Handbook on the implementation of the Services Directive* (p. 15).
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- 49 See also my Opinion in Joined Cases *Ministerul Public – Parchetul de pe lângă Înalta Curte de Casație și Justiție – Direcția Națională Anticorupție and Others*(C-357/19 and C-547/19, EU:C:2021:170, points 109 to 115), regarding the same argument raised with regard to the scope of application of Article 325(1) TFEU.
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- 50 See, for example, judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 19 and the case-law cited); of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraphs 49 and 50); and of 16 October 2019, *Glencore*

Agriculture Hungary (C-189/18, EU:C:2019:861, paragraphs 59 and 60).

51 See also above, point 42 of this Opinion.

52 See, for example, judgment of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions) (C-824/18, EU:C:2021:153, paragraphs 115 and 116).

53 Regarding the relationship and respective scopes of Article 19(1) TEU and Article 47 of the Charter, see my Opinion in Joined Cases *WB and Others* (C-748/19 to C-754/19, EU:C:2021:403, points 161 to 169).

54 See, for example, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 56 and the case-law cited).

55 Judgment 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).

56 Decision No III PO 7/18.

57 Taking into account the fact that, in Poland, the office of the Minister for Justice has been merged with that one of the General Prosecutor – see my Opinion in Joined Cases *WB and Others* (C-748/19 to C-754/19, EU:C:2021:403). For a critical (and indeed) negative assessment of the fusion of both offices, see Venice Commission, Opinion on the Act on the Public Prosecutor's Office, as amended (2017) Opinion 892/2017.

58 Case No II DSI 67/18.

59 Judgment 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).

60 Contrast, in this regard, for example, the *Torubarov* case where, following the successive exchanges between the same actors, the national proceedings were in a deadlock due to the apparent unwillingness of the administrative authority to apply the previous judicial decision. However, there, the referring court raised a question specific to the deadlock that had already materialised – see judgment of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626, paragraphs 23 to 32).

61 Judgment 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, paragraph 171).

62 See judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraphs 44 and 46 and the case-law cited), or order of 2 July 2020, *S.A.D. Maler und Anstreicher* (C-256/19, EU:C:2020:523, paragraphs 42 to 44).

63 See, for example, judgments of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraphs 21 and 22); of 19 June 1990, *Factortame and Others* (C-213/89, EU:C:1990:257, paragraph 20); and of 22 June 2010, *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 44).

64 See, with further references, judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraphs 50 et seq).

65 See, for example, judgments of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraph 30), and of 15 January 2013, *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 69).

66 The Court has repeatedly recalled that a national court is naturally entitled to find an incompatibility of national law with EU law and draw the appropriate consequences from that finding also without a request for a preliminary ruling under Article 267 TFEU being necessary – see judgments of 19 January 2010, *Kücükdeveci* (C-555/07, EU:C:2010:21, paragraphs 53 to 55); of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraph 28); and order of 3 September 2020, *Vikingo Fővállalkozó* (C-610/19, EU:C:2020:673, paragraph 75).

67 See, in greater detail, my Opinion in *Ministerul Public – Parchetul de pe lângă Înalta Curte de Casație și Justiție – Direcția Națională Anticorupție and Others* (C-357/19 and C-547/19, EU:C:2021:170, points 235 to 243).

68 Judgment 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, paragraph 171).

69 Judgment of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions) (C-824/18, EU:C:2021:153).

70 *Ibid.*, paragraphs 142 to 150.

71 But by the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) and the Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych) (Supreme Court (Labour and Social Insurance Chamber)), respectively.

72 Portalis, J.E.M., 'Discours préliminaire sur le projet de Code Civil présenté le 1^{er} pluviôse an IX' (p. 12), in Portalis, J.E.M., *Discours et rapports sur le Code civil*, Caen, Fontes & Paginae, 2010, p. 70.

73 See above, points 128 to 131 of this Opinion.

JUDGMENT OF THE COURT (Third Chamber)

13 January 2022^(*)

(Reference for a preliminary ruling – Admissibility – Article 267 TFEU – Definition of ‘court or tribunal of a Member State’ – Bar Association Disciplinary Court – Disciplinary investigation initiated against a lawyer – Decision of the Disciplinary Agent finding that there was no disciplinary offence and terminating the investigation – Appeal by the Minister for Justice to the Bar Association Disciplinary Court – Directive 2006/123/EC – Services in the internal market – Article 4, point (6), and Article 10(6) – Authorisation scheme – Withdrawal of authorisation – Article 47 of the Charter of Fundamental Rights of the European Union – Not applicable)

In **Case C-55/20**,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Bar Association Disciplinary Court, Warsaw, Poland), made by decision of 24 January 2020, received at the Court on 31 January 2020, in the proceedings initiated by

Minister Sprawiedliwości

intervening parties:

Prokurator Krajowy – Pierwszy Zastępca Prokuratora Generalnego,

Rzecznik Dyscyplinarny Izby Adwokackiej w Warszawie,

THE COURT (Third Chamber),

composed of A. Prechal (Rapporteur), President of the Second Chamber, acting as President of the Third Chamber, J. Passer, F. Biltgen, L.S. Rossi and N. Wahl, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Prokurator Krajowy – Pierwszy Zastępca Prokuratora Generalnego, by R. Hernand and B. Świączkowski,
- the Polish Government, by B. Majczyna, acting as Agent,
- the Netherlands Government, by M.K. Bulterman and J.M. Hoogveld, acting as Agents,
- the European Commission, initially by L. Armati, K. Herrmann, S.L. Kalèda and H. Støvlbæk, and subsequently by L. Armati, K. Herrmann and S.L. Kalèda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 June 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation 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 Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2 The request has been made in proceedings brought by the Minister Sprawiedliwości (Minister for Justice, Poland) against the decision of a disciplinary agent who closed an investigation initiated against a lawyer after finding that there was no disciplinary offence attributable to the person concerned.

[text deleted. See AG opinion for legal context]

Admissibility of the request for a preliminary ruling

48 The National Prosecutor and the Polish Government take the view that the present request for a preliminary ruling is inadmissible on the ground that the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Bar Association Disciplinary Court, Warsaw) does not constitute a court or tribunal within the meaning of Article 267 TFEU.

49 In that regard, the Polish Government submits that, in accordance with Article 17(1) of the Polish Constitution, such a disciplinary court is responsible for ensuring the proper practice of the profession of lawyer by ruling on whether the conduct of the persons concerned complies with the rules of professional ethics and not for bringing justice in the name of the Republic of Poland as a court or tribunal within the meaning of Article 179 of that Constitution.

50 Furthermore, the Disciplinary Court does not satisfy the requirement of independence required under the case-law of the Court of Justice. First, since such a body is not a court or tribunal within the meaning of the Polish Constitution, it likewise does not enjoy the guarantees of independence provided for by that Constitution in respect of courts and tribunals alone.

51 Secondly, the Disciplinary Board is not protected from indirect external influence likely to have an effect on its decisions, since its members are elected by the General Assembly of the local Bar Association pursuant to Article 40(2) of the Law on the Bar and are therefore called upon to rule on disciplinary matters concerning colleagues thanks to whose support they have been elected and by whom their term of office may subsequently be renewed several times.

52 Thirdly, those same members could, as is apparent from Article 11(4) of the Law on the Bar, be dismissed before the end of their term of office by the body which thus elected them, so that they do not enjoy guaranteed irremovability.

53 For his part, the National Prosecutor considers that the classification of a body as a court or tribunal within the meaning of Article 267 TFEU must be made in the light of all the circumstances of the case, including the subject matter of the proceedings at issue and the position and function of the body concerned in the national legal system. Thus, professional disciplinary courts can be regarded as such courts or tribunal only if they fulfil the functions of the State and, in particular, that of ruling on the right to pursue a professional activity. However, given the subject matter of the dispute in the main proceedings and the current stage of the disciplinary proceedings, that is not the case, in the present case, as regards the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Bar Association Disciplinary Court, Warsaw). In the absence of a decision by the Disciplinary Agent criticising Mr R.G. for having committed a disciplinary offence, that Disciplinary Court is not called upon to rule on *inter partes* proceedings concerning the disciplinary liability of the person concerned or, therefore, on his right to carry out his professional activity, but only called on to review the merits of that agent's decision to close the disciplinary investigation.

54 In that regard, it follows from settled case-law that, in order to determine whether a body making a reference is a 'court or tribunal' for the purposes of Article 267 TFEU, and whether, as a result, a request for a preliminary ruling sent by it to the Court on the basis of that provision may be admissible, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 51 and the case-law cited).

55 However, with regard to the *inter partes* nature of the proceedings before the national court, Article 267 TFEU does not make the reference to the Court subject to those proceedings being of such a nature. On the other hand, it follows from that article that a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (judgments of 16 December 2008, *Cartesio*, C-210/06, EU:C:2008:723, paragraph 56, and of 16 July 2020, *Governo della Repubblica italiana (Status of Italian magistrates)*, C-658/18, EU:C:2020:572, paragraph 63).

56 In the present case, it seems, first of all, to be common ground, in the light of the provisions of the Law on the Bar referred to by the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Bar Association Disciplinary Court, Warsaw), that that body satisfies the criteria relating to being established by law, being permanent, having compulsory jurisdiction and applying rules of law.

57 Next, as regards the doubts expressed by the National Prosecutor as to the function of the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Bar Association Disciplinary Court, Warsaw) in the context of the main proceedings, it must

be stated that that body is called upon to decide a case pending before it by adjudicating in proceedings intended to lead to a decision of a judicial nature, within the meaning of the case-law referred to in paragraph 55 above.

58 It is apparent from the statements in the order for reference that that disciplinary court is seised of an appeal brought by the Minister for Justice against a decision by which a Disciplinary Agent decided to close a disciplinary investigation opened in respect of a lawyer and that such an appeal may, *inter alia*, result in the annulment of that decision by the Disciplinary Court and, in that event, in the case being referred back to that disciplinary agent for re-examination of the file.

59 It follows from the case-law of the Court that the conditions in which the Court performs its duties in respect of preliminary rulings are independent of the nature and objective of the proceedings brought before the national courts. Article 267 TFEU refers to the judgment to be given by the national court without laying down special rules in terms of the nature of such judgments (judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraph 83 and the case-law cited).

60 As regards, finally, the arguments put forward by the Polish Government, first, the fact that the Bar Association Disciplinary Courts do not constitute courts or tribunals within the meaning of Article 179 of the Polish Constitution is not such as to preclude such bodies from being a ‘court or tribunal’ within the meaning of Article 267 TFEU. As is apparent from settled case-law, the question whether a body constitutes a court or tribunal within the meaning of that provision of EU law is a question governed by EU law alone (see, to that effect, judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 51 and the case-law cited).

61 Moreover, the Court has, on several occasions, already held that professional bodies, in particular those with jurisdiction over lawyers, may constitute courts or tribunals within the meaning of Article 267 TFEU provided that those bodies satisfy the requirements laid down in the case-law referred to in paragraphs 54 and 55 above (see, *inter alia*, judgments of 22 December 2010, *Koller*, C-118/09, EU:C:2010:805, paragraphs 22 and 23, and of 17 July 2014, *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraphs 17, 19 and 30).

62 As regards, secondly, the condition relating to the independence of the body making the reference, it must be borne in mind that, in accordance with settled case-law, that condition is essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism established by Article 267 TFEU, which may be activated only by a body responsible for applying EU law, which satisfies, *inter alia*, that criterion of independence (see, to that effect, judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 56 and the case-law cited).

63 According to the case-law of the Court, the concept of ‘independence’ has two aspects. The first aspect, which is external, requires that the body concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, being thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (judgments 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, paragraph 121 and the case-law cited, and of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 57 and the case-law cited).

64 The second aspect, which is internal, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (judgments 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, paragraph 122 and the case-law cited, and of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 61 and the case-law cited).

65 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgments 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, paragraph 123 and the case-law cited, and of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 63 and the case-law cited).

66 In particular, that freedom of the judges from all external intervention or pressure, which is essential, requires, as the Court has held on several occasions, certain guarantees appropriate for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office (judgments of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 75 and the case-law cited, and of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 58 and the case-law cited).

67 The Court has also held that the rules set out in paragraph 65 above must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned (judgment 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, paragraph 125 and the case-law cited).

68 As regards the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Bar Association Disciplinary Court, Warsaw), it should be noted, in the first place, that, as provided for in Article 89 of the Law on the Bar, the Bar Association disciplinary courts must be 'independent' as regards their rulings in disciplinary matters.

69 In the second place, the Polish Government's argument that the fact that the members of such a disciplinary court are elected by the college of lawyers enrolled on the register of the Bar Association concerned and the fact that that college may, in future, re-elect those members give rise to doubts as to the ability of that disciplinary court to rule impartially on the disciplinary matters before it cannot be accepted.

70 Having regard, in particular, to their collective nature, acts of election or re-election of the members of the disciplinary court of the local Bar Association concerned by the General Assembly of lawyers enrolled on the register of that Bar, that is, with regard to the Warsaw Bar, and as is apparent from the information provided by the referring body, some 5 500 lawyers, are not such as to give rise to doubts as to the independence and impartiality of the members thus elected where they are called upon to rule, in the public interest, on a possible infringement of the ethical rules governing the profession of lawyer committed by any particular lawyer enrolled on that register.

71 In the third place, the fact that, according to its wording, Article 11(4) of the Law on the Bar provides that members of the bodies of the Bar and of the local Bar Associations may be dismissed before the end of their term of office by the body which elected them is not, in the present case, such as to cast doubt on the independence of the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Bar Association Disciplinary Court, Warsaw).

72 In that regard, and as the Polish Government points out, it is true that the Court has recently held, with regard to the Spanish *Tribunales Económico-Administrativos* (economic-administrative courts), that the rules governing the dismissal of their members were not determined by specific legislation, by means of express legislative provisions, but that it was governed solely by the general rules of administrative law and, in particular, by the basic regulations relating to civil servants, so that the dismissal of those members consequently was not limited, as required by the principle of irremovability, to certain exceptional cases reflecting legitimate and compelling grounds that warrant the adoption of such a measure. The Court concluded that the national legislation in question did not ensure that the members of those bodies were protected from external pressures liable to cast doubt on their independence and that such a system did not constitute an effective safeguard against undue pressure from the executive with the result that those bodies could not be regarded as courts or tribunals within the meaning of Article 267 TFEU (judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraphs 66 to 69).

73 In the present case, it should however first be noted that the judicial function conferred on the Bar Association Disciplinary Courts is particularly specialised since it is, in essence, for those courts to ensure that the members of the profession concerned comply with the rules of professional ethics specifically laid down in order to control the practice of the profession of lawyer by penalising, where appropriate, those of the members who infringe those rules.

74 In such a context, the fact that the possible dismissal of the members of such a disciplinary body is a matter for an internal authority of the profession concerned is not, in principle, such as to pave the way for pressure or any direct or indirect intervention emanating from a power outside that profession which is allegedly intended to interfere in the exercise of the judicial task thus conferred on that disciplinary body.

75 Secondly, it is apparent from the information provided by the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Bar Association Disciplinary Court, Warsaw), in response to various questions put to it by the Court, on the one hand, that, even though Article 58(13) of the Law on the Bar provides that it falls within the remit of the Supreme Bar Council alone to request the competent authorities to dismiss members of the bodies of the Bar, that provision expressly

derogates from that rule as regards members of the disciplinary bodies. According to the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Bar Association Disciplinary Court, Warsaw), it follows that the Supreme Bar Council cannot make such a request for the dismissal of a member of a disciplinary court before the expiry of that member's mandate.

76 On the other hand, that information shows that the General Assembly of the Warsaw Bar has never exercised the power of dismissal which Article 11(4) of the Law on the Bar appears to confer upon it and that that provision must be held to be ineffective, which is, moreover, also borne out by the fact that the Bar regulations do not contain any provision specifying the substantive or procedural conditions which would allow actual implementation of the possibility thus theoretically made available by that provision.

77 As the Advocate General observed in points 52 and 53 of his Opinion, it thus follows from those various items of information that, as regards the possibility of dismissing members of the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Bar Association Disciplinary Court, Warsaw), Article 11(4) of the Law on the Bar has always been a dead letter of the law and devoid of any practical effect.

78 Thirdly, it should also be pointed out that the mere prospect that the general assembly of a local Bar Association, as a collective body bringing together all the lawyers enrolled in the professional register of the Bar Association concerned – that is, as regards the Warsaw Bar and as has already been observed, some 5 500 members – may, where appropriate, be led, under substantive and procedural conditions which would remain to be determined in such a case, to exercise a power of dismissal with regard to a member of the disciplinary court of that Bar Association, does not in itself seem to be such as to give rise to well-grounded fears that the independence of any such member, or of that Council itself, would be undermined in the exercise of their judicial activity.

79 In the light of all the foregoing considerations, it must be held that the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Bar Association Disciplinary Court, Warsaw) meets the conditions required to be regarded as a court or tribunal within the meaning of Article 267 TFEU. It follows that the present request for a preliminary ruling is admissible.

The first question

80 By its first question, the referring court asks, in essence, whether Article 10(6) of Directive 2006/123 must be interpreted as having the effect of rendering Article 47 of the Charter applicable to appeal proceedings brought by a State authority before a Bar Association Disciplinary Court and seeking annulment of a decision by which a Disciplinary Agent closed an investigation into a lawyer after finding that there was no disciplinary offence attributable to that lawyer and, should that decision be annulled, to the referral back of the file to that disciplinary agent.

Admissibility

81 The Polish Government raises doubts as to the admissibility of the first question on the ground that Directive 2006/123 is, in its view, inapplicable to the case in the main proceedings. In that regard, that government submits, first, that the situation at issue in the main proceedings is purely internal in nature, secondly, that Directive 98/5 constitutes a *lex specialis* which prevails over Directive 2006/123, thirdly, that only inclusion on the register of lawyers is covered by the authorisation scheme referred to in that directive and that such inclusion or removal from that register are not at issue in the main proceedings, and, fourthly, that since disciplinary proceedings are related to criminal proceedings, they must therefore, like criminal proceedings, fall outside the scope of that directive as provided for in Article 1(5) thereof.

82 According to the Polish Government, Article 47 of the Charter is not applicable in the present case either, since there is thus no implementation of Union law within the meaning of Article 51(1) of the Charter and the European Union, in any event, does not have competence with regard to disciplinary proceedings and appeals in disciplinary cases.

83 In those various connections, however, it must first be stated that the arguments put forward by the Polish Government relate, in essence, to the field of application and scope, and therefore to the interpretation, of the provisions of EU law to which the first question relates. Such arguments, which concern the substance of the question referred, cannot therefore, by their very nature, lead to the inadmissibility of the question (see, by analogy, judgment of 2 March 2021, *A.B. and Others (Appointment of Judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 80).

84 Secondly, the objection alleging that the enactment of disciplinary rules and procedures applicable to lawyers falls within the exclusive competence of the Member States must also be rejected. Even if such exclusive competence were

established, the fact would remain, as is clear from the settled case-law of the Court, that the Member States are required, when exercising such competences, to comply with their obligations under EU law (see, by analogy, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 52 and the case-law cited).

85 The National Prosecutor, for his part, submits that the first question was raised only as an essential prerequisite to the formulation of the second to fourth questions. He argues that, since those three other questions are themselves inadmissible, an answer to the first question is of no use for the purpose of resolving the dispute in the main proceedings and cannot, therefore, be regarded as necessary in order for the referring court to give judgment within the meaning of Article 267 TFEU.

86 In that regard, it must however be noted that the first question raises a difficulty in interpreting EU law which is related to the subject matter of the dispute in the main proceedings and that it is, moreover, and as the referring court has pointed out, preliminary in relation to the other three questions referred. In those circumstances, the Court considers that it is appropriate to examine the first question, following, in that regard, the logical order in which the various questions raised were thus referred to it by the national court.

87 It follows from all the foregoing that the first question is admissible.

Substance

88 As regards the applicability of Directive 2006/123 in general and of Article 10(6) thereof, to which the first question specifically relates, it should be noted in the first place that, as is apparent from recital 33 of that directive, the services covered by it concern, *inter alia*, legal advice services. Furthermore, under Article 4(1) of Directive 2006/123, 'service', for the purposes of that directive, means any self-employed economic activity, normally provided for remuneration, as referred to in Article 57 TFEU. It is therefore common ground that legal services provided by lawyers fall within the material scope of that directive.

89 In the second place, as regards the fact, highlighted by the referring court in its first question, that the case in the main proceedings seems *prima facie* to concern a purely internal situation, inasmuch as that case seems not to concern a situation falling within the scope of the freedom of establishment or the freedom of lawyers to provide services, within the meaning of Articles 49 to 55 and 56 to 62 TFEU, it is sufficient to recall that such a fact is not such as to exclude the applicability of the provisions of Chapter III of Directive 2006/123 and therefore, Article 10 thereof. As is apparent from the Court's case-law, the provisions of Chapter III must be interpreted as also applying to a situation where all the relevant elements are confined to a single Member State (judgment of 30 January 2018, *X and Visser*, C-360/15 and C-31/16, EU:C:2018:44, paragraph 110).

90 In the third place, as regards the argument put forward by the Polish Government that the applicability of the provisions of Directive 2006/123 is precluded in the present case on the ground that the provisions of Directive 98/5, as a *lex specialis*, prevail over them, it must be borne in mind that Article 3(1) of Directive 2006/123 merely provides that if the provisions of that directive 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, the provision of the other act is to prevail and is to apply to those specific sectors or professions.

91 However, it must be stated in that regard and as the Advocate General also observed in points 77, 78, 80 and 81 of his Opinion, that Directive 98/5 does not apply to a lawyer who, like Mr R.G., does not appear to have acquired his professional qualification in a Member State other than the Republic of Poland or have exercised the right to freedom of establishment guaranteed by Article 49 TFEU for the purposes of establishing himself in the Republic of Poland as a lawyer. It follows that in the context of a situation such as that at issue in the main proceedings, no conflict within the meaning of Article 3(1) of Directive 2006/123 can arise between the provisions of that directive and those of Directive 98/5.

92 Similarly, and in the absence of the applicability of Directive 98/5 in that context, Article 9(3) of Directive 2006/123, which provides that Section 1 of Chapter III thereof does not apply to those aspects of authorisation schemes which are governed directly or indirectly by other EU instruments, seems to be wholly irrelevant in the present case.

93 In the fourth place, as regards the Polish Government's argument that the provisions of Directive 2006/123 are, by analogy, inapplicable to disciplinary proceedings on the ground that Article 1(5) of that directive specifies, subject to certain reservations, that it does not affect Member States' rules of criminal law, it is sufficient to note that there is

nothing in the wording of that provision to suggest that the derogation scheme thus established in respect of Member States' rules of criminal law is also applicable so far as concerns the rules applicable with regard to professional disciplinary proceedings.

94 Moreover, in this connection, various provisions of Directive 2006/123 show, on the contrary, that provisions relating to disciplinary proceedings cannot be accorded the same treatment as that provided for in Article 1(5) of that directive in respect of Member States' rules of criminal law. Thus, for example, the concept of 'requirement' – which plays an essential transversal role in Directive 2006/123 and in particular in the context of Chapter III thereof, as is apparent from Articles 14 and 15 thereof – is defined in Article 4(7) of that directive as encompassing, inter alia, any obligation, prohibition, condition or limit in consequence of the 'rules of professional bodies' adopted in the exercise of their legal autonomy.

95 In the light of the foregoing considerations and as regards, in the fifth place, the possible applicability in the present case of Article 10(6) of Directive 2006/123, it should be noted that that provision states, under the heading 'Conditions for the granting of authorisation', that 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.

96 In this respect, it is important to point out that under Article 4(6) of Directive 2006/123, an authorisation scheme is defined 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.

97 There is therefore no doubt that legislation which makes the exercise of the activity of a lawyer subject to prior enrolment in the professional register of lawyers and thus obliges interested parties to undergo a procedure requiring them to take steps in order to obtain a formal decision from a competent authority allowing them to access and exercise that activity, establishes an authorisation scheme within the meaning of Article 4(6) and Chapter III of Directive 2006/123 (see, to that effect, judgment of 22 September 2020, *Cali Apartments*, C-724/18 and C-727/18, EU:C:2020:743, paragraphs 47, 49, 51 and 52). That is, moreover, expressly confirmed by recital 39 of that directive, which states that the concept of 'authorisation scheme' should cover, inter alia, 'the obligation, in order to be eligible to exercise the activity, to be registered as a member of a profession'.

98 An 'authorisation scheme' within the meaning of Article 4(6) of Directive 2006/123 is distinct from a 'requirement' within the meaning of Article 4(7) of that directive, which covers in particular any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of the rules of professional bodies adopted in the exercise of their legal autonomy (see, to that effect, judgment of 22 September 2020, *Cali Apartments*, C-724/18 and C-727/18, EU:C:2020:743, paragraphs 48 and 49). Thus, rules of a disciplinary nature specific to such professions do not constitute rules which render access to the professional activity concerned conditional upon a formal decision by the competent authorities authorising that activity, but rather constitute 'requirements' relating to the exercise, as such, of that activity, which do not, in principle, fall within the scope of such an authorisation scheme.

99 Furthermore, it must also be acknowledged that a decision of the State authority ordering removal from the register of the Bar Association constitutes, in principle, a 'withdrawal of an authorisation' within the meaning of Article 10(6) of Directive 2006/123. It follows that, as the referring court points out, a disciplinary decision adopted on the basis of Article 81(1) of the Law on the Bar holding that a lawyer was to be expelled from the Bar Association must be regarded as such a withdrawal of authorisation. It is apparent from Article 82(2) of that law that such an expulsion decision entails removal from the register of lawyers with no right to apply for re-registration in that register for a period of 10 years from the date on which the ruling imposing expulsion from the Bar becomes final.

100 However, as the Polish and Netherlands Governments and the European Commission have pointed out, the appeal currently pending before the referring court cannot result in such a decision to expel a lawyer from the Bar Association that would thus entail the removal of the person concerned from the register of lawyers and therefore a withdrawal of authorisation within the meaning of Article 10(6) of Directive 2006/123.

101 It is apparent from the statements in the order for reference that the case in the main proceedings concerns an appeal brought by the Minister for Justice against a decision by which a Disciplinary Agent, on the contrary, took the view, having carried out a preliminary investigation, that in the instant case there were no grounds for bringing disciplinary proceedings before the body competent to rule thereon and for deciding, on the basis of the proceedings

brought before that body, as to any expulsion from the Bar by way of a disciplinary penalty. It also follows from those statements that, in the procedural context of the case in the main proceedings, the decision that the referring court is required to make may thus consist exclusively of either dismissing that appeal or upholding it, in the latter case by referring the case back to the Disciplinary Agent for a fresh examination of the file.

102 It thus follows from the foregoing, first, that the proceedings currently pending before the referring court are not capable of leading to the imposition of a disciplinary penalty on a lawyer, including his or her potential expulsion from the Bar, and, secondly, that those proceedings, which relate exclusively to a decision of the Disciplinary Agent not to bring disciplinary proceedings against such a lawyer, are between that disciplinary agent and the Minister for Justice, since the lawyer concerned himself is not at that stage subject to disciplinary proceedings or a party to those proceedings.

103 In the light of the foregoing, Article 10(6) of Directive 2006/123 is not applicable in the context of the proceedings currently pending in the case referred to the Court of Justice. Consequently, nor is that provision, in the same context, capable of rendering Article 47 of the Charter applicable.

104 It should be recalled that Article 47 of the Charter constitutes a reaffirmation of the principle of effective judicial protection and enshrines the right to an effective remedy before a tribunal for every person whose rights and freedoms guaranteed by EU law are infringed (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 40 and the case-law cited).

105 Thus, the recognition of that right, in a given case, presupposes, as is apparent from the first paragraph of Article 47 of the Charter, that the person invoking that right is relying on rights or freedoms guaranteed by EU law (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 41 and the case-law cited).

106 The information contained in the order for reference does not show that, given the current configuration of the main proceedings, Mr R.G., who is not at the present stage himself a party to those proceedings, would be in a position to rely on a right conferred on him by EU law, since Article 10(6) of Directive 2006/123, in particular and as set out above, is not applicable in the present case.

107 In the light of all the foregoing, the answer to the first question is that Article 10(6) of Directive 2006/123 must be interpreted as not having the effect of rendering Article 47 of the Charter applicable to appeal proceedings brought by a State authority before a Bar Association Disciplinary Court and seeking annulment of a decision by which a Disciplinary Agent closed an investigation into a lawyer after finding that there was no disciplinary offence attributable to that lawyer and, should that decision be annulled, to the referral back of the file to that disciplinary agent.

The second, third and fourth questions

108 Having regard to the answer given to the first question, there is no need to examine the second to fourth questions, which were raised by the referring court only if it were to follow from the answer to the first question that Article 47 of the Charter is applicable in the context of the main proceedings.

On those grounds, the Court (Third Chamber) hereby rules:

Article 10(6) 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 having the effect of rendering Article 47 of the Charter of Fundamental Rights of the European Union applicable to appeal proceedings brought by a State authority before a Bar Association Disciplinary Court and seeking annulment of a decision by which a Disciplinary Agent closed an investigation into a lawyer after finding that there was no disciplinary offence attributable to that lawyer and, should that decision be annulled, to the referral back of the file to that disciplinary agent.

[Signatures]

* Language of the case: Polish.

OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 13 July 2006 (1)

Case C-306/05

Sociedad General de Autores y Editores de España (SGAE)

v

Rafael Hoteles SL

1. In the present case, the Audiencia Provincial de Barcelona (Provincial High Court, Barcelona) (Spain) seeks an interpretation of Article 3(1) of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society (2) ('the Copyright Directive' or 'the Directive').

The Copyright Directive

2. The Copyright Directive, as its title indicates, aims to harmonise certain aspects of copyright and related rights, (3) including the right to communicate works to the public.

3. The preamble to the Directive first stresses that any harmonisation of copyright and related rights must take as a basis a high level of protection of, inter alios, authors and performers who, if they are to continue their creative and artistic work, must receive an appropriate reward for the use of their work. It adds that a rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and safeguarding the independence and dignity of artistic creators and performers. (4)

4. The following recitals are also relevant to the present case:

(15) The ... "WIPO Copyright Treaty" ... update[s] the international protection for copyright and related rights significantly, not least with regard to the so-called "digital agenda" This Directive also serves to implement a number of the new international obligations. ...

(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts. ...

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.'

5. Article 3(1) of the Directive requires Member States to 'provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them'.

6. The Directive entered into force on 22 June 2001 and required implementation by 22 December 2002. (5)

The international legal framework

7. Article 3(1) of the Copyright Directive is similar to Article 11 bis(1) of the Berne Convention for the Protection of Literary and Artistic Works (6) ('the Berne Convention' or 'the Convention') and almost identical to Article 8 of the WIPO (7) Copyright Treaty ('the WCT'). (8) As the Commission notes, it is settled case-law that provisions of secondary

Community legislation must, so far as is possible, be interpreted in a manner that is consistent with international agreements concluded by the Community. (9)

The Berne Convention

8. Although the Community is not a party to the Berne Convention (and indeed could not be, since membership of the Berne Union is confined to States), it is required to comply with the Convention by Article 9 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPs Agreement'). That Agreement is found in Annex 1C to the Agreement establishing the World Trade Organisation, (10) to which the Community is a party. It may therefore be assumed that Article 3(1) of the Directive is intended to be consistent with the Convention.

9. Article 11 of the Berne Convention provides:

'1. Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorising:

- (i) the public performance of their works, including such public performance by any means or process;
- (ii) any communication to the public of the performance of their works.

2. Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.'

10. Article 11bis(1) of the Berne Convention provides:

'Authors of literary and artistic works shall enjoy the exclusive right of authorising:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one; [(11)]

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.'

11. The Berne Convention was last revised in 1971. (12) Revision of the Convention requires unanimity of the contracting parties present and voting. Even in 1971, when there were considerably fewer contracting parties, (13) unanimity proved difficult to achieve. It appears for that reason to have been regarded as unrealistic to effect a further revision of the Convention to take account of technological developments since 1971. WIPO accordingly decided to prepare a new treaty which, as a 'special agreement' within the meaning of Article 20 of the Convention, would not require unanimity of the Berne Union members. A further advantage was that the European Community could accede (as could countries which were not members of the Berne Union).

The WCT

12. The WCT entered into force on 6 December 2001. The Community, although a signatory, has not yet ratified the WCT. (14) It is none the less of relevance in interpreting the Copyright Directive since recital 15 in the preamble to the Directive states that the Directive 'serves to implement a number of the new international obligations' deriving from the WCT.

13. Article 8, headed 'Right of Communication to the Public', reads as follows:

'Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii) ... of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.'

The relevant Spanish legislation

14. According to the order for reference, the Spanish law governing intellectual property (15) grants authors exclusive rights for exploitation of their works in any form. Such rights include public communication. Article 20 explains first what is meant by public communication: 'any act by which a number of persons can have access to the

work without prior distribution of copies to each of those persons'. It then states that communication which 'takes place within a strictly domestic location which is not integrated into or connected to a distribution network of any kind' does not fall to be classified as public communication.

15. The referring court states that until recently the Spanish Tribunal Supremo (Supreme Court) took the view that hotel rooms were not domestic locations and that, consequently, the use of television in those hotel rooms constituted an act of public communication within the meaning of Article 20 of the Intellectual Property Law. (16) As a result, the hotel owner was required to pay fees for authorised use to the society owning and managing the repertoire of works communicated.

16. That case-law was however reversed by a decision of the Supreme Court in 2003, (17) which ruled that a hotel room is a strictly domestic location, that consequently the use of television sets in such rooms does not constitute an act of public communication and that no authorisation is therefore required from the owners of intellectual property rights in respect of the works communicated.

The main proceedings and the reference to the Court

17. Sociedad General de Autores y Editores de España ('SGAE') is an intellectual property rights management society. It commenced proceedings against Rafael Hoteles SL ('Rafael'), the owner of Hotel Rafael, for infringement of intellectual property rights managed by SGAE. Specifically, SGAE complained that in the months between June 2002 and March 2003 acts of communication to the public were carried out involving works belonging to the repertoire managed by SGAE. The acts in question were carried out through television sets installed in the hotel rooms which enabled the guests to see programmes on channels whose signals were received by the hotel main aerial and then distributed to each of the television sets in the various rooms. SGAE claimed that Rafael should be ordered to pay compensation.

18. The court of first instance dismissed SGAE's claim. It held that, on the basis of the Spanish Supreme Court's recent case-law summarised above, the use of television sets in the rooms of Hotel Rafael did not involve acts of public communication of works managed by SGAE; and that it was therefore not necessary for the hotel owner to obtain prior authorisation and pay the corresponding fee.

19. SGAE appealed to the Audiencia Provincial de Barcelona which considers that the Spanish legislation and case-law may infringe the Copyright Directive. Specifically, the referring court has doubts as to whether the reception by the hotel of the television signal, whether terrestrial or satellite, and the distribution thereof by cable to the various hotel rooms, are acts of communication to the public for the purposes of the Directive. It considers that the essence of communication to the public is rendering the work broadcast, in this case by television, accessible to a number of persons. Such a situation clearly exists where the public is present at the same time, for example when there is a television set in a hotel lobby. More doubts arise, however, when the public comprises a series of members present successively, as in the case of a hotel bedroom.

20. The Audiencia Provincial de Barcelona has accordingly stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

(1) Does the installation in hotel rooms of television sets to which a satellite or terrestrial television signal is sent by cable constitute an act of communication to the public which is covered by the harmonisation of national laws protecting copyright provided for in Article 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001?

(2) Is the fact of deeming a hotel room to be a strictly domestic location, so that communication by means of television sets to which is fed a signal previously received by the hotel is not regarded as communication to the public, contrary to the protection of copyright pursued by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001?

(3) For the purposes of protecting copyright in relation to acts of communication to the public provided for in Directive 2001/29/EEC of the European Parliament and of the Council of 22 May 2001, can a communication that is effected through a television set inside a hotel bedroom be regarded as public because successive viewers have access to the work?

21. Written observations have been submitted by SGAE, the Austrian, French and Irish Governments and the Commission. SGAE, Rafael, the Irish and Polish Governments and the Commission were represented at the hearing.

The EGEDA case

22. The Spanish legislation which has given rise to the present case has already been the subject-matter of a reference for a preliminary ruling, made before the Copyright Directive was adopted. In EGEDA (18) the Court was asked whether the reception by a hotel establishment of satellite or terrestrial television signals and their distribution by cable to the various rooms of that hotel constituted an act of communication to the public or reception by the public within the meaning of Directive 93/83. (19) The Court ruled that that question was not governed by Directive 93/83 and was consequently to be decided in accordance with national law.

23. Advocate General La Pergola had also taken the view that the question was not governed by Directive 93/83. (20) Nevertheless, he went on to analyse Article 11bis(1) of the Berne Convention, which in his view enabled an answer to be given to the national court's question. (21) He concluded by proposing that the Court should rule that, first, Directive 93/83 was not applicable, and, second, that the reception by a hotel of protected works broadcast by satellite or terrestrial television signals from another Member State and the subsequent retransmission by cable of the programme signals received to the televisions located in the bedrooms of the same hotel constitutes an act of communication to the public within the meaning of Article 11bis of the Berne Convention. I shall refer in this Opinion to much of Advocate General La Pergola's helpful analysis.

Assessment

24. The questions referred concern the interpretation of 'communication to the public' in Article 3(1) of the Directive.

25. Essentially, SGAE and the French Government consider that that concept properly construed covers the activities described, so that all three questions referred should be answered in the affirmative. Rafael and the Austrian and Irish Governments take the contrary view. The Polish Government focuses on the second and third questions, which it considers should be answered in the affirmative. The Commission considers that, while the mere installation of television sets in hotel rooms does not constitute an act of 'communication to the public', the distribution to hotel rooms by cable of television signals, received by satellite or terrestrially, does constitute such an act.

The first question

26. I agree with Rafael, the Austrian and Irish Governments and the Commission that the mere installation of television sets in hotel rooms does not constitute an act of communication to the public within the meaning of Article 3(1) of the Directive. (22)

27. That conclusion follows clearly from recital 27 in the preamble to the Directive, which states that 'The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive'. That limitation, which is unequivocal, corroborates the statement in recital 23 that the 'right [of communication to the public] should cover any ... transmission or retransmission of a work to the public [not present at the place where the communication originates] by wire or wireless means, including broadcasting [and] should not cover any other acts'.

28. That approach is moreover consistent with the interpretation of the term 'communication' in the WCT. It is clear that Article 3(1) of the Directive seeks to implement at Community level certain new international obligations imposed by that Treaty. (23) Indeed the right which Article 3(1) requires Member States to provide is framed in virtually identical terms to Article 8 thereof. That is not coincidental: the Community and the Member States proposed Article 8. (24) The Diplomatic Conference which adopted that treaty (25) also adopted the following 'agreed statement' concerning Article 8:

'It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2).'

29. I accordingly consider that the answer to the first question referred should be that the installation in hotel rooms of television sets to which a satellite or terrestrial television signal is sent by cable does not constitute an act of communication to the public within the meaning of Article 3(1) of the Copyright Directive.

The second and third questions

30. The referring court's second and third questions can conveniently be dealt with together. Read in conjunction, they ask in effect whether communication of broadcasts to hotel bedrooms by means of television sets to which is fed

a signal initially received by the hotel is to be regarded as 'communication to the public' within the meaning of Article 3(1) of the Directive.

31. It is common ground that, if the recipients are found to constitute 'the public', Article 3(1) will apply: what divides the parties submitting observations, and what prompted the referring court to make the reference, is the meaning of 'the public'.

32. In my view, the second and third questions should be answered in the affirmative.

33. The Directive gives no definition of 'the public', although (as SGAE and the French and Polish Governments submit) there are indications that the term is, for the purposes of the Directive, to be interpreted broadly. That is suggested both by the principal objective of the Directive, which takes as its basis 'a high level of protection' of copyright and related rights, (26) and by the statement in the preamble to the Directive that the right of communication to the public 'should be understood in a broad sense covering all communication to the public not present at the place where the communication originates [and] should cover any such transmission or retransmission to the public by wire or wireless means'. (27)

34. In the absence of a definition or clearer indications in the Directive, I consider that it is legitimate to seek guidance from the relevant international instruments.

35. As explained above, (28) Article 3(1) of the Directive seeks to implement at Community level the obligations imposed by Article 8 of the WCT.

36. The objectives of Article 8 are to clarify the provisions of the Berne Convention concerning the exclusive right of communication to the public of works, principally Article 11 bis(1), and to supplement the rights provided under that Convention 'by extending the field of application of the right of communication to the public to cover all categories of works'. (29)

37. The second of those objectives concerns in particular literary works, photographic works, works of pictorial art and graphic works, not previously covered by the right of communication. The Basic Proposal mentions that technological developments 'have made it possible to make protected works available in many ways that differ from traditional methods'. (30) The principal such development is, of course, the internet; (31) and it is interactive (on demand), on-line transmissions that are specifically intended to be caught by the phrase 'the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them' in Article 3(1) (32) of the Directive and Article 8 of the WCT. (33) For that reason, I do not consider that, as Rafael submits, there is no 'communication to the public' in the present case because the hotel guests, being bound by existing schedules, cannot access television programmes at a time individually chosen by them. More broadly, the present case is concerned with the general rule laid down by Article 3(1) of the Directive and Article 8 of the WCT rather than the specific area expressly included under it.

38. Article 8 of the WCT seeks to supplement the provisions of the Berne Convention concerning communication to the public by conferring an exclusive right of communication to the public for authors of all kinds of works, in so far as that right is not already conferred by the Convention. (34) It thus confers a broader right to authorise 'any communication to the public of their works, by wire or wireless means'. There is no definition of 'the public'.

39. The Austrian Government submits that it is for national law to define 'the public'. It refers to Explanatory Note 10.17 in the Basic Proposal, which states: 'The term "public" has been used in Article 10 as it has been used in the present provisions of the Berne Convention. It is a matter for national legislation and case-law to define what is "public".' The Austrian Government refers also to academic sources supporting its view that it is for national law to define 'public' (35) and to the Commission Staff working paper on the review of the EC legal framework in the field of copyright and related rights (36) which states: 'At this point, there does not seem to be any need to re-assess the line taken so far and the term "public" should remain a matter determined by national legislation and jurisprudence.'

40. In a variation on that theme, Rafael submits that Directive 93/83, (37) and not the Copyright Directive, is applicable to the present case. In accordance with the judgment of the Court in EGEDA, (38) it is thus for national law to define 'communication to the public'.

41. I do not agree with those submissions.

42. As the Commission points out, the Court has recognised that 'the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express

reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question'. (39)

43. It is clear that the Copyright Directive is intended to be a harmonising directive, designed above all to 'help to implement the four freedoms of the internal market' and 'provid[e] for a high level of protection of intellectual property'. (40) The right to authorise communication to the public is one of the four issues which the Commission considered, when submitting its proposal for the Directive, to require immediate legislative action at Community level in view of their relevance for the internal market. (41) Recital 23 in the preamble explicitly states that the Directive 'should harmonise further the author's right of communication to the public'. It is manifest that that harmonisation would be a dead letter if Member States were free to define one of the two fundamental elements of the substance of that right. (42) Moreover the Court in *EGEDA* (43) assumes that Article 3(1) is based on a uniform concept of 'communication to the public'.

44. I do not consider that that view is in conflict with the Explanatory Note referred to by Austria. In the context of the WCT, to which the Community is a signatory, the 'national legislation' is the Copyright Directive (rather than the national legislations of the various Member States) and the 'case-law' is that of this Court.

45. With regard to the Commission Working Paper, the agent for the Commission indicated at the hearing that it was only a draft which had never been approved by the Commission. In any event, the Commission's own view of the effect of Community legislation, while it will be of interest and may have some weight, is clearly not binding on the Court.

46. Since the WCT, like the Directive, contains no definition of 'the public', the meaning of that term must be determined by reference to the aim of Article 8. As I have indicated, (44) that provision seeks to clarify and supplement Article 11bis(1) of the Berne Convention.

47. The history of Article 11bis(1) of the Berne Convention can be seen as a series of attempts to enhance protection of authors' rights in the light of technological developments. The author's right to authorise a performance of his dramatic or musical work had been granted from the outset in 1886. (45) In 1928 Article 11bis was added, which in its original form simply conferred on authors of literary and artistic works 'the exclusive right of authorising the communication of their works to the public by radio-diffusion'. (46) That provision was clearly intended to extend the existing right to authorise a performance in the light of the technological development of radio transmission. (47) The diffusion of signals over wire was not covered.

48. In 1948 Article 11bis(1) was revised to (substantially) its current wording. The rights to authorise public performance (Article 11(1)) and communication to the public by broadcasting (existing Article 11bis(1), which essentially became Article 11bis(1)(i)) were supplemented by the rights to authorise communication to the public of a broadcast, by wire or by rebroadcasting, by an organisation other than the original one (Article 11bis(1)(ii)) and public communication (48) of a broadcast by loudspeaker or analogous instrument (Article 11bis(1)(iii)). The WIPO Glossary (49) defines 'rebroadcasting' as either 'simultaneous broadcasting of a broadcast received from another source, or a new, deferred broadcast of a former broadcast transmitted or received and recorded earlier'. It also makes clear that the 'authorisation to broadcast a work does not necessarily cover rebroadcasting of the work'.

49. Thus again the revision extended protection in the light of technological advances. (50) The concern throughout was clearly to ensure that authorisation given for one stage (for example performance or first broadcast) was not automatically regarded as extending to subsequent stages (for example first broadcast of a performance, communication of that broadcast by another organisation or by loudspeaker etc.).

50. It appears that the criterion of communication 'by an organisation other than the original one', used in Article 11bis(1)(ii) of the Convention, was adopted as a 'purely functional' distinction: the option of requiring a fresh authorisation wherever a retransmission 'procured a fresh circle of listeners' was deliberately rejected. (51) None the less, that seems to be the essence of the provision's effect. The WIPO Guide (52) moreover confirms that interpretation. It states, in the context of Article 11bis(1)(iii):

'Finally, the third case dealt with in [Article 11bis(1)] is that in which the work which has been broadcast is publicly communicated e.g., by loudspeaker or otherwise, to the public. This case is becoming more common. In places where people gather (cafés, restaurants, tea-rooms, hotels, large shops, trains, aircraft etc.) the practice is growing of providing broadcast programmes. There is also an increasing use of copyright works for advertising purposes in public places. The question is whether the licence given by the author to the broadcasting station covers, in addition, all the use made of the broadcast, which may or may not be for commercial ends.

The Convention's answer is "no". Just as, in the case of a relay of a broadcast by wire, an additional audience is created (paragraph (1)(ii)), so, in this case too, the work is made perceptible to listeners (and perhaps viewers) other than those contemplated by the author when his permission was given. Although, by definition, the number of people receiving a broadcast cannot be ascertained with any certainty, the author thinks of his licence to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting. The author is given control over this new public performance of his work.' (53)

51. It seems clear in the light of the above that Article 8 of the WCT seeks to supplement Article 11bis(1) of the Berne Convention by enhancing the right of authors to authorise communication of their works in circumstances where advances in technology have enabled a communication which has itself been authorised to be relayed to a circle of persons going beyond the intended recipients of the initial communication.

52. The transmission of broadcasts to hotel bedrooms by means of television sets to which is fed a signal initially received by the hotel falls squarely within that concept. As Advocate General La Pergola put it in his Opinion in EGEDA, (54) '[I]t is all too clear – given that such retransmission is not just a technical means to ensure or improve reception of the original broadcast in the catchment area, as in the case, for example, of the installation and use of transceivers – that [the hotel proprietor] gave the hotel guests access to the protected work. If [it] had not made secondary use of the broadcasts, the clients – although physically within the satellite catchment area – would not have been able to enjoy the broadcast work in any other way; they therefore constitute, in this sense, a "new" public that differs from the primary broadcast public'.

53. It will be noted that the 'purely functional' criterion in fact adopted by Article 11bis(1)(ii), namely that the communication must be 'made by an organisation other than the original one', is in any event satisfied in circumstances such as those of the present case. As the French Government points out, the hotel owner is in the same situation as a third party who relays original programmes broadcast or transmitted by cable.

54. The Commission submits that the decisive factor for determining whether a communication is 'to the public' is the extent of the circle of potential recipients of the communication and its economic significance for the author. I agree that both those factors should enter into the equation. An interpretation reflecting those factors would be consistent with the aim of the provision, which is to confer on the author the right to authorise exploitation of his work by communication to the public. (55)

55. Admittedly, in the case of the communication of television signals by a hotel to different bedrooms the only recipients of each individual communication at a particular moment in time are the occupants of each bedroom, usually only one or two people. However, the cumulative effects of all communications of the same type must be taken into consideration, bearing in mind the objective of the Directive articulated in recital 9 of 'a high level of protection' of rightholders and the statement in recital 23 that the right of communication to the public 'should be understood in a broad sense'. Advocate General La Pergola dealt adroitly in his Opinion in EGEDA with the argument 'that the economic weight of the guests of a hotel room is so slight that they cannot constitute a "new" public that differs from the primary transmission public. Consequently the retransmission of the broadcast work by television does not have the economic importance necessary to constitute an independent act of communication'. I agree with his response, which is 'that all the clients in a hotel at a given time constitute the "public" within the meaning and for the purpose of copyright. In other words the "spatial discontinuity" of the individuals involved, who constitute the circle of addressees to which the work is made accessible by the person responsible for each act of secondary use, is not large enough to negate the economic importance of the new public reached'. (56)

56. For the Commission, the profit-making nature of the communication is not decisive. The Commission cites the examples of broadcasting music over loudspeakers or images on a giant screen at charitable or political events. In its view, there would in such cases be a 'communication to the public' notwithstanding the absence of an economic motive. In contrast, Advocate General La Pergola, while agreeing on the relevance of 'the economic importance of the new public', considered in his Opinion in EGEDA that the Berne Convention 'lays down the principle that the author must authorise all secondary use of the broadcast work if this gives rise to independent economic exploitation for financial profit by the person responsible'. (57) He also expressed the view, with which I agree, that the internal retransmission service to hotel rooms undoubtedly 'constitutes an economically quantifiable benefit to the hotel'. (58)

57. It is clear that in the present case first, the circle of potential recipients of the communication is both extensive and of economic significance for the author and, second, the intervening organisation making the communication does so for its own economic benefit. In such circumstances, the communication should be regarded as being made 'to the public'. I do not consider that it is necessary or appropriate to decide in the context of the present case whether

economic benefit to the person responsible for making the communication is always required in order for a communication to be regarded as 'to the public' within the meaning of Article 3 of the Directive.

58. I need finally to deal with four further detailed arguments advanced by Rafael and the Austrian and Irish Governments.

59. First, Rafael submits, if I correctly understood its counsel at the hearing, that recital 35 in the preamble to, and Article 5 of, the Copyright Directive envisage exceptions to the authors' rights protected thereby, and that in any event recital 35 provides only that in such cases 'rightholders should receive fair compensation' (59) for the use made of their works. Rafael submits that, since the verb is in the conditional tense, compensation is not mandatory. The Irish Government also referred to the Member States' right to provide for exceptions.

60. It is correct that Article 5 of the Directive contains 'an exhaustive enumeration of exceptions and limitations to ... the right of communication to the public'. (60) No explanation has been given, however, (61) as to which of those exceptions might apply in the present case. The argument from use of the conditional tense in Spanish (which in any event is normal usage in recitals) survives neither teleological interpretation nor a comparison with other language versions.

61. Second, Rafael and the Austrian Government submit that the act of retransmission by the hotel to the hotel rooms does not fall within the scope of Article 3(1) since that provision, by using the phrase 'by wire or wireless means', focuses on communication over distance. That interpretation is confirmed by recital 23, which states that the right covers only 'communication to the public not present at the place where the communication originates'. It follows that there is no complete harmonisation of the provisions relating to communication to the public and that only communication over distance – such as radio broadcasting ('by ... wireless means') or cable broadcasting ('by wire') – has been harmonised. Rafael and the Austrian Government conclude that, if every act of communication, even if only successive, is public and therefore constitutes an act of communication to the public, the (probably unintended) consequence would be that the private reception of television broadcasts would also amount to an act of communication to the public.

62. I have already explained why I consider the argument that the Directive does not fully harmonise the notion of 'communication to the public' to be untenable.

63. Nor do I accept the argument that 'communication to the public' requires physical distance. Quite apart from the obvious difficulties inherent in making such an arbitrary condition workable – where would one draw the line? – the history of Article 11bis(1) of the Berne Convention provides no support for that view. On the contrary, and as discussed above, it indicates that the relevant criterion is the extension of the circle of recipients of the original transmission by an organisation other than the original one. It is clear that a given technique for transmission will need to be able to operate over distance, (62) but the fact that in a given case the distance is small does not undermine that criterion. Conversely, the criterion used in recital 23 in the preamble to the Directive, namely that 'communication to the public' covers 'all communication to the public not present at the place where the communication originates', (63) is a workable test which does not involve any quantification of distance.

64. As for Rafael and Austria's remaining suggestion that, if 'successive' communications are nevertheless 'public', private reception of television broadcasts will be caught by the definition, it seems clear from the WIPO Guide and Glossary that (as common sense would suggest) such a consequence would not follow. As the Guide states, 'the author thinks of his licence to broadcast as covering only the direct audience receiving the signal within the family circle'. (64) That interpretation is confirmed by the definition in the WIPO Glossary of 'Communication to the public' as 'Making a work ... perceptible in any appropriate manner to persons in general, that is, not restricted to specific individuals belonging to a private group'. (65) Moreover, to the extent that economic benefit to the providing organisation is relevant, it provides, in the words of Advocate General La Pergola in his Opinion in EGEDA, 'a cogent explanation for there being no communication to the public if the protected work is made accessible by the direct user of the television to his family circle or friends: in such cases there is no secondary use of the broadcast work by a third party but instead the equipment for receiving the primary transmission is shared, at no financial profit to the interested party'. (66) Finally, the Berne Convention, the WCT and the Directive are all concerned to protect authors' economic rights. It is hard to see how those rights could be prejudiced by communication to private circles.

65. Third, the Irish Government argues that the private context of hotel rooms renders the retransmission or making available of protected works to television sets in such places, where they may be seen by the guest(s) (and perhaps also by family or friends visiting the guest(s) in the room), a non-public act of communication. It notes that the Court of Justice has recognised, primarily by reference to Article 8 of the European Convention on Human Rights, (67)

that the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person constitutes a general principle of Community law. (68) The Community legislature must be deemed to take account of that principle when enacting secondary Community legislation, such as the Copyright Directive. It is therefore relevant for the interpretation of Article 3(1) of the Directive.

66. However, I do not see how Article 8 of the European Convention on Human Rights, which is concerned to protect individuals against interference by public authorities in the exercise of their right to respect for private and family life, can be relevant even by analogy in interpreting a provision designed to harmonise rights related to copyright. More generally, I would agree with Advocate General La Pergola who responded to a similar argument in his Opinion in EGEDA. (69) While the Advocate General accepted that, for the purpose of protecting fundamental rights, 'a hotel room forms part of the purely private or domestic sphere of a person and his family', he continued: 'the legal boundary between the private and the public is not necessarily the same in the area of copyright protection. It is no chance that the criterion for establishing the public or private nature of a room is foreign not just to the letter but also to the spirit of Article 11bis of the Convention, which requires authorisation by the author not for retransmission to places that are public or are open to the public but for acts of communication in which the work is made accessible to the public. For this purpose the term "public" is not of fundamental importance in defining an act of communication as public, because it traditionally means the absence of special personal relationships between members of a group of persons or between group members and the organiser.'

67. Finally, Rafael and the Irish Government argue that there is no 'communication to the public' in the present case because whether there is actual reception of a given relayed television programme depends on whether a hotel guest turns on the television in his room and chooses a particular channel. Again, I am indebted to Advocate General La Pergola, who has already formulated the answer to that question. In his Opinion in EGEDA, (70) he stated that that argument 'contradicts one of the fundamental principles of copyright: copyright holders are remunerated on the basis not of the actual enjoyment of the work but of a legal possibility of that enjoyment. For example, publishers must pay royalties to authors for their novels on the basis of the number of copies sold, whether or not they are ever read by their purchasers. Similarly, hotels that are responsible for the – simultaneous, uncut and unchanged – internal cable retransmission of an original satellite broadcast cannot refuse to pay the author the remuneration due to him by maintaining that the broadcast work was not actually received by the potential viewers who have access to the televisions in their rooms'.

68. I am accordingly of the view that the answer to the second and third questions should be that communication by means of television sets to which is fed a signal initially received by the hotel constitutes 'communication to the public' within the meaning of Article 3(1) of the Copyright Directive.

Conclusion

69. For the reasons give above, I am of the view that the questions referred by the Audiencia Provincial de Barcelona (Spain) should be answered as follows:

Question 1

– The installation in hotel rooms of television sets to which a satellite or terrestrial television signal is sent by cable does not constitute a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

Questions 2 and 3

– Communication by means of television sets to which is fed a signal initially received by the hotel constitutes 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29.

1 – Original language: English.

2 – Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 (OJ 2001 L 167, p. 10).

- 3 – In the context of EC law, copyright ('droit d'auteur') comprises the exclusive rights granted to authors, composers, artists etc while related rights ('droits voisins') covers the analogous rights granted to performers (musicians, actors etc.) and entrepreneurs (publishers, film producers etc.).
- 4 – Recitals 9 to 11.
- 5 – Articles 13 and 14.
- 6 – Of 9 September 1886; as last revised on 24 July 1971 and amended on 28 September 1979.
- 7 – World Intellectual Property Organisation.
- 8 – Adopted in Geneva on 20 December 1996.
- 9 – Case C-61/94 Commission v Germany [1996] ECR I-3989, paragraph 52.
- 10 – Approved on behalf of the Community, in respect of those areas for which it has jurisdiction, by Council Decision 94/800/EC of 22 December 1994 (OJ 1994 L 336, p. 1). The TRIPs Agreement is at OJ 1994 L 336, p. 213.
- 11 – Subparagraph (ii) is not as clear as it might be in English. The French is clearer: 'toute communication publique, soit par fil, soit sans fil, de l'œuvre radiodiffusée, lorsque cette communication est faite par un autre organisme que celui d'origine'.
- 12 – The 1979 amendments concerned minor drafting detail rather than substance.
- 13 – There are currently 162.
- 14 – It appears that ratification by the Community is to take place only when, after implementing the Copyright Directive, all the Member States have ratified the WCT. The Community and the (pre-2004 enlargement 15) Member States indicated their intention at the end of the Diplomatic Conference on certain copyright and neighbouring rights questions, Geneva, 2 to 20 December 1996 to deposit their instruments of ratification simultaneously. See M. Ficsor, *The Law of Copyright and the Internet* (2002), p. 68, point 2.41.
- 15 – Royal Legislative Decree 1/1996 of 12 April 1996 (BOE No 97 of 22 April 1996, p. 14369); see in particular Article 17.
- 16 – Judgments of the Supreme Court of 19 July 1993 (RJ 1993/6164) and of 11 March 1996 (RJ 1996/2413).
- 17 – Judgment of 10 May 2003 – RJ 2003/3036.
- 18 – Case C-293/98 [2000] ECR I-629.
- 19 – Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15).
- 20 – Point 14 of his Opinion.
- 21 – Points 20 to 27.
- 22 – Although the national court refers to Article 3 of the Directive, it is clear that it is Article 3(1) which calls for interpretation, since it is that provision which explicitly confers the right to authorise 'communication to the public', the subject-matter of all three questions referred. (Article 3(2) extends the right to authorise 'the making available to the public of their works', conferred on authors by the second phrase of Article 3(1), to performers, phonogram producers, film producers and broadcasting organisations.)
- 23 – Recital 15 in the preamble, set out in point 4 above.
- 24 – 'Basic Proposal for the substantive provisions of the Treaty on certain questions concerning the protection of literary and artistic works to be considered by the Diplomatic Conference' ('the Basic Proposal', available on the WIPO website (www.wipo.int)), Explanatory Notes 10.07 and 10.08. The Memorandum Prepared by the Chairman of the Committees of Experts prefacing the Basic Proposal explains (at point 19): 'The purpose of the Explanatory Notes is: (i) to explain briefly the contents and rationale of the proposals and to offer guidelines for understanding and interpreting specific provisions, (ii) to indicate the reasoning behind the proposals, and (iii) to include references to proposals and comments made at sessions of the Committees of Experts, as well as references to models and points of comparison found in existing treaties.'
- 25 – See footnote 14. The Agreed statements concerning the WIPO Copyright Treaty (CRNR/DC/96) may be found on the WIPO website.
- 26 – Recital 9 in the preamble. See point 3 above.

27 – Recital 23.

28 – Point 28.

29 – Basic Proposal, Explanatory Note 10.05. These objectives are moreover reflected in the recitals in the preamble to the WCT, which refers to ‘the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments’.

30 – Ibid.

31 – See also recital 5 in the preamble to the Copyright Directive.

32 – And indeed Article 3(2).

33 – Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, COM(97) 628 final, points 1.I.B.6 and 3.II.A.1 in the Explanatory Memorandum; Basic Proposal, point 10.11. This is also made clear by recital 25 in the preamble to the Directive.

34 – For an exhaustive analysis of the scope of protection conferred by the Berne Convention as compared to that conferred by the WCT, see Reinbothe and von Lewinski, *The WIPO Treaties 1996*, pp. 105 to 107, point 11, and Ficsor, *op. cit.* footnote 14, pp. 494 and 495, point C8.03.

35 – Including Reinbothe & von Lewinski, *op. cit.*, at p. 107, points 12 and 13.

36 – 19 July 2004, SEC(2004) 995, p. 15.

37 – Cited in footnote 19.

38 – See point 22 above.

39 – Case C-245/00 SENA [2003] ECR I-1251, paragraph 23.

40 – Recitals 3 and 4 in the preamble.

41 – See point 2.II.4 of the Explanatory Memorandum to the Proposal, cited in footnote 33. The other three issues were the right of reproduction (Article 2 of the Directive), technological measures and rights-management information (Articles 6 and 7) and the right of distribution of physical copies, including its exhaustion (Article 4).

42 – As the Commission noted in its Green Paper on Copyright and Related Rights in the Information Society (COM(95) 382 final, 19 July 1995), which paved the way for the Directive, ‘The fact that particular activities should be lawful in certain Member States and not in others could cause difficulties for the functioning of the Internal Market’ (Section IV.3).

43 – Cited in footnote 18, paragraphs 26 to 28 of the judgment.

44 – See point 36 above.

45 – Originally in Article 9, and initially only by requiring any protection afforded by national law to be extended to non-nationals. This was changed in the 1948 Brussels revision, when it was made explicit that the right was protected as such by the Convention. In the meantime Article 9 had become Article 11 after the Berlin revision of 1908.

46 – Article 11bis(1). Article 11bis(2) concerned the conditions which could be imposed on the exercise of that right by national law.

47 – The Records of the 1948 Brussels Revisions Conference note of the original Article 11bis(1): ‘By laying down the principle in an elliptical fashion, the Convention wording was appropriate for the state of an invention whose development was only just starting at the time’ (p. 263). The term ‘radio-diffusion’ used in the version adopted was generally understood to include television broadcasting: see S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, p. 439. Ricketson describes ‘radiodiffusion’ in 1928 as ‘a new technological development which had profound implications for authors’ rights’ (p. 103).

48 – Nothing seems to turn on the different formulations ‘communication to the public’ and ‘public communication’. Both are rendered as ‘communication publique’ in the French text, which by virtue of Article 37(1)(c) is to prevail in case of differences of opinion on the interpretation of the various texts.

49 – Glossary of terms of the law of copyright and neighbouring rights (1980). The introduction to the Glossary states that the general purpose of the Glossary is ‘to help in the understanding of the legal terms most frequently used in the fields of the law of copyright and neighbouring rights’.

50 – The Rapporteur to the Brussels Conference stated: ‘Taking due account of the prodigious development of radio, the program proposed [a revised Article 11bis] that broke down the right according to the latest forms of its exploitation ... with an attempt to encompass the improvements or extensions that could yet be made to [television]’ (Records, cited in footnote 47, p. 263). Similarly, Ricketson states that at the time of the Brussels Revision, authors’ rights ‘were in danger of being outflanked by the rapid and revolutionary changes in technology that were occurring’ (op. cit., p. 113 (point 3.48)). See also Ricketson, p. 424, point 8.63.

51 – Ricketson, op. cit., p. 449.

52 – Guide to the Berne Convention (1978). According to its Preface, the Guide, while not ‘intended to be an authentic interpretation of the provisions of the Convention’, aims ‘to present, as simply and clearly as possible, the contents of the Berne Convention and to provide a number of explanations as to its nature, aims and scope’.

53 – Points 11bis11 and 11bis12; emphasis added.

54 – Cited in footnote 18; point 22.

55 – See Reinbothe & von Lewinski, op. cit., p. 107, point 12.

56 – Point 26.

57 – Ibid., point 24.

58 – Point 25.

59 – Emphasis added. The equivalent in Spanish, which presumably prompted the submission, is ‘deberían’. It is however ‘doivent’ in French.

60 – Recital 32 in the preamble; emphasis added.

61 – Even in response to a question at the hearing.

62 – The WIPO Glossary defines ‘Diffusion of signs, sounds and images’ for the purpose of Article 11bis(1)(i) as ‘any technique for transmitting works or other sound and/or visual programs and information for public reception at a distance by wireless means or by wire’.

63 – Emphasis added.

64 – Point 11bis12.

65 – See to similar effect Ricketson, op. cit. footnote 47, pp. 432 and 433 (point 8.71) and 453 (point 8.88), and Reinbothe and von Lewinski, op. cit. footnote 34, p. 107, point 12.

66 – Point 24.

67 – Article 8 confers the right to respect for private and family life, and prohibits (subject to public-interest exceptions) any interference by a public authority with the exercise of that right.

68 – The Irish Government cites Joined Cases 46/87 and 227/88 Hoechst v Commission [1989] ECR I-2859, paragraph 19, and Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraphs 27 and 29.

69 – Cited in footnote 18, point 23.

70 – Cited in footnote 18, point 22.

**Case C-306/05, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SL,
Judgment of the Court**

JUDGMENT OF THE COURT (Third Chamber)

7 December 2006 [*](#)

(Copyright and related rights in the information society – Directive 2001/29/EC – Article 3 – Concept of communication to the public – Works communicated by means of television sets installed in hotel rooms)

In Case C-306/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Audiencia Provincial de Barcelona (Spain), made by decision of 7 June 2005, received at the Court on 3 August 2005, in the proceedings

Sociedad General de Autores y Editores de España (SGAE)

v

Rafael Hoteles SA,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Borg Barthet, J. Malenovský (Rapporteur), U. Löhmus and A. Ó Caoimh, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 May 2006,

after considering the observations submitted on behalf of:

- the Sociedad General de Autores y Editores de España (SGAE), by R. Gimeno-Bayón Cobos and P. Hernández Arroyo, abogados,
- Rafael Hoteles SA, by R. Tornero Moreno, abogado,
- the French Government, by G. de Bergues and J.-C. Niollet, acting as Agents,
- Ireland, by D.J. O'Hagan, acting as Agent, assisted by N. Travers BL,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the Polish Government, by K. Murawski, U. Rutkowska and P. Derwicz, acting as Agents,
- the Commission of the European Communities, by J.R. Vidal Puig and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 July 2006,

gives the following

Judgment

- 1 The reference for a preliminary ruling concerns the interpretation of Article 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).
- 2 This reference was made in the context of proceedings between the Sociedad General de Autores y Editores de España (SGAE) and Rafael Hoteles SA ('Rafael'), concerning the alleged infringement, by the latter, of intellectual property rights managed by SGAE.

Legal context

Applicable international law

- 3 The Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPs Agreement'), as set out in Annex 1C to the Marrakesh Agreement establishing the World Trade Organisation, was approved on behalf of the European Community by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on

behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

4 Article 9(1) of the TRIPs Agreement provides:

'Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.'

5 Article 11 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979 ('the Berne Convention') provides:

'1. Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorising:

(i) the public performance of their works, including such public performance by any means or process;

(ii) any communication to the public of the performance of their works.

2. Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.'

6 Article 11*bis*(1) of the Berne Convention provides:

'Authors of literary and artistic works shall enjoy the exclusive right of authorising:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.'

7 The World Intellectual Property Organisation (WIPO) adopted in Geneva, on 20 December 1996, the WIPO Performances and Phonograms Treaty and the WIPO Copyright Treaty. Those two treaties were approved on behalf of the Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

8 Article 8 of the WIPO Copyright Treaty provides:

'Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.'

9 Joint declarations concerning the WIPO Copyright Treaty were adopted by the Diplomatic Conference on 20 December 1996.

10 The joint declaration concerning Article 8 of that Treaty provides:

'It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2).'

Community legislation

11 The ninth recital in the preamble to Directive 2001/29 states:

'Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.'

12 The 10th recital in the preamble to that directive states:

'If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.'

13 The 15th recital in the preamble to that directive states:

'The Diplomatic Conference held under the auspices of the [WIPO] in December 1996 led to the adoption of two new Treaties, the [WIPO Copyright Treaty] and the [WIPO Performances and Phonograms Treaty], dealing respectively with the protection of authors and the protection of performers and phonogram producers. Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called "digital agenda", and improve the means to fight piracy world-wide. The Community and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of the Treaties by the Community and the Member States is under way. This Directive also serves to implement a number of the new international obligations.'

14 The 23rd recital in the preamble to that directive states:

'This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.'

15 The 27th recital in the preamble to Directive 2001/29 states:

'The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.'

16 Article 3 of that directive provides:

'1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

(a) for performers, of fixations of their performances;

(b) for phonogram producers, of their phonograms;

(c) for the producers of the first fixations of films, of the original and copies of their films;

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.'

National legislation

17 The codified text of the Law on intellectual property, which rectifies, clarifies and harmonises the legislative provisions in force in that area ('the LIP'), was approved by Royal Legislative Decree No 1/1996 of 12 April 1996 (BOE No 97 of 22 April 1996).

18 Article 17 of the LIP provides:

'The author has the exclusive rights of exploitation of his works regardless of their form and, inter alia, the exclusive rights of reproduction, distribution, public communication and conversion which cannot be exercised without his permission except in circumstances laid down in this Law.'

19 Article 20(1) of the LIP provides:

'Public communication shall mean any act by which a number of persons can have access to the work without prior distribution of copies to each of those persons.

Communication which takes place within a strictly domestic location which is not integrated into or connected to a distribution network of any kind shall not be classified as public.'

The main proceedings and the questions referred for a preliminary ruling

20 SGAE is the body responsible for the management of intellectual property rights in Spain.

21 SGAE took the view that the use of television sets and the playing of ambient music within the hotel owned by Rafael, during the period from June 2002 to March 2003, involved communication to the public of works belonging to the repertoire which it manages. Considering that those acts were carried out in breach of the intellectual property rights attached to the works, SGAE brought an action for compensation against Rafael before the Juzgado de Primera Instancia (Court of First Instance) No 28, Barcelona (Spain).

22 By decision of 6 June 2003, that court partially rejected the claim. It took the view that the use of television sets in the hotel's rooms did not involve communication to the public of works managed by SGAE. It considered, on the other hand, that the claim was well founded as regards the well-known existence in hotels of communal areas with television sets and where ambient music is played.

23 SGAE and Rafael both brought appeals before the Audiencia Provincial (Provincial Court) de Barcelona, which decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Does the installation in hotel rooms of television sets to which a satellite or terrestrial television signal is sent by cable constitute an act of communication to the public which is covered by the harmonisation of national laws protecting copyright provided for in Article 3 of Directive [2001/29]?

(2) Is the fact of deeming a hotel room to be a strictly domestic location, so that communication by means of television sets to which is fed a signal previously received by the hotel is not regarded as communication to the public, contrary to the protection of copyright pursued by Directive [2001/29]?

(3) For the purposes of protecting copyright in relation to acts of communication to the public provided for in Directive [2001/29], can a communication that is effected through a television set inside a hotel bedroom be regarded as public because successive viewers have access to the work?

The request to have the oral procedure reopened

24 By letter received at the Court of Justice on 12 September 2006, Rafael requested the reopening of the oral procedure, pursuant to Article 61 of the Rules of Procedure of the Court of Justice.

25 That request is based on the alleged inconsistency of the Advocate General's Opinion. Rafael submits that the negative response in the Opinion to the first question unavoidably implies a negative response to the second and third questions, whereas the Advocate General suggests that the answer to the latter questions should be in the affirmative.

26 On that point, it is appropriate to recall that neither the Statute of the Court of Justice nor the Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion (see, in particular, Case C-259/04 *Emanuel* [2006] ECR I-3089, paragraph 15).

27 The Court may, certainly, of its own motion, on a proposal from the Advocate General or at the request of the parties, order that the oral procedure should be reopened in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, in particular, Case C-209/01 *Schilling and Fleck-*

Schilling [2003] ECR I-13389, paragraph 19, and Case C-30/02 *Recheio – Cash & Carry* [2004] ECR I-6051, paragraph 12).

28 However, the Court finds that in the present case it has all the information necessary to give judgment.

29 Consequently, there is no need to order the reopening of the oral procedure.

The questions

Preliminary observations

30 It should be stated at the outset that, contrary to Rafael's submissions, the situation at issue in the main proceedings does not fall within Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15), but within Directive 2001/29. The latter applies to all communications to the public of protected works, whereas Directive 93/83 only provides for minimal harmonisation of certain aspects of protection of copyright and related rights in the case of communication to the public by satellite or cable retransmission of programmes from other Member States. As the Court has already held, unlike Directive 2001/29, this minimal harmonisation does not provide information to enable the Court to reply to a question concerning a situation similar to that which is the subject of the questions referred for a preliminary ruling (see, to that effect, Case C-293/98 *Egeda* [2000] ECR I-629, paragraphs 25 et 26).

31 Next, it should be noted that the need for uniform application of Community law and the principle of equality require that where provisions of Community law make no express reference to the law of the Member States for the purpose of determining their meaning and scope, as is the case with Directive 2001/29/EC, they must normally be given an autonomous and uniform interpretation throughout the Community (see, in particular, Case C-357/98 *Yiadom* [2000] ECR I-9265, paragraph 26, and Case C-245/00 *SENA* [2003] ECR I-1251, paragraph 23). It follows that the Austrian Government cannot reasonably maintain that it is for the Member States to provide the definition of 'public' to which Directive 2001/29 refers but does not define.

The first and third questions

32 By its first and third questions, which it is appropriate to examine together, the referring court asks, essentially, whether the distribution of a signal through television sets to customers in hotel rooms constitutes communication to the public within the meaning of Article 3(1) of Directive 2001/29, and whether the installation of television sets in hotel rooms constitutes, in itself, an act of that nature.

33 In that respect, it should be noted that that Directive does not define 'communication to the public'.

34 According to settled case-law, in interpreting a provision of Community 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 (see, in particular, Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 50, and Case C-53/05 *Commission v Portugal* [2006] ECR I-0000, paragraph 20).

35 Moreover, Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community (see, in particular, Case C-341/95 *Bettati* [1998] ECR I-4355, paragraph 20 and the case-law cited).

36 It follows from the 23rd recital in the preamble to Directive 2001/29 that 'communication to the public' must be interpreted broadly. Such an interpretation is moreover essential to achieve the principal objective of that directive, which, as can be seen from its ninth and tenth recitals, is to establish a high level of protection of, inter alios, authors, allowing them to obtain an appropriate reward for the use of their works, in particular on the occasion of communication to the public.

37 The Court has held that, in the context of this concept, the term 'public' refers to an indeterminate number of potential television viewers (Case C-89/04 *Mediakabel* [2005] ECR I-4891, paragraph 30, and Case C-192/04 *Lagardère Active Broadcast* [2005] ECR I-7199, paragraph 31).

38 In a context such as that in the main proceedings, a general approach is required, making it necessary to take into account not only customers in hotel rooms, such customers alone being explicitly mentioned in the questions referred for a preliminary ruling, but also customers who are present in any other area of the hotel and able to

- make use of a television set installed there. It is also necessary to take into account the fact that, usually, hotel customers quickly succeed each other. As a general rule, a fairly large number of persons are involved, so that they may be considered to be a public, having regard to the principal objective of Directive 2001/29, as referred to in paragraph 36 of this judgment.
- 39 In view, moreover, of the cumulative effects of making the works available to such potential television viewers, the latter act could become very significant in such a context. It matters little, accordingly, that the only recipients are the occupants of rooms and that, taken separately, they are of limited economic interest for the hotel.
- 40 It should also be pointed out that a communication made in circumstances such as those in the main proceedings constitutes, according to Article 11*bis*(1)(ii) of the Berne Convention, a communication made by a broadcasting organisation other than the original one. Thus, such a transmission is made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public.
- 41 As is explained in the Guide to the Berne Convention, an interpretative document drawn up by the WIPO which, without being legally binding, nevertheless assists in interpreting that Convention, when the author authorises the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme. According to the Guide, if reception is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work and the communication of the programme via a loudspeaker or analogous instrument no longer constitutes simple reception of the programme itself but is an independent act through which the broadcast work is communicated to a new public. As the Guide makes clear, such public reception falls within the scope of the author's exclusive authorisation right.
- 42 The clientele of a hotel forms such a new public. The transmission of the broadcast work to that clientele using television sets is not just a technical means to ensure or improve reception of the original broadcast in the catchment area. On the contrary, the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers. In the absence of that intervention, its customers, although physically within that area, would not, in principle, be able to enjoy the broadcast work.
- 43 It follows from Article 3(1) of Directive 2001/29 and Article 8 of the WIPO Copyright Treaty that for there to be communication to the public it is sufficient that the work is made available to the public in such a way that the persons forming that public may access it. Therefore, it is not decisive, contrary to the submissions of Rafael and Ireland, that customers who have not switched on the television have not actually had access to the works.
- 44 Moreover, it is apparent from the documents submitted to the Court that the action by the hotel by which it gives access to the broadcast work to its customers must be considered an additional service performed with the aim of obtaining some benefit. It cannot be seriously disputed that the provision of that service has an influence on the hotel's standing and, therefore, on the price of rooms. Therefore, even taking the view, as does the Commission of the European Communities, that the pursuit of profit is not a necessary condition for the existence of a communication to the public, it is in any event established that the communication is of a profit-making nature in circumstances such as those in the main proceedings.
- 45 With reference to the question whether the installation of television sets in hotel rooms constitutes, in itself, a communication to the public within the meaning of Article 3(1) of Directive 2001/29, it should be pointed out that the 27th recital in the preamble to that directive states, in accordance with Article 8 of the WIPO Copyright Treaty, that '[t]he mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of [that] Directive.'
- 46 While the mere provision of physical facilities, usually involving, besides the hotel, companies specialising in the sale or hire of television sets, does not constitute, as such, a communication within the meaning of Directive 2001/29, the installation of such facilities may nevertheless make public access to broadcast works technically possible. Therefore, if, by means of television sets thus installed, the hotel distributes the signal to customers staying in its rooms, then communication to the public takes place, irrespective of the technique used to transmit the signal.
- 47 Consequently, the answer to the first and second questions is that, while the mere provision of physical facilities does not as such amount to a communication within the meaning of Directive 2001/29, the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that directive.

The second question

- 48 By its second question, the referring court asks, essentially, whether the private nature of hotel rooms precludes the communication of a work to those rooms by means of television sets from constituting communication to the public within the meaning of Article 3(1) of Directive 2001/29.
- 49 In that respect, Ireland submits that communication or making available of works in the private context of hotel rooms should be distinguished from the same acts which take place in public areas of the hotel. This argument cannot however be accepted.
- 50 It is apparent from both the letter and the spirit of Article 3(1) of Directive 2001/29 and Article 8 of the WIPO Copyright Treaty – both of which require authorisation by the author not for retransmissions in a public place or one which is open to the public but for communications by which the work is made accessible to the public – that the private or public nature of the place where the communication takes place is immaterial.
- 51 Moreover, according to the provisions of Directive 2001/29 and of the WIPO Copyright Treaty, the right of communication to the public covers the making available to the public of works in such a way that they may access them from a place and at a time individually chosen by them. That right of making available to the public and, therefore, of communication to the public would clearly be meaningless if it did not also cover communications carried out in private places.
- 52 In support of the argument concerning the private nature of hotel rooms, Ireland also invokes the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), and in particular its Article 8, which prohibits any arbitrary or disproportionate interference by a public authority in the sphere of private activity. However, this argument cannot be accepted either.
- 53 In that respect, it should be pointed out that Ireland does not make clear who, in a context such as that of the main proceedings, would be the victim of such an arbitrary or disproportionate intervention. Ireland can hardly have in mind the customers who benefit from the signal which they receive and who are under no obligation to pay the authors. Nor can the victim be the hotel since, even though it must be concluded that the hotel is obliged to make such payment, it cannot claim to be a victim of an infringement of Article 8 of the ECHR in so far as the rooms, once made available to its customers, cannot be considered as coming within its private sphere.
- 54 Having regard to all of the foregoing considerations, the answer to the second question is that the private nature of hotel rooms does not preclude the communication of a work by means of television sets from constituting communication to the public within the meaning of Article 3(1) of Directive 2001/29.

Costs

- 55 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. While the mere provision of physical facilities does not as such amount to communication within the meaning of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of copyright and related rights in the information society, the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that directive.**
- 2. The private nature of hotel rooms does not preclude the communication of a work by means of television sets from constituting communication to the public within the meaning of Article 3(1) of Directive 2001/29.**

[Signatures]

JUDGMENT OF THE COURT (Fourth Chamber)

16 July 2009 (*)

(Copyright – Information society – Directive 2001/29/EC – Articles 2 and 5 – Literary and artistic works – Concept of ‘reproduction’ – Reproduction ‘in part’ – Reproduction of short extracts of literary works – Newspaper articles – Temporary and transient reproductions – Technological process consisting in scanning of articles followed by conversion into text file, electronic processing of the reproduction, storage of part of that reproduction and printing out)

In **Case C-5/08**,

REFERENCE for a preliminary ruling under Article 234 EC from the Højesteret (Denmark), made by decision of 21 December 2007, received at the Court on 4 January 2008, in the proceedings

Infopaq International A/S

v

Danske Dagblades Forening,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, T. von Danwitz, R. Silva de Lapuerta, G. Arestis and J. Malenovský (Rapporteur), Judges,

Advocate General: V. Trstenjak,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 20 November 2008,

after considering the observations submitted on behalf of:

- Infopaq International A/S, by A. Jensen, advokat,
- Danske Dagblades Forening, by M. Dahl Pedersen, advokat,
- the Austrian Government, by E. Riedl, acting as Agent,
- the Commission of the European Communities, by H. Krämer and H. Støvlbæk, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 February 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns, first, the interpretation of Article 2(a) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10) and, secondly, the conditions for exemption of temporary acts of reproduction within the meaning of Article 5 of that directive.

2 The reference was made in the context of proceedings between Infopaq International A/S (‘Infopaq’) and Danske Dagblades Forening (‘DDF’) concerning the dismissal of its application for a declaration that it was not required to obtain

the consent of the rightholders for acts of reproduction of newspaper articles using an automated process consisting in the scanning and then conversion into digital files followed by electronic processing of that file.

Legal context

International law

3 Under Article 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPs Agreement'), as set out in Annex 1C to the Marrakesh Agreement establishing the World Trade Organisation, which was approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1):

'Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. ...'

4 Article 2 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979 ('the Berne Convention') reads as follows:

'(1) The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; ...

...

(5) Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.

...

(8) The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.'

5 Under Article 9(1) of the Berne Convention, authors of literary and artistic works protected by that convention are to have the exclusive right of authorising the reproduction of those works, in any manner or form.

Community law

6 Article 1 of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42) provided:

'1. In accordance with the provisions of this Directive, Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. ...

...

3. A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.'

7 Article 3(1) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20) provides:

'In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.'

8 Directive 2001/29 states the following in recitals 4, 6, 9 to 11, 20 to 22, 31 and 33 in the preamble thereto:

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure ...

(6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.

...

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. ...

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work ...

(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

...

(20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives [91/250] ... and [96/9], and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

(21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the *acquis communautaire*. A broad definition of these acts is needed to ensure legal certainty within the internal market.

(22) The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.

...

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. ...

...

(33) The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.'

9 According to Article 2(a) of Directive 2001/29:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works.'

10 Article 5 of the same directive provides:

'(1) Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

...

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

11 According to Article 6 of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (OJ 2006 L 372, p. 12):

'Photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1 [which specifies the duration of the rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention]. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs.'

National law

12 Articles 2 and 5(1) of Directive 2001/29 were transposed into Danish law by paragraphs 2 and 11a(1) of Law No 395 on copyright (lov n°395 om ophavsret) of 14 June 1995 (*Lovtidende* 1995 A, p. 1796), as amended and consolidated by, inter alia, Law No 1051 (lov n°1051 om ændring af ophavsretsloven) of 17 December 2002 (*Lovtidende* 2002 A, p. 7881).

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 Infopaq operates a media monitoring and analysis business which consists primarily in drawing up summaries of selected articles from Danish daily newspapers and other periodicals. The articles are selected on the basis of certain subject criteria agreed with customers and the selection is made by means of a 'data capture process'. The summaries are sent to customers by email.

14 DDF is a professional association of Danish daily newspaper publishers, whose function is inter alia to assist its members with copyright issues.

15 In 2005 DDF became aware that Infopaq was scanning newspaper articles for commercial purposes without authorisation from the relevant rightholders. Taking the view that such consent was necessary for processing articles using the process in question, DDF complained to Infopaq about this procedure.

16 The data capture process comprises the five phases described below which, according to DDF, lead to four acts of reproduction of newspaper articles.

17 First, the relevant publications are registered manually by Infopaq employees in an electronic registration database.

18 Secondly, once the spines are cut off the publications so that all the pages consist of loose sheets, the publications are scanned. The section to be scanned is selected from the registration database before the publication is put into the

scanner. Scanning allows a TIFF ('Tagged Image File Format') file to be created for each page of the publication. When scanning is completed, the TIFF file is transferred to an OCR ('Optical Character Recognition') server.

19 Thirdly, the OCR server translates the TIFF file into data that can be processed digitally. During that process, the image of each letter is translated into a character code which tells the computer what type of letter it is. For instance, the image of the letters 'TDC' is translated into something the computer can treat as the letters 'TDC' and put in a text format which can be recognised by the computer's system. These data are saved as a text file which can be understood by any text processing program. The OCR process is completed by deleting the TIFF file.

20 Fourthly, the text file is processed to find a search word defined beforehand. Each time a match for a search word is found, data is generated giving the publication, section and page number on which the match was found, together with a value expressed as a percentage between 0 and 100 indicating how far into the text it is to be found, in order to make it easier to read the article. Also in order to make it easier to find the search word when reading the article, the five words which come before and after the search word are captured ('extract of 11 words'). At the end of the process the text file is deleted.

21 Fifthly, at the end of the data capture process a cover sheet is printed out in respect of all the pages where the relevant search word was found. The following is an example of the text of a cover sheet:

'4 November 2005 – *Dagbladet Arbejderen*, page 3:

TDC: 73% "a forthcoming sale of the telecommunications group TDC which is expected to be bought".

22 Infopaq disputed the claim that the procedure required consent from the rightholders and brought an action against DDF before the Østre Landsret (Eastern Regional Court), claiming that DDF should be ordered to acknowledge that Infopaq is entitled in Denmark to apply the abovementioned procedure without the consent of DDF or of its members. After the Østre Landsret dismissed that action, Infopaq brought an appeal before the referring court.

23 According to the Højesteret, it is not disputed in this case that consent from the rightholders is not required to engage in press monitoring activity and the writing of summaries consisting in manual reading of each publication, selection of the relevant articles on the basis of predetermined search words, and production of a manually prepared cover sheet for the summary writers, giving an identified search word in an article and its position in the newspaper. Similarly, the parties in the main proceedings do not dispute that genuinely independent summary writing per se is lawful and does not require consent from the rightholders.

24 Nor is it disputed in this case that the data capture process described above involves two acts of reproduction: the creation of a TIFF file when the printed articles are scanned and the conversion of the TIFF file into a text file. In addition, it is common ground that this procedure entails the reproduction of parts of the scanned printed articles since the extract of 11 words is stored and those 11 words are printed out on paper.

25 There is, however, disagreement between the parties as to whether there is reproduction as contemplated by Article 2 of Directive 2001/29. Likewise, they disagree as to whether, if there is reproduction, the acts in question, taken as a whole, are covered by the exemption from the right of reproduction provided for in Article 5(1) of that directive.

26 In those circumstances, the Højesteret decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Can the storing and subsequent printing out of a text extract from an article in a daily newspaper, consisting of a search word and the five preceding and five subsequent words, be regarded as acts of reproduction which are protected (see Article 2 of [Directive 2001/29])?

(2) Is the context in which temporary acts of reproduction take place relevant to whether they can be regarded as "transient" (see Article 5(1) of Directive 2001/29)?

(3) Can a temporary act of reproduction be regarded as "transient" where the reproduction is processed, for example, by the creation of a text file on the basis of an image file or by a search for text strings on the basis of a text file?

(4) Can a temporary act of reproduction be regarded as "transient" where part of the reproduction, consisting of one or more text extracts of 11 words, is stored?

- (5) Can a temporary act of reproduction be regarded as “transient” where part of the reproduction, consisting of one or more text extracts of 11 words, is printed out?
- (6) Is the stage of the technological process at which temporary acts of reproduction take place relevant to whether they constitute “an integral and essential part of a technological process” (see Article 5(1) of Directive 2001/29)?
- (7) Can temporary acts of reproduction be an “integral and essential part of a technological process” if they consist of manual scanning of entire newspaper articles whereby the latter are transformed from a printed medium into a digital medium?
- (8) Can temporary acts of reproduction constitute an “integral and essential part of a technological process” where they consist of printing out part of the reproduction, comprising one or more text extracts of 11 words?
- (9) Does “lawful use” (see Article 5(1) of Directive 2001/29) include any form of use which does not require the rightholder’s consent?
- (10) Does “lawful use” (see Article 5(1) of Directive 2001/29) include the scanning by a commercial business of entire newspaper articles, subsequent processing of the reproduction, and the storing and possible printing out of part of the reproduction, consisting of one or more text extracts of 11 words, for use in the business’s summary writing, even where the rightholder has not given consent to those acts?
- (11) What criteria should be used to assess whether temporary acts of reproduction have “independent economic significance” (see Article 5(1) of Directive 2001/29) if the other conditions laid down in the provision are satisfied?
- (12) Can the user’s efficiency gains from temporary acts of reproduction be taken into account in assessing whether the acts have “independent economic significance” (see Article 5(1) of Directive 2001/29)?
- (13) Can the scanning by a commercial business of entire newspaper articles, subsequent processing of the reproduction, and the storing and possible printing out of part of the reproduction, consisting of one or more text extracts of 11 words, without the rightholder’s consent be regarded as constituting “certain special cases which do not conflict with a normal exploitation” of the newspaper articles and “not unreasonably [prejudicing] the legitimate interests of the rightholder” (see Article 5(5) of Directive 2001/29)?

The questions referred for a preliminary ruling

Preliminary observation

27 It should be noted as a preliminary point that the need for uniform application of Community law and the principle of equality require that where provisions of Community law make no express reference to the law of the Member States for the purpose of determining their meaning and scope, as is the case with Article 2 of Directive 2001/29, they must normally be given an autonomous and uniform interpretation throughout the Community (see, in particular, Case C-245/00 *SENA* [2003] ECR I-1251, paragraph 23, and Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 31).

28 Those considerations are of particular importance with respect to Directive 2001/29, in the light of the wording of recitals 6 and 21 in the preamble to that directive.

29 Consequently, the Austrian Government cannot successfully contend that it is for the Member States to provide the definition of the concept of ‘reproduction in part’ in Article 2 of Directive 2001/29 (see, to that effect, with respect to the concept of ‘public’ as referred to in Article 3 of the same directive, *SGAE*, paragraph 31).

The first question

30 By its first question, the national court asks, essentially, whether the concept of ‘reproduction in part’ within the meaning of Directive 2001/29 is to be interpreted as meaning that it encompasses the storing and subsequent printing out on paper of a text extract consisting of 11 words.

31 It is clear that Directive 2001/29 does not define the concept of either ‘reproduction’ or ‘reproduction in part’.

32 In those circumstances, those concepts must be defined having regard to the wording and context of Article 2 of Directive 2001/29, where the reference to them is to be found and in the light of both the overall objectives of that directive and international law (see, to that effect, *SGAE*, paragraphs 34 and 35 and case-law cited).

33 Article 2(a) of Directive 2001/29 provides that authors have the exclusive right to authorise or prohibit reproduction, in whole or in part, of their works. It follows that protection of the author's right to authorise or prohibit reproduction is intended to cover 'work'.

34 It is, moreover, apparent from the general scheme of the Berne Convention, in particular Article 2(5) and (8), that the protection of certain subject-matters as artistic or literary works presupposes that they are intellectual creations.

35 Similarly, under Articles 1(3) of Directive 91/250, 3(1) of Directive 96/9 and 6 of Directive 2006/116, works such as computer programs, databases or photographs are protected by copyright only if they are original in the sense that they are their author's own intellectual creation.

36 In establishing a harmonised legal framework for copyright, Directive 2001/29 is based on the same principle, as evidenced by recitals 4, 9 to 11 and 20 in the preamble thereto.

37 In those circumstances, copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation.

38 As regards the parts of a work, it should be borne in mind that there is nothing in Directive 2001/29 or any other relevant directive indicating that those parts are to be treated any differently from the work as a whole. It follows that they are protected by copyright since, as such, they share the originality of the whole work.

39 In the light of the considerations referred to in paragraph 37 of this judgment, the various parts of a work thus enjoy protection under Article 2(a) of Directive 2001/29, provided that they contain elements which are the expression of the intellectual creation of the author of the work.

40 With respect to the scope of such protection of a work, it follows from recitals 9 to 11 in the preamble to Directive 2001/29 that its main objective is to introduce a high level of protection, in particular for authors to enable them to receive an appropriate reward for the use of their works, including at the time of reproduction of those works, in order to be able to pursue their creative and artistic work.

41 Similarly, recital 21 in the preamble to Directive 2001/29 requires that the acts covered by the right of reproduction be construed broadly.

42 That requirement of a broad definition of those acts is, moreover, also to be found in the wording of Article 2 of that directive, which uses expressions such as 'direct or indirect', 'temporary or permanent', 'by any means' and 'in any form'.

43 Consequently, the protection conferred by Article 2 of Directive 2001/29 must be given a broad interpretation.

44 As regards newspaper articles, their author's own intellectual creation, referred to in paragraph 37 of this judgment, is evidenced clearly from the form, the manner in which the subject is presented and the linguistic expression. In the main proceedings, moreover, it is common ground that newspaper articles, as such, are literary works covered by Directive 2001/29.

45 Regarding the elements of such works covered by the protection, it should be observed that they consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation.

46 Words as such do not, therefore, constitute elements covered by the protection.

47 That being so, given the requirement of a broad interpretation of the scope of the protection conferred by Article 2 of Directive 2001/29, the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual

creation of the author of that article. Such sentences or parts of sentences are, therefore, liable to come within the scope of the protection provided for in Article 2(a) of that directive.

48 In the light of those considerations, the reproduction of an extract of a protected work which, like those at issue in the main proceedings, comprises 11 consecutive words thereof, is such as to constitute reproduction in part within the meaning of Article 2 of Directive 2001/29, if that extract contains an element of the work which, as such, expresses the author's own intellectual creation; it is for the national court to make this determination.

49 It must be remembered also that the data capture process used by Infopaq allows for the reproduction of multiple extracts of protected works. That process reproduces an extract of 11 words each time a search word appears in the relevant work and, moreover, often operates using a number of search words because some clients ask Infopaq to draw up summaries based on a number of criteria.

50 In so doing, that process increases the likelihood that Infopaq will make reproductions in part within the meaning of Article 2(a) of Directive 2001/29 because the cumulative effect of those extracts may lead to the reconstitution of lengthy fragments which are liable to reflect the originality of the work in question, with the result that they contain a number of elements which are such as to express the intellectual creation of the author of that work.

51 In the light of the foregoing, the answer to the first question is that an act occurring during a data capture process, which consists of storing an extract of a protected work comprising 11 words and printing out that extract, is such as to come within the concept of reproduction in part within the meaning of Article 2 of Directive 2001/29, if the elements thus reproduced are the expression of the intellectual creation of their author; it is for the national court to make this determination.

Questions 2 to 12

52 If the acts at issue in the main proceedings do come within the concept of reproduction in part of a protected work within the meaning of Article 2 of Directive 2001/29, Articles 2 and 5 of that directive make it clear that such reproduction may not be made without the consent of the relevant author, unless that reproduction satisfies the conditions laid down in Article 5 of that directive.

53 In that context, by questions 2 to 12, the referring court asks, essentially, whether acts of reproduction occurring during a data capture process, such as that at issue in the main proceedings, satisfy the conditions laid down in Article 5(1) of Directive 2001/29 and, therefore, whether that process may be carried out without the consent of the relevant rightholders, since it is used to draw up summaries of newspaper articles and consists of scanning those articles in their entirety to produce a digital file, storing an extract of 11 words and then printing out that extract.

54 Under Article 5(1) of Directive 2001/29, an act of reproduction may be exempted from the reproduction right provided for in Article 2 thereof only if it fulfils five conditions, that is, where

- the act is temporary;
- it is transient or incidental;
- it is an integral and essential part of a technological process;
- the sole purpose of that process is to enable a transmission in a network between third parties by an intermediary of a lawful use of a work or protected subject-matter; and
- the act has no independent economic significance.

55 It must be borne in mind that those conditions are cumulative in the sense that non-compliance with any one of them will lead to the act of reproduction not being exempted pursuant to Article 5(1) of Directive 2001/29 from the reproduction right provided for in Article 2 of that directive.

56 For the interpretation of each of those conditions in turn, it should be borne in mind that, according to settled case-law, the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly (Case C-476/01 *Kapper* [2004] ECR I-5205, paragraph 72, and Case C-36/05 *Commission v Spain* [2006] ECR I-10313, paragraph 31).

57 This holds true for the exemption provided for in Article 5(1) of Directive 2001/29, which is a derogation from the general principle established by that directive, namely the requirement of authorisation from the rightholder for any reproduction of a protected work.

58 This is all the more so given that the exemption must be interpreted in the light of Article 5(5) of Directive 2001/29, under which that exemption is to be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

59 In accordance with recitals 4, 6 and 21 in the preamble to Directive 2001/29, the conditions laid down in Article 5(1) thereof must also be interpreted in the light of the need for legal certainty for authors with regard to the protection of their works.

60 In the present case, Infopaq claims, first, that the acts of reproduction at issue in the main proceedings fulfil the condition relating to transient nature, since they are deleted at the end of the electronic search process.

61 The Court finds, in the light of the third condition referred to in paragraph 54 of this judgment, that a temporary and transient act of reproduction is intended to enable the completion of a technological process of which it forms an integral and essential part. In those circumstances, given the principles set out in paragraphs 57 and 58 of this judgment, those acts of reproduction must not exceed what is necessary for the proper completion of that technological process.

62 Legal certainty for rightholders further requires that the storage and deletion of the reproduction not be dependent on discretionary human intervention, particularly by the user of protected works. There is no guarantee that in such cases the person concerned will actually delete the reproduction created or, in any event, that he will delete it once its existence is no longer justified by its function of enabling the completion of a technological process.

63 This finding is supported by recital 33 in the preamble to Directive 2001/29 which lists, as examples of the characteristics of the acts referred to in Article 5(1) thereof, acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently. Such acts are, by definition, created and deleted automatically and without human intervention.

64 In the light of the foregoing, the Court finds that an act can be held to be 'transient' within the meaning of the second condition laid down in Article 5(1) of Directive 2001/29 only if its duration is limited to what is necessary for the proper completion of the technological process in question, it being understood that that process must be automated so that it deletes that act automatically, without human intervention, once its function of enabling the completion of such a process has come to an end.

65 In the main proceedings, the possibility cannot be ruled out at the outset that in the first two acts of reproduction at issue in those proceedings, namely the creation of TIFF files and text files resulting from the conversion of TIFF files, may be held to be transient as long as they are deleted automatically from the computer memory.

66 Regarding the third act of reproduction, namely the storing of a text extract of 11 words, the evidence submitted to the Court does not permit an assessment of whether the technological process is automated with the result that that file is deleted promptly and without human intervention from the computer memory. It is for the national court to ascertain whether the deletion of that file is dependent on the will of the user of the reproduction and whether there is a risk that the file might remain stored once the function of enabling completion of the technological process has come to an end.

67 It is common ground, however, that, by the last act of reproduction in the data capture process, Infopaq is making a reproduction outside the sphere of computer technology. It is printing out files containing the extracts of 11 words and thus reproduces those extracts on a paper medium.

68 Once the reproduction has been affixed onto such a medium, it disappears only when the paper itself is destroyed.

69 Moreover, since the data capture process is apparently not likely itself to destroy that medium, the deletion of that reproduction is entirely dependent on the will of the user of that process. It is not at all certain that he will want to dispose of the reproduction, which means that there is a risk that the reproduction will remain in existence for a longer period, according to the user's needs.

70 In those circumstances, the Court finds that the last act in the data capture process at issue in the main proceedings, during which Infopaq prints out the extracts of 11 words, is not a transient act within the meaning of Article 5(1) of Directive 2001/29.

71 There is, moreover, nothing in the case-file submitted to the Court – and nor has it been pleaded – that such an act is liable to be incidental in nature.

72 It follows from the foregoing that that act does not fulfil the second condition laid down in Article 5(1) of Directive 2001/29; accordingly, such an act cannot be exempted from the reproduction right provided for in Article 2 thereof.

73 It follows that the data capture process at issue in the main proceedings cannot be carried out without the consent of the rightholders and, consequently, it is not necessary to consider whether the four acts which make up that process fulfil the other conditions laid down in Article 5(1).

74 Consequently, the answer to questions 2 to 12 is that the act of printing out an extract of 11 words, during a data capture process such as that at issue in the main proceedings, does not fulfil the condition of being transient in nature as required by Article 5(1) of Directive 2001/29 and, therefore, that process cannot be carried out without the consent of the relevant rightholders.

Question 13

75 In the light of the answer given to questions 2 to 12, it is not necessary to answer question 13.

Costs

76 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 (Fourth Chamber) hereby rules:

1. An act occurring during a data capture process, which consists of storing an extract of a protected work comprising 11 words and printing out that extract, is such as to come within the concept of reproduction in part within the meaning of Article 2 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, if the elements thus reproduced are the expression of the intellectual creation of their author; it is for the national court to make this determination.

2. The act of printing out an extract of 11 words, during a data capture process such as that at issue in the main proceedings, does not fulfil the condition of being transient in nature as required by Article 5(1) of Directive 2001/29 and, therefore, that process cannot be carried out without the consent of the relevant rightholders.

[Signatures]

Football Association Premier League Ltd and others v QC Leisure and others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08)

JUDGMENT OF THE COURT (Grand Chamber)

4 October 2011 [\(★\)](#)

(Satellite broadcasting – Broadcasting of football matches – Reception of the broadcast by means of satellite decoder cards – Satellite decoder cards lawfully placed on the market in one Member State and used in another Member State – Prohibition on marketing and use in a Member State – Visualisation of broadcasts in disregard of the exclusive rights granted – Copyright – Television broadcasting right – Exclusive licences to broadcast in a single Member State – Freedom to provide services – Article 56 TFEU – Competition – Article 101 TFEU – Restriction of competition by object – Protection of services based on conditional access – Illicit device – Directive 98/84/EC – Directive 2001/29/EC – Reproduction of works within the memory of a satellite decoder and on a television screen – Exception to the reproduction right – Communication of works to the public in public houses – Directive 93/83/EEC)

In Joined Cases C-403/08 and C-429/08,

REFERENCES for a preliminary ruling under Article 234 EC from the High Court of Justice of England and Wales, Chancery Division, and from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), made by decisions of 11 and 28 July 2008, received at the Court on 17 and 29 September 2008 respectively, in the proceedings

Football Association Premier League Ltd,

NetMed Hellas SA,

Multichoice Hellas SA

v

QC Leisure,

David Richardson,

AV Station plc,

Malcolm Chamberlain,

Michael Madden,

SR Leisure Ltd,

Philip George Charles Houghton,

Derek Owen (C-403/08)

and

Karen Murphy

v

Media Protection Services Ltd (C-429/08),

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, A. Arabadjiev and J.-J. Kasel, Presidents of Chambers, A. Borg Barthet, M. Ilešič, J. Malenovský (Rapporteur) and T. von Danwitz, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 5 October 2010,

after considering the observations submitted on behalf of:

– Football Association Premier League Ltd, NetMed Hellas SA and Multichoice Hellas SA, by J. Mellor QC, N. Green QC, C. May and A. Robertson, Barristers, and S. Levine, M. Pullen and R. Hoy, Solicitors,

- QC Leisure, Mr Richardson, AV Station plc, Mr Chamberlain, Mr Madden, SR Leisure Ltd, Mr Houghton and Mr Owen, by M. Howe QC, A. Norris, S. Vousden, T. St Quentin and M. Demetriou, Barristers, and P. Dixon and P. Sutton, Solicitors,
- Ms Murphy, by M. Howe QC, W. Hunter QC, M. Demetriou, Barrister, and P. Dixon, Solicitor,
- Media Protection Services Ltd, by J. Mellor QC, N. Green QC, H. Davies QC and C. May, A. Robertson and P. Cadman, Barristers,
- the United Kingdom Government, by V. Jackson and S. Hathaway, acting as Agents, and J. Stratford QC,
- the Czech Government, by K. Havlíčková, acting as Agent,
- the Spanish Government, by N. Díaz Abad, acting as Agent,
- the French Government, by G. de Bergues and B. Beaupère-Manokha, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and L. D’Ascia, avvocato dello Stato,
- the European Parliament, by J. Rodrigues and L. Visaggio, acting as Agents,
- the Council of the European Union, by F. Florindo Gijón and G. Kimberley, acting as Agents,
- the European Commission, by X. Lewis, H. Krämer, I.V. Rogalski, J. Bourke and J. Samnadda, acting as Agents,
- the EFTA Surveillance Authority, by O.J. Einarsson and M. Schneider, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 February 2011,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of:

- Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access (OJ 1998 L 320, p. 54; ‘the Conditional Access Directive’),
- Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15; ‘the Satellite Broadcasting Directive’),
- 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), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60) (‘the Television without Frontiers Directive’),
- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10, corrigendum at OJ 2002 L 6, p. 70; ‘the Copyright Directive’) and
- Articles 34 TFEU, 36 TFEU, 56 TFEU and 101 TFEU.

2 The references have been made in proceedings between Football Association Premier League Ltd (‘FAPL’), NetMed Hellas SA (‘NetMed Hellas’) and Multichoice Hellas SA (‘Multichoice Hellas’) (collectively ‘FAPL and others’) and QC Leisure, Mr Richardson, AV Station plc (‘AV Station’), Mr Chamberlain, Mr Madden, SR Leisure Ltd, Mr Houghton and Mr Owen (collectively ‘QC Leisure and others’) (in Case C-403/08), and between Ms Murphy and Media Protection Services Ltd (‘MPS’) (in Case C-429/08), concerning the marketing and use in the United Kingdom of decoding devices which give access to the satellite broadcasting services of a broadcaster, are manufactured and marketed with that broadcaster’s authorisation, but are used, in disregard of its will, outside the geographical area for which they have been issued (‘foreign decoding devices’).

I – Legal context

A – International law

3 The Agreement on Trade-Related Aspects of Intellectual Property Rights, which constitutes Annex 1 C to the Agreement establishing the World Trade Organisation, signed in Marrakech on 15 April 1994, was approved by Council

Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

4 Article 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights provides:

'Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.'

5 Article 11(1) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979 ('the Berne Convention'), states:

'Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorising:

- (i) the public performance of their works, including such public performance by any means or process;
- (ii) any communication to the public of the performance of their works.'

6 Article 11*bis*(1) of the Berne Convention provides:

'Authors of literary and artistic works shall enjoy the exclusive right of authorising:

- (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
- (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one;
- (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.'

7 The World Intellectual Property Organisation (WIPO) adopted in Geneva on 20 December 1996 the WIPO Performances and Phonograms Treaty ('the Performances and Phonograms Treaty') and the WIPO Copyright Treaty ('the Copyright Treaty'). Those two treaties were approved on behalf of the Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

8 Article 2(g) of the Performances and Phonograms Treaty provides:

'For the purposes of this Treaty:

...

(g) "communication to the public" of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, "communication to the public" includes making the sounds or representations of sounds fixed in a phonogram audible to the public.'

9 Article 15(1) of that treaty states:

'Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.'

10 Article 1(4) of the Copyright Treaty provides that Contracting Parties are to comply with Articles 1 to 21 of and the Appendix to the Berne Convention.

B – European Union law

1. Broadcasting directives

11 The third recital in the preamble to the Television without Frontiers Directive states:

'... broadcasts transmitted across frontiers by means of various technologies are one of the ways of pursuing the objectives of the Community; ... measures should be adopted to permit and ensure the transition from national markets to a common programme production and distribution market and to establish conditions of fair competition without prejudice to the public interest role to be discharged by the television broadcasting services'.

12 Recital 21 in the preamble to Directive 97/36 states:

'... events of major importance for society should, for the purposes of this Directive, meet certain criteria, that is to say be outstanding events which are of interest to the general public in the European Union or in a given Member State or in an important component part of a given Member State and are organised in advance by an event organiser who is legally entitled to sell the rights pertaining to that event'.

13 Recitals 3, 5, 7, 14, 15 and 17 in the preamble to the Satellite Broadcasting Directive state:

'(3) ... broadcasts transmitted across frontiers within the Community, in particular by satellite and cable, are one of the most important ways of pursuing [the] Community objectives, which are at the same time political, economic, social, cultural and legal;

...

(5) ... holders of rights are exposed to the threat of seeing their works exploited without payment of remuneration or that the individual holders of exclusive rights in various Member States block the exploitation of their rights; ... the legal uncertainty in particular constitutes a direct obstacle in the free circulation of programmes within the Community;

...

(7) ... the free broadcasting of programmes is further impeded by the current legal uncertainty over whether broadcasting by a satellite whose signals can be received directly affects the rights in the country of transmission only or in all countries of reception together; ...

...

(14) ... the legal uncertainty regarding the rights to be acquired which impedes cross-border satellite broadcasting should be overcome by defining the notion of communication to the public by satellite at a Community level; ... this definition should at the same time specify where the act of communication takes place; ... such a definition is necessary to avoid the cumulative application of several national laws to one single act of broadcasting; ...

(15) ... the acquisition on a contractual basis of exclusive broadcasting rights should comply with any legislation on copyright and rights related to copyright in the Member State in which communication to the public by satellite occurs;

...

(17) ... in arriving at the amount of the payment to be made for the rights acquired, the parties should take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version'.

14 Article 1(2)(a) to (c) of the Satellite Broadcasting Directive states:

'(a) For the purpose of this Directive, "communication to the public by satellite" means the act of introducing, under the control and responsibility of the broadcasting organisation, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(b) The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(c) If the programme-carrying signals are encrypted, then there is communication to the public by satellite on condition that the means for decrypting the broadcast are provided to the public by the broadcasting organisation or with its consent.'

15 Article 2 of the Satellite Broadcasting Directive provides:

'Member States shall provide an exclusive right for the author to authorise the communication to the public by satellite of copyright works, subject to the provisions set out in this chapter.'

16 Recitals 2, 3, 6 and 13 in the preamble to the Conditional Access Directive state:

(2) ... the cross-border provision of broadcasting and information society services may contribute, from the individual point of view, to the full effectiveness of freedom of expression as a fundamental right and, from the collective point of view, to the achievement of the objectives laid down in the Treaty;

(3) ... the Treaty provides for the free movement of all services which are normally provided for remuneration; ... this right, as applied to broadcasting and information society services, is also a specific manifestation in Community law of a more general principle, namely freedom of expression as enshrined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; ... that Article explicitly recognises the right of citizens to receive and impart information regardless of frontiers and ... any restriction of that right must be based on due consideration of other legitimate interests deserving of legal protection;

...

(6) ... the opportunities offered by digital technologies provide the potential for increasing consumer choice and contributing to cultural pluralism, by developing an even wider range of services within the meaning of Articles [56 TFEU and 57 TFEU]; ... the viability of those services will often depend on the use of conditional access in order to obtain the remuneration of the service provider; ... accordingly, the legal protection of service providers against illicit devices which allow access to these services free of charge seems necessary in order to ensure the economic viability of the services;

...

(13) ... it seems necessary to ensure that Member States provide appropriate legal protection against the placing on the market, for direct or indirect financial gain, of an illicit device which enables or facilitates without authority the circumvention of any technological measures designed to protect the remuneration of a legally provided service'.

17 Article 2 of the Conditional Access Directive provides:

'For the purposes of this Directive:

(a) *protected service* shall mean any of the following services, where provided against remuneration and on the basis of conditional access:

– television broadcasting, as defined in Article 1(a) of [the Television without Frontiers Directive],

...

(b) *conditional access* shall mean any technical measure and/or arrangement whereby access to the protected service in an intelligible form is made conditional upon prior individual authorisation;

(c) *conditional access device* shall mean any equipment or software designed or adapted to give access to a protected service in an intelligible form;

...

(e) *illicit device* shall mean any equipment or software designed or adapted to give access to a protected service in an intelligible form without the authorisation of the service provider;

(f) *field coordinated by this Directive* shall mean any provision relating to the infringing activities specified in Article 4.'

18 As set out in Article 3 of the Conditional Access Directive:

1. Each Member State shall take the measures necessary to prohibit on its territory the activities listed in Article 4, and to provide for the sanctions and remedies laid down in Article 5.

2. Without prejudice to paragraph 1, Member States may not:

(a) restrict the provision of protected services, or associated services, which originate in another Member State; or

(b) restrict the free movement of conditional access devices;

for reasons falling within the field coordinated by this Directive.'

19 Article 4 of the Conditional Access Directive states:

'Member States shall prohibit on their territory all of the following activities:

- (a) the manufacture, import, distribution, sale, rental or possession for commercial purposes of illicit devices;
- (b) the installation, maintenance or replacement for commercial purposes of an illicit device;
- (c) the use of commercial communications to promote illicit devices.'

2. Intellectual property directives

20 Recitals 9, 10, 15, 20, 23, 31 and 33 in the preamble to the Copyright Directive state:

'(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. ...

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work ...

...

(15) ... This Directive ... serves to implement a number of the new international obligations [arising from the Copyright Treaty and the Performances and Phonograms Treaty].

...

(20) This Directive is based on principles and rules already laid down in the Directives currently in force in [the area of intellectual property], in particular [Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61)], and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

...

(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

...

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded ...

...

(33) The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.'

21 As set out in Article 2(a) and (e) of the Copyright Directive:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

...

(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.'

22 Article 3(1) of the Copyright Directive provides:

'Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.'

23 Article 5 of the Copyright Directive states:

'1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental, which are an integral and essential part of a technological process and the sole purpose of which is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

...

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

...

(i) incidental inclusion of a work or other subject-matter in other material;

...

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

24 According to recital 5 in the preamble to Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) (OJ 2006 L 376, p. 28; 'the Related Rights Directive'):

'The creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky. ...'

25 Under Article 7(2) of the Related Rights Directive, Member States are to provide for broadcasting organisations the exclusive right to authorise or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

26 Article 8(3) of the Related Rights Directive is worded as follows:

'Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.'

27 Recital 5 in the preamble to, and Articles 7(2) and 8(3) of, the Related Rights Directive essentially reproduce the seventh recital in the preamble to, and Articles 6(2) and 8(3) of, Directive 92/100.

C – National legislation

28 Section 297(1) of the Copyright, Designs and Patents Act 1988 (‘the Copyright, Designs and Patents Act’) provides:

‘A person who dishonestly receives a programme included in a broadcasting service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale.’

29 Section 298 of the Copyright, Designs and Patents Act states:

‘(1) A person who–

(a) makes charges for the reception of programmes included in a broadcasting service provided from a place in the United Kingdom or any other Member State,

(b) sends encrypted transmissions of any other description from a place in the United Kingdom or any other Member State, or

...

is entitled to the following rights and remedies.

(2) He has the same rights and remedies against a person–

(a) who–

(i) makes, imports, distributes, sells or lets for hire, offers or exposes for sale or hire, or advertises for sale or hire,

(ii) has in his possession for commercial purposes, or

(iii) installs, maintains or replaces for commercial purposes,

any apparatus designed or adapted to enable or assist persons to access the programmes or other transmissions or circumvent conditional access technology related to the programmes or other transmissions when they are not entitled to do so, ...

...

as a copyright owner has in respect of an infringement of copyright.

...’

II – The disputes in the main proceedings and the questions referred for a preliminary ruling

30 FAPL runs the Premier League, the leading professional football league competition for football clubs in England.

31 FAPL’s activities include organising the filming of Premier League matches and exercising in their regard television broadcasting rights, that is to say, rights to make the audiovisual content of sporting events available to the public by means of television broadcasting (‘broadcasting rights’).

A – Licensing of the broadcasting rights for Premier League matches

32 FAPL grants licences in respect of those broadcasting rights for live transmission, on a territorial basis and for three-year terms. In that regard, FAPL’s strategy is to bring the competition to viewers throughout the world while maximising the value of the rights to its members, the clubs.

33 Those rights are thus awarded to broadcasters under an open competitive tender procedure which begins with the invitation to tenderers to submit bids on a global, regional or territorial basis. Demand then determines the territorial basis on which FAPL sells its international rights. However, as a rule, that basis is national since there is only a limited demand from bidders for global or pan-European rights, given that broadcasters usually operate on a territorial basis and serve the domestic market either in their own country or in a small cluster of neighbouring countries with a common language.

34 Where a bidder wins, for an area, a package of broadcasting rights for the live transmission of Premier League matches, it is granted the exclusive right to broadcast them in that area. This is necessary, according to FAPL, in order to realise the optimum commercial value of all of the rights, broadcasters being prepared to pay a premium to acquire that exclusivity as it allows them to differentiate their services from those of their rivals and therefore enhances their ability to generate revenue.

35 In order to protect the territorial exclusivity of all broadcasters, they each undertake, in their licence agreement with FAPL, to prevent the public from receiving their broadcasts outside the area for which they hold the licence. This requires, first, each broadcaster to ensure that all of its broadcasts capable of being received outside that territory – in particular those transmitted by satellite – are encrypted securely and cannot be received in unencrypted form. Second, broadcasters must ensure that no device is knowingly authorised so as to permit anyone to view their transmissions outside the territory concerned. Therefore, broadcasters are in particular prohibited from supplying decoding devices that allow their broadcasts to be decrypted for the purpose of being used outside the territory for which they hold the licence.

B – Broadcasting of Premier League matches

36 As part of its activities, FAPL is also responsible for organising the filming of Premier League matches and transmission of the signal to the broadcasters that have the rights for those matches.

37 For this purpose, the images and ambient sound captured at the match are transmitted to a production facility which adds logos, video sequences, on-screen graphics, music and English commentary.

38 The signal is sent, by satellite, to a broadcaster which adds its own logo and possibly some commentary. The signal is then compressed and encrypted, and then transmitted by satellite to subscribers, who receive the signal using a satellite dish. The signal is, finally, decrypted and decompressed in a satellite decoder which requires a decoding device such as a decoder card for its operation.

39 In Greece, the holder of the sub-licence to broadcast Premier League matches is NetMed Hellas. The matches are broadcast via satellite on SuperSport channels on the NOVA platform, the owner and operator of which is Multichoice Hellas.

40 Viewers who have subscribed to the NOVA satellite package have access to those channels. Every subscriber must have been able to provide a name, a Greek address and a Greek telephone number. Subscriptions can be taken out for private or commercial purposes.

41 In the United Kingdom, at the material time the licensee for live Premier League broadcasting was BSkyB Ltd. Where a natural or legal person wishes to screen Premier League matches in the United Kingdom, he may take out a commercial subscription from that company.

42 However, in the United Kingdom certain restaurants and bars have begun to use foreign decoding devices to access Premier League matches. They buy from a dealer a card and a decoder box which allow them to receive a satellite channel broadcast in another Member State, such as the NOVA channels, the subscription to which is less expensive than BSkyB Ltd's subscription. Those decoder cards have been manufactured and marketed with the authorisation of the service provider, but they are subsequently used in an unauthorised manner, since the broadcasters have made their issue subject to the condition – in accordance with the undertakings set out in paragraph 35 of the present judgment – that customers do not use them outside the national territory concerned.

43 FAPL has taken the view that such activities are harmful to its interests because they undermine the exclusivity of the rights granted by licence in a given territory and hence the value of those rights. Indeed, according to FAPL, the broadcaster selling the cheapest decoder cards has the potential to become, in practice, the broadcaster at European level, which would result in broadcast rights in the European Union having to be granted at European level. This would lead to a significant loss in revenue for both FAPL and the broadcasters, and would thus undermine the viability of the services that they provide.

44 Consequently, FAPL and others have brought, in Case C-403/08, what they consider to be three test cases before the High Court of Justice of England and Wales, Chancery Division. Two of the actions are against QC Leisure, Mr Richardson, AV Station and Mr Chamberlain, suppliers to public houses of equipment and satellite decoder cards that enable the reception of programmes of foreign broadcasters, including NOVA, which transmit live Premier League matches.

45 The third action is brought against Mr Madden, SR Leisure Ltd, Mr Houghton and Mr Owen, licensees or operators of four public houses that have screened live Premier League matches by using a foreign decoding device.

46 FAPL and others allege that those persons are infringing their rights protected by section 298 of the Copyright, Designs and Patents Act by trading in or, in the case of the defendants in the third action, being in possession for commercial purposes of foreign decoding devices designed or adapted to give access to the services of FAPL and others without authorisation.

47 In addition, the defendants in the third action have allegedly infringed their copyrights by creating copies of the works in the internal operation of the satellite decoder and by displaying the works on screen, as well as by performing, playing or showing the works in public and communicating them to the public.

48 Furthermore, QC Leisure and AV Station have allegedly infringed the copyrights by authorising the acts perpetrated by the defendants in the third action, as well as by other persons to whom they have supplied decoder cards.

49 In the view of QC Leisure and others, the actions are unfounded because they are not using pirate decoder cards, all of the cards in question having been issued and placed upon the market, in another Member State, by the relevant satellite broadcaster.

50 In Case C-429/08, Ms Murphy, manager of a public house, procured a NOVA decoder card to screen Premier League matches.

51 Agents from MPS, a body mandated by FAPL to conduct a campaign of prosecutions against public house managers using foreign decoding devices, found that Ms Murphy was receiving, in her public house, broadcasts of Premier League matches transmitted by NOVA.

52 Consequently, MPS brought Ms Murphy before Portsmouth Magistrates' Court, which convicted her of two offences under section 297(1) of the Copyright, Designs and Patents Act on the ground that she had dishonestly received a programme included in a broadcasting service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme.

53 After Portsmouth Crown Court had essentially dismissed her appeal, Ms Murphy brought an appeal by way of case stated before the High Court of Justice, taking a position similar to that adopted by QC Leisure and others.

54 In those circumstances, the High Court of Justice of England and Wales, Chancery Division, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling in Case C-403/08:

'(1) (a) Where a conditional access device is made by or with the consent of a service provider and sold subject to a limited authorisation to use the device only to gain access to the protected service in particular circumstances, does that device become an "illicit device" within the meaning of Article 2(e) of [the Conditional Access Directive] if it is used to give access to that protected service in a place or in a manner or by a person outside the authorisation of the service provider?

(b) What is the meaning of "designed or adapted" within Article 2(e) of the Directive?

(2) When a first service provider transmits programme content in encoded form to a second service provider who broadcasts that content on the basis of conditional access, what factors are to be taken into account in determining whether the interests of the first provider of a protected service are affected, within the meaning of Article 5 of [the Conditional Access Directive]?

In particular:

Where a first undertaking transmits programme content (comprising visual images, ambient sound and English commentary) in encoded form to a second undertaking which in turn broadcasts to the public the programme content (to which it has added its logo and, on occasion, an additional audio commentary track):

(a) Does the transmission by the first undertaking constitute a protected service of "television broadcasting" within the meaning of Article 2(a) of [the Conditional Access Directive] and Article 1(a) of [the Television without Frontiers Directive]?

(b) Is it necessary for the first undertaking to be a broadcaster within the meaning of Article 1(b) of [the Television without Frontiers Directive] in order to be considered as providing a protected service of “television broadcasting” within the first indent of Article 2(a) of [the Conditional Access Directive]?

(c) Is Article 5 of [the Conditional Access Directive] to be interpreted as conferring a civil right of action on the first undertaking in respect of illicit devices which give access to the programme as broadcast by the second undertaking, either:

(i) because such devices are to be regarded as giving access via the broadcast signal to the first undertaking’s own service; or

(ii) because the first undertaking is the provider of a protected service whose interests are affected by an infringing activity (because such devices give unauthorised access to the protected service provided by the second undertaking)?

(d) Is the answer to (c) affected by whether the first and second service providers use different decryption systems and conditional access devices?

(3) Does “possession for commercial purposes” in Article 4(a) of the [Conditional Access] Directive relate only to possession for the purposes of commercial dealings in (for example, sales of) illicit devices, or does it extend to the possession of a device by an end user in the course of a business of any kind?

(4) Where sequential fragments of a film, musical work or sound recording (in this case frames of digital video and audio) are created (i) within the memory of a decoder or (ii) in the case of a film on a television screen, and the whole work is reproduced if the sequential fragments are considered together but only a limited number of fragments exist at any point in time:

(a) Is the question of whether those works have been reproduced in whole or in part to be determined by the rules of national copyright law relating to what constitutes an infringing reproduction of a copyright work, or is it a matter of interpretation of Article 2 of [the Copyright Directive]?

(b) If it is a matter of interpretation of Article 2 of [the Copyright Directive], should the national court consider all of the fragments of each work as a whole, or only the limited number of fragments which exist at any point in time? If the latter, what test should the national court apply to the question of whether the works have been reproduced in part within the meaning of that Article?

(c) Does the reproduction right in Article 2 extend to the creation of transient images on a television screen?

(5) (a) Are transient copies of a work created within a satellite television decoder box or on a television screen linked to the decoder box, and whose sole purpose is to enable a use of the work not otherwise restricted by law, to be regarded as having “independent economic significance” within the meaning of Article 5(1) of [the Copyright Directive] by reason of the fact that such copies provide the only basis upon which the rights holder can extract remuneration for the use of his rights?

(b) Is the answer to Question 5(a) affected by (i) whether the transient copies have any inherent value; or (ii) whether the transient copies comprise a small part of a collection of works and/or other subject-matter which otherwise may be used without infringement of copyright; or (iii) whether the exclusive licensee of the rights holder in another Member State has already received remuneration for use of the work in that Member State?

(6) (a) Is a copyright work communicated to the public by wire or wireless means within the meaning of Article 3 of [the Copyright Directive] where a satellite broadcast is received at a commercial premises (for example a bar) and communicated or shown at those premises via a single television screen and speakers to members of the public present in those premises?

(b) Is the answer to Question 6(a) affected if:

(i) the members of the public present constitute a new public not contemplated by the broadcaster (in this case because a domestic decoder card for use in one Member State is used for a commercial audience in another Member State)?

(ii) the members of the public are not a paying audience according to national law?

(iii) the television broadcast signal is received by an aerial or satellite dish on the roof of or adjacent to the premises where the television is situated?

(c) If the answer to any part of (b) is yes, what factors should be taken into account in determining whether there is a communication of the work which has originated from a place where members of the audience are not present?

(7) Is it compatible with [the Satellite Broadcasting Directive] or with Articles 28 and 30 or 49 of the EC Treaty if national copyright law provides that when transient copies of works included in a satellite broadcast are created inside a satellite decoder box or on a television screen, there is an infringement of copyright under the law of the country of reception of the broadcast? Does it affect the position if the broadcast is decoded using a satellite decoder card which has been issued by the provider of a satellite broadcasting service in another Member State on the condition that the satellite decoder card is only authorised for use in that other Member State?

(8) (a) If the answer to [Question 1] is that a conditional access device made by or with the consent of the service provider becomes an “illicit device” within the meaning of Article 2(e) of [the Conditional Access Directive] when it is used outside the scope of the authorisation of the service provider to give access to a protected service, what is the specific subject-matter of the right by reference to its essential function conferred by the Conditional Access Directive?

(b) Do Articles 28 or 49 of the EC Treaty preclude enforcement of a provision of national law in a first Member State which makes it unlawful to import or sell a satellite decoder card which has been issued by the provider of a satellite broadcasting service in another Member State on the condition that the satellite decoder card is only authorised for use in that other Member State?

(c) Is the answer affected if the satellite decoder card is authorised only for private and domestic use in that other Member State but used for commercial purposes in the first Member State?

(9) Do Articles 28 and 30 or 49 of the EC Treaty preclude enforcement of a provision of national copyright law which makes it unlawful to perform or play in public a musical work where that work is included in a protected service which is accessed[,] and [that work is] played in public[,] by use of a satellite decoder card where that card has been issued by the service provider in another Member State on the condition that the decoder card is only authorised for use in that other Member State? Does it make a difference if the musical work is an unimportant element of the protected service as a whole and the showing or playing in public of the other elements of the service are not prevented by national copyright law?

(10) Where a programme content provider enters into a series of exclusive licences each for the territory of one or more Member States under which the broadcaster is licensed to broadcast the programme content only within that territory (including by satellite) and a contractual obligation is included in each licence requiring the broadcaster to prevent its satellite decoder cards which enable reception of the licensed programme content from being used outside the licensed territory, what legal test should the national court apply and what circumstances should it take into consideration in deciding whether the contractual restriction contravenes the prohibition imposed by Article 81(1) [EC]?

In particular:

(a) must Article 81(1) [EC] be interpreted as applying to that obligation by reason only of it being deemed to have the object of preventing, restricting or distorting competition?

(b) if so, must it also be shown that the contractual obligation appreciably prevents, restricts or distorts competition in order to come within the prohibition imposed by Article 81(1) [EC]?

55 In Case C-429/08, the High Court of Justice of England and Wales, Queen’s Bench Division (Administrative Court), decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) In what circumstances is a conditional access device an “illicit device” within the meaning of Article 2(e) of [the Conditional Access Directive]?

(2) In particular, is a conditional access device an “illicit device” if it is acquired in circumstances where:

(i) the conditional access device was made by or with the consent of a service provider and originally supplied subject to limited contractual authorisation to use the device to gain access to a protected service only in a first Member State and was used to gain access to that protected service received in another Member State? and/or

(ii) the conditional access device was made by or with the consent of a service provider and was originally procured and/or enabled by the provision of a false name and residential address in the first Member State thereby overcoming contractual territorial restrictions imposed on the export of such devices for use outside the first Member State? and/or

(iii) the conditional access device was made by or with the consent of a service provider and was originally supplied subject to a contractual condition that it be used only for domestic or private use rather than commercial use (for which a higher subscription charge is payable), but was used in the United Kingdom for commercial purposes, namely showing live football broadcasts in a public house?

(3) If the answer to any part of Question 2 is “no”, does Article 3(2) of that Directive preclude a Member State from invoking a national law that prevents use of such conditional access devices in the circumstances set out in Question 2 above?

(4) If the answer to any part of Question 2 is “no”, is Article 3(2) of that Directive invalid:

(a) for the reason that it is discriminatory and/or disproportionate; and/or

(b) for the reason that it conflicts with free movement rights under the Treaty; and/or

(c) for any other reason?

(5) If the answer to Question 2 is “yes”, are Articles 3(1) and 4 of that Directive invalid for the reason that they purport to require the Member States to impose restrictions on the importation from other Member States of and other dealings with “illicit devices” in circumstances where those devices may lawfully be imported and/or used to receive cross-border satellite broadcasting services by virtue of the rules on the free movement of goods under Articles 28 and 30 of the EC Treaty and/or the freedom to provide and receive services under Article 49 of the EC Treaty?

(6) Do Articles 28, 30 and/or 49 EC preclude enforcement of a national law (such as section 297 of the [Copyright, Designs and Patents Act]) which makes it a criminal offence dishonestly to receive a programme included in a broadcasting service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme, in any of the following circumstances:

(i) where the conditional access device was made by or with the consent of a service provider and originally supplied subject to limited contractual authorisation to use the device to gain access to a protected service only in a first Member State and was used to gain access to that protected service received in another Member State (in this case the UK)? and/or

(ii) where the conditional access device was made by or with the consent of a service provider and was originally procured and/or enabled by the provision of a false name and residential address in the first Member State thereby overcoming contractual territorial restrictions imposed on the export of such devices for use outside the first Member State? and/or

(iii) where the conditional access device was made by or with the consent of a service provider and was originally supplied subject to a contractual condition that it be used only for domestic or private use rather than commercial use (for which a higher subscription charge is payable), but was used in the United Kingdom for commercial purposes, namely showing live football broadcasts in a public house?

(7) Is enforcement of the national law in question in any event precluded on the ground of discrimination contrary to Article 12 EC or otherwise, because the national law applies to programmes included in a broadcasting service provided from a place in the United Kingdom but not from any other Member State?

(8) Where a programme content provider enters into a series of exclusive licences each for the territory of one or more Member States under which the broadcaster is licensed to broadcast the programme content only within that territory (including by satellite) and a contractual obligation is included in each licence requiring the broadcaster to prevent its satellite decoder cards which enable reception of the licensed programme content from being used outside the licensed territory, what legal test should the national court apply and what circumstances should it take into consideration in deciding whether the contractual restriction contravenes the prohibition imposed by Article 81(1) [EC]?

In particular:

(a) must Article 81(1) [EC] be interpreted as applying to that obligation by reason only of it being deemed to have the object of preventing, restricting or distorting competition?

(b) if so, must it also be shown that the contractual obligation appreciably prevents, restricts or distorts competition in order to come within the prohibition imposed by Article 81(1) [EC]?’

56 By order of the President of the Court of 3 December 2008, Cases C-403/08 and C-429/08 were joined for the purposes of the written and oral procedure and the judgment.

III – Consideration of the questions referred

A – Rules relating to the reception of encrypted broadcasts from other Member States

1. Introductory remarks

57 First of all, it should be made clear that the present cases concern only the satellite broadcasting of Premier League matches to the public by broadcasting organisations, such as Multichoice Hellas. Thus, the only part of the audiovisual communication that is relevant here is the part which consists in the transmission of those broadcasts by the broadcasting organisations to the public in accordance with Article 1(2)(a) and (b) of the Satellite Broadcasting Directive, that operation being carried out from the Member State where the programme-carrying signals are introduced into a chain of satellite communication (‘the Member State of broadcast’), in this instance the Hellenic Republic in particular.

58 On the other hand, the upstream part of the communication, between FAPL and those broadcasters, which consists in the transmission of audiovisual data containing those matches, is irrelevant here, that communication indeed being capable of being effected by means of telecommunication other than those used by the parties to the main proceedings.

59 Second, it is apparent from the documents before the Court that, under the licence agreements between FAPL and the broadcasters concerned, the broadcasts in question are intended solely for the public of the Member State of broadcast and that those broadcasters must therefore ensure that their satellite transmissions can be received only in that State. Consequently, the broadcasters must encrypt their transmissions and supply decoding devices only to persons resident in the Member State of broadcast.

60 Finally, it is not in dispute that proprietors of public houses use such decoding devices outside that Member State and therefore they use them in disregard of the broadcasters’ will.

61 It is in this context that the referring courts inquire, by the first part of their questions, whether such use of decoding devices falls within the Conditional Access Directive and what its effect is on that use. Next, should this aspect not be harmonised by the Conditional Access Directive, they seek to ascertain whether Articles 34 TFEU, 36 TFEU, 56 TFEU and 101 TFEU preclude national legislation and licence agreements that prohibit the use of foreign decoding devices.

2. Conditional Access Directive

a) Interpretation of ‘illicit device’ within the meaning of Article 2(e) of the Conditional Access Directive (Question 1 in Case C-403/08 and Questions 1 and 2 in Case C-429/08)

62 By these questions, the referring courts ask, in essence, whether ‘illicit device’ within the meaning of Article 2(e) of the Conditional Access Directive must be interpreted as also covering foreign decoding devices, including those procured or enabled by the provision of a false name and address and those used in breach of a contractual limitation permitting their use only for private purposes.

63 First, Article 2(e) of the Conditional Access Directive defines ‘illicit device’ as any equipment or software ‘designed’ or ‘adapted’ to give access to a protected service in an intelligible form without the authorisation of the service provider.

64 This wording is thus limited solely to equipment which has been the subject of manual or automated operations prior to commencement of its use and enables protected services to be received without the consent of providers of those services. Consequently, the wording refers only to equipment that has been manufactured, manipulated, adapted or readjusted without the authorisation of the service provider, and it does not cover the use of foreign decoding devices.

65 Second, recitals 6 and 13 in the preamble to the Conditional Access Directive, which contain explanation of the concept of ‘illicit device’, refer to the need to combat both illicit devices ‘which allow access ... free of charge’ to protected services and the placing on the market of illicit devices which enable or facilitate ‘without authority the circumvention of any technological measures’ designed to protect the remuneration of a legally provided service.

66 Neither of those categories covers foreign decoding devices, foreign decoding devices procured or enabled by the provision of a false name and address or foreign decoding devices which have been used in breach of a contractual limitation permitting their use only for private purposes. All those devices are manufactured and placed on the market with the authorisation of the service provider, they do not allow access free of charge to protected services and they do not enable or facilitate the circumvention of a technological measure designed to protect the remuneration of those services, given that remuneration has been paid in the Member State where they have been placed on the market.

67 In light of the foregoing, the answer to the questions referred is that 'illicit device' within the meaning of Article 2(e) of the Conditional Access Directive must be interpreted as not covering foreign decoding devices, foreign decoding devices procured or enabled by the provision of a false name and address or foreign decoding devices which have been used in breach of a contractual limitation permitting their use only for private purposes.

b) Interpretation of Article 3(2) of the Conditional Access Directive (Question 3 in Case C-429/08)

68 By this question, the referring court asks, in essence, whether Article 3(2) of the Conditional Access Directive precludes national legislation which prevents the use of foreign decoding devices, including those procured or enabled by the provision of a false name and address or those which have been used in breach of a contractual limitation permitting their use only for private purposes.

69 Under Article 3(2) of the Conditional Access Directive, Member States may not restrict the free movement of protected services and conditional access devices for reasons falling within the field coordinated by that directive, without prejudice to the obligations flowing from Article 3(1).

70 Article 3(1) of the Conditional Access Directive imposes obligations in the field coordinated by the directive – which is defined in Article 2(f) as any provision relating to the infringing activities specified in Article 4 – by requiring in particular that the Member States prohibit the activities listed in Article 4.

71 However, Article 4 concerns only activities which are infringing because they result in the use of illicit devices within the meaning of the directive.

72 Foreign decoding devices, including those procured or enabled by the provision of a false name and address and those used in breach of a contractual limitation permitting their use only for private purposes, do not constitute such illicit devices, as is apparent from paragraphs 63 to 67 of the present judgment.

73 Consequently, neither activities resulting in the use of those devices nor national legislation prohibiting those activities fall within the field coordinated by the Conditional Access Directive.

74 Accordingly, the answer to the question referred is that Article 3(2) of the Conditional Access Directive does not preclude national legislation which prevents the use of foreign decoding devices, including those procured or enabled by the provision of a false name and address or those used in breach of a contractual limitation permitting their use only for private purposes, since such legislation does not fall within the field coordinated by that directive.

c) The other questions concerning the Conditional Access Directive

75 In light of the answers to Question 1 in Case C-403/08 and to Questions 1, 2 and 3 in Case C-429/08, there is no need to examine Questions 2, 3 and 8(a) in Case C-403/08 or Questions 4 and 5 in Case C-429/08.

3. Rules of the FEU Treaty concerning free movement of goods and services

a) Prohibition on the import, sale and use of foreign decoding devices (Question 8(b) and the first part of Question 9 in Case C-403/08 and Question 6(i) in Case C-429/08)

76 By these questions, the referring courts ask in essence whether, on a proper construction of Articles 34 TFEU, 36 TFEU and 56 TFEU, those articles preclude legislation of a Member State which makes it unlawful to import into and sell and use in that State foreign decoding devices which give access to an encrypted satellite broadcasting service from another Member State that includes subject-matter protected by the legislation of that first State.

i) Identification of the applicable provisions

77 National legislation such as that at issue in the main proceedings concerns both the cross-border provision of encrypted broadcasting services and the movement within the European Union of foreign decoding devices which

enable those services to be decoded. In those circumstances, the question arises whether the legislation must be examined from the point of view of the freedom to provide services or from that of the free movement of goods.

78 It is clear from the case-law that, where a national measure relates to both the free movement of goods and the freedom to provide services, the Court will in principle examine it in the light of one only of those two fundamental freedoms if it is apparent that one of them is entirely secondary in relation to the other and may be considered together with it (see Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22, and Case C-108/09 *Ker-Optika* [2010] ECR I-0000, paragraph 43).

79 However, in the field of telecommunications, those two aspects are often intimately linked, one not capable of being regarded as entirely secondary in relation to the other. That is so in particular where national legislation governs the supply of telecommunications equipment, such as decoding devices, in order to specify the requirements which that equipment must meet or to lay down the conditions under which it can be marketed, so that it is appropriate, in such a case, to examine both fundamental freedoms simultaneously (see, to this effect, Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraphs 29 to 33).

80 That said, where legislation concerns, in this field, an activity in respect of which the services provided by the economic operators are particularly prominent, whilst the supply of telecommunications equipment is related thereto in only a purely secondary manner, it is appropriate to examine that activity in the light of the freedom to provide services alone.

81 That is so, *inter alia*, where making such equipment available constitutes only a specific step in the organisation or operation of a service and that activity does not display an end in itself, but is intended to enable the service to be obtained. In those circumstances, the activity which consists in making such equipment available cannot be assessed independently of the activity linked to the service to which that first activity relates (see, by analogy, *Schindler*, paragraphs 22 and 25).

82 In the main proceedings, the national legislation is not directed at decoding devices in order to determine the requirements which they must meet or to lay down conditions under which they can be marketed. It deals with them only as an instrument enabling subscribers to obtain the encrypted broadcasting services.

83 Given that the national legislation thus concerns, above all, the freedom to provide services, whilst the free movement of goods aspect is entirely secondary in relation to the freedom to provide services, that legislation must be assessed from the point of view of the latter freedom.

84 It follows that such legislation must be examined in the light of Article 56 TFEU.

ii) Existence of a restriction on the freedom to provide services

85 Article 56 TFEU requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. Moreover, the freedom to provide services is for the benefit of both providers and recipients of services (see Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 51 and the case-law cited).

86 In the main proceedings, the national legislation prohibits foreign decoding devices – which give access to satellite broadcasting services from another Member State – from being imported into, and sold and used in, national territory.

87 Given that access to satellite transmission services such as those at issue in the main proceedings requires possession of such a device whose supply is subject to the contractual limitation that it may be used only in the Member State of broadcast, the national legislation concerned prevents those services from being received by persons resident outside the Member State of broadcast, in this instance those resident in the United Kingdom. Consequently, that legislation has the effect of preventing those persons from gaining access to those services.

88 It is true that the actual origin of the obstacle to the reception of such services is to be found in the contracts concluded between the broadcasters and their customers, which in turn reflect the territorial restriction clauses included in contracts concluded between those broadcasters and the holders of intellectual property rights. However, as the legislation confers legal protection on those restrictions and requires them to be complied with on pain of civil-law and pecuniary sanctions, it itself restricts the freedom to provide services.

89 Consequently, the legislation concerned constitutes a restriction on the freedom to provide services that is prohibited by Article 56 TFEU unless it can be objectively justified.

iii) Justification of a restriction on the freedom to provide services by an objective of protecting intellectual property rights

– Observations submitted to the Court

90 FAPL and others, MPS and the United Kingdom, French and Italian Governments submit that the restriction underlying the legislation at issue in the main proceedings can be justified in light of the rights of holders of intellectual property rights, because it is necessary in order to ensure that those holders remain appropriately remunerated; this requires that they be entitled to demand appropriate remuneration for the use of their works or other subject-matter in each Member State and to grant territorial exclusivity in respect of their use.

91 Those parties contend in particular in this regard that, if there were no protection of that territorial exclusivity, the holder of intellectual property rights would no longer be able to obtain appropriate licence fees from the broadcasters given that the live broadcast of sporting events would have lost part of its value. Broadcasters are not interested in acquiring licences outside the territory of the Member State of broadcast. Acquiring licences for all the national territories where potential customers reside is not financially attractive, because of the extremely high cost of such licences. Thus, broadcasters acquire licences to transmit the works concerned in the territory of a single Member State. They are prepared to pay a substantial premium provided that they are guaranteed territorial exclusivity, because that exclusivity enables them to stand out from their competitors and thereby to attract additional customers.

92 QC Leisure and others, Ms Murphy, the Commission and the EFTA Surveillance Authority contend that such a restriction on the freedom to provide broadcasting services cannot be justified, because it results in a partitioning of the internal market.

– The Court's response

93 When examining the justification for a restriction, such as that at issue in the main proceedings, it is to be recalled that a restriction on fundamental freedoms guaranteed by the Treaty cannot be justified unless it serves overriding reasons in the public interest, is suitable for securing the attainment of the public interest objective which it pursues and does not go beyond what is necessary in order to attain it (see, to this effect, Case C-222/07 *UTECA* [2009] ECR I-1407, paragraph 25 and the case-law cited).

94 As regards the justifications which are capable of being accepted, it is apparent from settled case-law that such a restriction may be justified, in particular, by overriding reasons in the public interest which consist in the protection of intellectual property rights (see, to this effect, Case 62/79 *Coditel and Others ('Coditel I')* [1980] ECR 881, paragraphs 15 and 16, and Joined Cases 55/80 and 57/80 *Musik-Vertrieb membran and K-tel International* [1981] ECR 147, paragraphs 9 and 12).

95 It should thus be determined at the outset whether FAPL can invoke such rights capable of justifying the fact that the national legislation at issue in the main proceedings establishes in its favour protection which constitutes a restriction on the freedom to provide services.

96 FAPL cannot claim copyright in the Premier League matches themselves, as they cannot be classified as works.

97 To be so classified, the subject-matter concerned would have to be original in the sense that it is its author's own intellectual creation (see, to this effect, Case C-5/08 *Infopaq International* [2009] ECR I-6569, paragraph 37).

98 However, sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive. That applies in particular to football matches, which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright.

99 Accordingly, those events cannot be protected under copyright. It is, moreover, undisputed that European Union law does not protect them on any other basis in the field of intellectual property.

100 None the less, sporting events, as such, have a unique and, to that extent, original character which can transform them into subject-matter that is worthy of protection comparable to the protection of works, and that protection can be granted, where appropriate, by the various domestic legal orders.

101 In this regard, it is to be noted that, under the second subparagraph of Article 165(1) TFEU, the European Union is to contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.

102 Accordingly, it is permissible for a Member State to protect sporting events, where appropriate by virtue of protection of intellectual property, by putting in place specific national legislation, or by recognising, in compliance with European Union law, protection conferred upon those events by agreements concluded between the persons having the right to make the audiovisual content of the events available to the public and the persons who wish to broadcast that content to the public of their choice.

103 It should be added that the European Union legislature has envisaged exercise of that power by a Member State inasmuch as it refers, in recital 21 in the preamble to Directive 97/36, to events organised by an organiser who is legally entitled to sell the rights pertaining to that event.

104 Therefore, if the national legislation concerned is designed to confer protection on sporting events – a matter which it is for the referring court to establish – European Union law does not preclude, in principle, that protection and such legislation is thus capable of justifying a restriction on the free movement of services such as that at issue in the main proceedings.

105 However, it is also necessary that such a restriction does not go beyond what is necessary in order to attain the objective of protecting the intellectual property at issue (see, to this effect, *UTECA*, paragraphs 31 and 36).

106 In this regard, it should be pointed out that derogations from the principle of free movement can be allowed only to the extent to which they are justified for the purpose of safeguarding the rights which constitute the specific subject-matter of the intellectual property concerned (see, to this effect, Case C-115/02 *Rioglass and Transremar* [2003] ECR I-12705, paragraph 23 and the case-law cited).

107 It is clear from settled case-law that the specific subject-matter of the intellectual property is intended in particular to ensure for the right holders concerned protection of the right to exploit commercially the marketing or the making available of the protected subject-matter, by the grant of licences in return for payment of remuneration (see, to this effect, *Musik-Vertrieb membran and K-tel International*, paragraph 12, and Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, paragraph 20).

108 However, the specific subject-matter of the intellectual property does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration. Consistently with its specific subject-matter, they are ensured – as recital 10 in the preamble to the Copyright Directive and recital 5 in the preamble to the Related Rights Directive envisage – only appropriate remuneration for each use of the protected subject-matter.

109 In order to be appropriate, such remuneration must be reasonable in relation to the economic value of the service provided. In particular, it must be reasonable in relation to the actual or potential number of persons who enjoy or wish to enjoy the service (see, by analogy, Case C-61/97 *FDV* [1998] ECR I-5171, paragraph 15, and Case C-52/07 *Kanal 5 and TV 4* [2008] ECR I-9275, paragraphs 36 to 38).

110 Thus, with regard to television broadcasting, such remuneration must in particular – as recital 17 in the preamble to the Satellite Broadcasting Directive confirms – be reasonable in relation to parameters of the broadcasts concerned, such as their actual audience, their potential audience and the language version (see, to this effect, Case C-192/04 *Lagardère Active Broadcast* [2005] ECR I-7199, paragraph 51).

111 In this context, it is to be noted, first of all, that the right holders at issue in the main proceedings are remunerated for the broadcasting of the protected subject-matter from the Member State of broadcast in which the act of broadcasting is deemed to take place, in accordance with Article 1(2)(b) of the Satellite Broadcasting Directive, and in which the appropriate remuneration is therefore payable.

112 Next, when such remuneration is agreed between the right holders concerned and the broadcasters in an auction, there is nothing to prevent the right holder from asking, at that time, for an amount which takes account of the actual audience and the potential audience both in the Member State of broadcast and in any other Member State in which the broadcasts including the protected subject-matter are also received.

113 In this regard, it should be borne in mind in particular that reception of a satellite broadcast, such as that at issue in the main proceedings, requires possession of a decoding device. Consequently, it is possible to determine with a very

high degree of precision the total number of viewers who form part of the actual and potential audience of the broadcast concerned, hence of the viewers residing within and outside the Member State of broadcast.

114 Finally, as regards the premium paid by broadcasters in order to be granted territorial exclusivity, it admittedly cannot be ruled out that the amount of the appropriate remuneration also reflects the particular character of the broadcasts concerned, that is to say, their territorial exclusivity, so that a premium may be paid on that basis.

115 None the less, here such a premium is paid to the right holders concerned in order to guarantee absolute territorial exclusivity which is such as to result in artificial price differences between the partitioned national markets. Such partitioning and such an artificial price difference to which it gives rise are irreconcilable with the fundamental aim of the Treaty, which is completion of the internal market. In those circumstances, that premium cannot be regarded as forming part of the appropriate remuneration which the right holders concerned must be ensured.

116 Consequently, the payment of such a premium goes beyond what is necessary to ensure appropriate remuneration for those right holders.

117 Having regard to the foregoing, it is to be concluded that the restriction which consists in the prohibition on using foreign decoding devices cannot be justified in light of the objective of protecting intellectual property rights.

118 Doubt is not cast on this conclusion by the judgment in *Coditel I*, which has been relied upon by FAPL and others and by MPS in support of their arguments. It is true that, in paragraph 16 of that judgment, the Court held that the rules of the Treaty cannot in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment of intellectual property rights have agreed upon in order to protect the author and his assigns and that the mere fact that the geographical limits in question coincide, in some circumstances, with the frontiers of the Member States does not require a different view.

119 However, those statements were made in a context which is not comparable to that of the main proceedings. In the case which led to the judgment in *Coditel I*, the cable television broadcasting companies communicated a work to the public without having, in the Member State of the place of origin of that communication, an authorisation from the right holders concerned and without having paid remuneration to them.

120 By contrast, in the main proceedings the broadcasters carry out acts of communication to the public while having in the Member State of broadcast, which is the Member State of the place of origin of that communication, an authorisation from the right holders concerned and by paying them remuneration – which can, moreover, take account of the actual and potential audience in the other Member States.

121 Finally, account should be taken of the development of European Union law that has resulted, in particular, from the adoption of the Television without Frontiers Directive and the Satellite Broadcasting Directive which are intended to ensure the transition from national markets to a single programme production and distribution market.

iv) Justification of a restriction on the freedom to provide services by the objective of encouraging the public to attend football stadiums

122 FAPL and others and MPS submit, in the alternative, that the restriction at issue in the main proceedings is necessary in order to ensure compliance with the 'closed period' rule which prohibits the broadcasting in the United Kingdom of football matches on Saturday afternoons. This rule is stated to have the objective of encouraging the public to attend stadiums to watch football matches, particularly those in the lower divisions; according to FAPL and others and MPS, the objective could not be achieved if television viewers in the United Kingdom were able freely to watch the Premier League matches which broadcasters transmit from other Member States.

123 In that regard, even if the objective of encouraging such attendance of stadiums by the public were capable of justifying a restriction on the fundamental freedoms, suffice it to state that compliance with the aforementioned rule can be ensured, in any event, by incorporating a contractual limitation in the licence agreements between the right holders and the broadcasters, under which the latter would be required not to broadcast those Premier League matches during closed periods. It is indisputable that such a measure proves to have a lesser adverse effect on the fundamental freedoms than application of the restriction at issue in the main proceedings.

124 It follows that the restriction which consists in the prohibition on using foreign decoding devices cannot be justified by the objective of encouraging the public to attend football stadiums.

125 In light of all the foregoing, the answer to the questions referred is that, on a proper construction of Article 56 TFEU, that article precludes legislation of a Member State which makes it unlawful to import into and sell and use in that State foreign decoding devices which give access to an encrypted satellite broadcasting service from another Member State that includes subject-matter protected by the legislation of that first State.

b) Use of foreign decoding devices following the giving of a false identity and a false address and use of such devices for commercial purposes (Question 8(c) in Case C-403/08 and Question 6(ii) and (iii) in Case C-429/08)

126 By their questions, the referring courts ask, in essence, whether the conclusion set out in paragraph 125 of the present judgment is affected by the fact, first, that the foreign decoding device has been procured or enabled by the giving of a false identity and a false address, with the intention of circumventing the territorial restriction at issue in the main proceedings, and second, that it is used for commercial purposes although it was restricted to private use.

127 So far as concerns the first circumstance, it is admittedly liable to produce effects in the contractual relations between the purchaser who has given the false identity and the false address and the person supplying the foreign decoding device, who may in particular claim damages from the purchaser should the false identity and the false address given by the latter cause him loss or render him liable to a body such as FAPL. On the other hand, such a circumstance does not affect the conclusion set out in paragraph 125 of the present judgment, because it has no impact on the number of users who have paid for reception of the broadcasts.

128 The same is true of the second circumstance, where the decoding device is used for commercial purposes although it was restricted to private use.

129 In this regard, it should be stated that there is nothing to prevent the amount of the remuneration agreed between the right holders concerned and the broadcasters from being calculated on the basis of the fact that some customers use the decoding devices commercially whereas others use them privately.

130 Passing this on to its customers, the broadcaster may thus demand a different fee for access to its services according to whether the access is for commercial or for private purposes.

131 However, the risk that certain persons will use foreign decoding devices in disregard of the purpose to which they are restricted is comparable to the risk which arises when decoding devices are used in purely internal situations, that is to say, when they are used by customers resident in the Member State of broadcast. Accordingly, the second circumstance cannot justify a territorial restriction on the freedom to provide services and therefore it does not affect the conclusion set out in paragraph 125 of the present judgment. This is, however, without prejudice to the legal assessment – from the point of view of copyright – of the use of the satellite broadcasts for commercial purposes following their reception, an assessment which is carried out in the second part of the present judgment.

132 Having regard to the foregoing, the answer to the questions referred is that the conclusion set out in paragraph 125 of the present judgment is affected neither by the fact that the foreign decoding device has been procured or enabled by the giving of a false identity and a false address, with the intention of circumventing the territorial restriction in question, nor by the fact that it is used for commercial purposes although it was restricted to private use.

c) The other questions relating to free movement (the second part of Question 9 in Case C-403/08 and Question 7 in Case C-429/08)

133 In light of the answer to Question 8(b) and the first part of Question 9 in Case C-403/08 and Question 6(i) in Case C-429/08, there is no need to examine the second part of Question 9 in Case C-403/08 or Question 7 in Case C-429/08.

4. Rules of the FEU Treaty concerning competition

134 By Question 10 in Case C-403/08 and Question 8 in Case C-429/08, the referring courts ask, in essence, whether the clauses of an exclusive licence agreement concluded between a holder of intellectual property rights and a broadcaster constitute a restriction on competition prohibited by Article 101 TFEU where they oblige the broadcaster not to supply decoding devices giving access to that right holder's protected subject-matter outside the territory covered by the licence agreement concerned.

135 First of all, it should be recalled that an agreement falls within the prohibition laid down in Article 101(1) TFEU when it has as its object or effect the prevention, restriction or distortion of competition. The fact that the two criteria are alternatives means that it is appropriate, first and foremost, to determine whether just one of them is satisfied, here the criterion concerning the object of the agreement. It is only secondarily, when the analysis of the content of the

agreement does not reveal a sufficient degree of impairment of competition, that the consequences of the agreement should be considered, and for it to be open to prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (see, to this effect, Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 28, and Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, paragraph 55).

136 In order to assess whether the object of an agreement is anti-competitive, regard must be had inter alia to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part (see, to this effect, *GlaxoSmithKline Services and Others v Commission and Others*, paragraph 58 and the case-law cited).

137 As regards licence agreements in respect of intellectual property rights, it is apparent from the Court's case-law that the mere fact that the right holder has granted to a sole licensee the exclusive right to broadcast protected subject-matter from a Member State, and consequently to prohibit its transmission by others, during a specified period is not sufficient to justify the finding that such an agreement has an anti-competitive object (see, to this effect, Case 262/81 *Coditel and Others ('Coditel II')* [1982] ECR 3381, paragraph 15).

138 That being so, and in accordance with Article 1(2)(b) of the Satellite Broadcasting Directive, a right holder may in principle grant to a sole licensee the exclusive right to broadcast protected subject-matter by satellite, during a specified period, from a single Member State of broadcast or from a number of Member States.

139 None the less, regarding the territorial limitations upon exercise of such a right, it is to be pointed out that, in accordance with the Court's case-law, an agreement which might tend to restore the divisions between national markets is liable to frustrate the Treaty's objective of achieving the integration of those markets through the establishment of a single market. Thus, agreements which are aimed at partitioning national markets according to national borders or make the interpenetration of national markets more difficult must be regarded, in principle, as agreements whose object is to restrict competition within the meaning of Article 101(1) TFEU (see, by analogy, in the field of medicinal products, Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others* [2008] ECR I-7139, paragraph 65, and *GlaxoSmithKline Services and Others v Commission and Others*, paragraphs 59 and 61).

140 Since that case-law is fully applicable to the field of the cross-border provision of broadcasting services, as follows inter alia from paragraphs 118 to 121 of the present judgment, it must be held that, where a licence agreement is designed to prohibit or limit the cross-border provision of broadcasting services, it is deemed to have as its object the restriction of competition, unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition.

141 In the main proceedings, the actual grant of exclusive licences for the broadcasting of Premier League matches is not called into question. Those proceedings concern only the additional obligations designed to ensure compliance with the territorial limitations upon exploitation of those licences that are contained in the clauses of the contracts concluded between the right holders and the broadcasters concerned, namely the obligation on the broadcasters not to supply decoding devices enabling access to the protected subject-matter with a view to their use outside the territory covered by the licence agreement.

142 Such clauses prohibit the broadcasters from effecting any cross-border provision of services that relates to those matches, which enables each broadcaster to be granted absolute territorial exclusivity in the area covered by its licence and, thus, all competition between broadcasters in the field of those services to be eliminated.

143 Also, FAPL and others and MPS have not put forward any circumstance falling within the economic and legal context of such clauses that would justify the finding that, despite the considerations set out in the preceding paragraph, those clauses are not liable to impair competition and therefore do not have an anticompetitive object.

144 Accordingly, given that those clauses of exclusive licence agreements have an anticompetitive object, it is to be concluded that they constitute a prohibited restriction on competition for the purposes of Article 101(1) TFEU.

145 It should be added that while, in principle, Article 101(1) TFEU does not apply to agreements which fall within the categories specified in Article 101(3) TFEU, clauses of licence agreements such as the clauses at issue in the main proceedings do not meet the requirements laid down by the latter provision for reasons stated in paragraphs 105 to 124 of the present judgment and therefore the possibility of Article 101(1) TFEU being inapplicable does not arise.

146 In light of the foregoing, the answer to the questions referred is that the clauses of an exclusive licence agreement concluded between a holder of intellectual property rights and a broadcaster constitute a restriction on competition

prohibited by Article 101 TFEU where they oblige the broadcaster not to supply decoding devices enabling access to that right holder's protected subject-matter with a view to their use outside the territory covered by that licence agreement.

B – Rules relating to the use of the broadcasts once they are received

1. Introductory remarks

147 The second part of the questions referred for a preliminary ruling is designed to ascertain whether the reception of the broadcasts containing Premier League matches and the associated works is subject to restriction pursuant to the Copyright Directive and the Related Rights Directive by reason of the fact that it results in reproductions of those works within the memory of a satellite decoder and on a television screen and by reason of the showing of those works in public by the proprietors of the public houses in question.

148 It is to be noted that, as is apparent from paragraphs 37 and 57 of the present judgment, two categories of persons can assert intellectual property rights relating to television broadcasts such as the broadcasts at issue in the main proceedings, namely, first, the authors of the works concerned and, secondly, the broadcasters.

149 First, authors can rely on the copyright which attaches to the works exploited within the framework of those broadcasts. In the main proceedings, it is common ground that FAPL can assert copyright in various works contained in the broadcasts, that is to say, in particular, the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of recent Premier League matches, or various graphics.

150 Secondly, broadcasters such as Multichoice Hellas can invoke the right of fixation of their broadcasts which is provided for in Article 7(2) of the Related Rights Directive, the right of communication of their broadcasts to the public which is laid down in Article 8(3) of that directive, or the right to reproduce fixations of their broadcasts which is confirmed by Article 2(e) of the Copyright Directive.

151 None the less, the questions referred in the main proceedings do not relate to such rights.

152 Accordingly, the Court's examination should be limited to Articles 2(a), 3(1) and 5(1) of the Copyright Directive which protect copyright in the works exploited within the framework of the television broadcasts at issue in the main proceedings, that is to say, in particular, the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of recent Premier League matches, or various graphics.

2. The reproduction right provided for in Article 2(a) of the Copyright Directive (Question 4 in Case C-403/08)

153 By this question, the referring court asks, in essence, whether Article 2(a) of the Copyright Directive must be interpreted as meaning that the reproduction right extends to the creation of transient sequential fragments of the works within the memory of a satellite decoder and on a television screen which are immediately effaced and replaced by the next fragments. In this context, the referring court is uncertain, in particular, whether it must conduct its appraisal by reference to all the fragments as a whole or only by reference to those which exist at a given moment.

154 First of all, the term 'reproduction' in Article 2 of the Copyright Directive is a concept of European Union law which must be given an autonomous and uniform interpretation throughout the European Union (*Infopaq International*, paragraphs 27 to 29).

155 As regards its meaning, it has already been observed, in paragraph 97 of the present judgment, that copyright for the purposes of Article 2(a) of the Copyright Directive can apply only in relation to subject-matter which is its author's own intellectual creation (*Infopaq International*, paragraph 37).

156 The Court has thus stated that the various parts of a work enjoy protection under that provision, provided that they contain elements which are the expression of the intellectual creation of the author of the work (*Infopaq International*, paragraph 39).

157 This means that the unit composed of the fragments reproduced simultaneously – and therefore existing at a given moment – should be examined in order to determine whether it contains such elements. If it does, it must be classified as partial reproduction for the purposes of Article 2(a) of the Copyright Directive (see, to this effect, *Infopaq International*, paragraphs 45 and 46). In this regard, it is not relevant whether a work is reproduced by means of linear fragments which may have an ephemeral existence because they are immediately effaced in the course of a technical process.

158 It is in the light of the foregoing that the referring court must determine whether the creation of transient fragments of the works within the memory of a satellite decoder and on a television screen results in reproductions for the purposes of Article 2(a) of the Copyright Directive.

159 Consequently, the answer to the question referred is that Article 2(a) of the Copyright Directive must be interpreted as meaning that the reproduction right extends to transient fragments of the works within the memory of a satellite decoder and on a television screen, provided that those fragments contain elements which are the expression of the authors' own intellectual creation, and the unit composed of the fragments reproduced simultaneously must be examined in order to determine whether it contains such elements.

3. The exception in Article 5(1) of the Copyright Directive to the reproduction right (Question 5 in Case C-403/08)

160 By its question, the referring court asks, in essence, whether acts of reproduction such as those at issue in Case C-403/08, performed within the memory of a satellite decoder and on a television screen, fulfil the conditions laid down in Article 5(1) of the Copyright Directive and, therefore, whether those acts may be carried out without the copyright holders' authorisation.

a) Introductory remarks

161 Under Article 5(1) of the Copyright Directive, an act of reproduction is to be exempted from the reproduction right provided for in Article 2 thereof if it fulfils five conditions, that is to say, where:

- it is temporary;
- it is transient or incidental;
- it is an integral and essential part of a technological process;
- its sole purpose is to enable a transmission in a network between third parties by an intermediary, or a lawful use, of a work or other subject-matter; and
- it has no independent economic significance.

162 It is clear from the case-law that the conditions set out above must be interpreted strictly, because Article 5(1) of the Copyright Directive is a derogation from the general rule established by that directive that the copyright holder must authorise any reproduction of his protected work (*Infopaq International*, paragraphs 56 and 57).

163 None the less, the interpretation of those conditions must enable the effectiveness of the exception thereby established to be safeguarded and permit observance of the exception's purpose as resulting in particular from recital 31 in the preamble to the Copyright Directive and from Common Position (EC) No 48/2000 adopted by the Council on 28 September 2000 with a view to adopting that directive (OJ 2000 C 344, p. 1).

164 In accordance with its objective, that exception must allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and interests of right holders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other.

b) Compliance with the conditions laid down in Article 5(1) of the Copyright Directive

165 It is undisputed that the acts of reproduction concerned satisfy the first three conditions laid down in Article 5(1) of the Copyright Directive, because they are temporary, transient and form an integral part of a technological process carried out by means of a satellite decoder and a television set in order to enable the broadcasts transmitted to be received.

166 It therefore remains solely to determine whether the fourth and fifth conditions are complied with.

167 As regards, first of all, the fourth condition, it is to be stated at the outset that the acts of reproduction concerned are not intended to enable transmission in a network between third parties by an intermediary. Thus, it must be examined alternatively whether their sole purpose is to enable a lawful use to be made of a work or other subject-matter.

168 As is apparent from recital 33 in the preamble to the Copyright Directive, a use should be considered lawful where it is authorised by the right holder or where it is not restricted by the applicable legislation.

169 Since in the main proceedings the use of the works at issue is not authorised by the copyright holders, it must be determined whether the acts in question are intended to enable a use of works which is not restricted by the applicable legislation.

170 In this regard, it is undisputed that those ephemeral acts of reproduction enable the satellite decoder and the television screen to function correctly. From the television viewers' standpoint, they enable the broadcasts containing protected works to be received.

171 Mere reception as such of those broadcasts – that is to say, the picking up of the broadcasts and their visual display – in private circles does not reveal an act restricted by European Union legislation or by that of the United Kingdom, as indeed follows from the wording of Question 5 in Case C-403/08, and that act is therefore lawful. Furthermore, it follows from paragraphs 77 to 132 of the present judgment that such reception of the broadcasts must be considered lawful in the case of broadcasts from a Member State other than the United Kingdom when it is brought about by means of a foreign decoding device.

172 Accordingly, the acts of reproduction have the sole purpose of enabling a 'lawful use' of the works within the meaning of Article 5(1)(b) of the Copyright Directive.

173 Acts of reproduction such as those at issue in the main proceedings thus satisfy the fourth condition laid down by that provision.

174 So far as concerns, finally, the fifth condition laid down by that provision, these acts of reproduction carried out in the course of a technological process make access to the protected works possible. Since the latter have an economic value, access to them necessarily has economic significance.

175 However, if the exception laid down in Article 5(1) of the Copyright Directive is not to be rendered redundant, that significance must also be independent in the sense that it goes beyond the economic advantage derived from mere reception of a broadcast containing protected works, that is to say, beyond the advantage derived from the mere picking up of the broadcast and its visual display.

176 In the main proceedings, the temporary acts of reproduction, carried out within the memory of the satellite decoder and on the television screen, form an inseparable and non-autonomous part of the process of reception of the broadcasts transmitted containing the works in question. Furthermore, they are performed without influence, or even awareness, on the part of the persons thereby having access to the protected works.

177 Consequently, those temporary acts of reproduction are not capable of generating an additional economic advantage going beyond the advantage derived from mere reception of the broadcasts at issue.

178 It follows that the acts of reproduction at issue in the main proceedings cannot be regarded as having independent economic significance. Consequently, they fulfil the fifth condition laid down in Article 5(1) of the Copyright Directive.

179 This finding, and the finding set out in paragraph 172 of the present judgment, are moreover borne out by the objective of that provision, which is intended to ensure the development and operation of new technologies. If the acts at issue were not considered to comply with the conditions set by Article 5(1) of the Copyright Directive, all television viewers using modern sets which, in order to work, need those acts of reproduction to be carried out would be prevented from receiving broadcasts containing broadcast works, in the absence of an authorisation from copyright holders. That would impede, and even paralyse, the actual spread and contribution of new technologies, in disregard of the will of the European Union legislature as expressed in recital 31 in the preamble to the Copyright Directive.

180 In light of the foregoing, it must be concluded that acts of reproduction such as those at issue in the main proceedings fulfil all five conditions laid down in Article 5(1) of the Copyright Directive.

181 Nevertheless, in order for the exception laid down by that provision to be capable of being relied upon, those acts must also fulfil the conditions of Article 5(5) of the Copyright Directive. In this regard, suffice it to state that, in view of the considerations set out in paragraphs 163 to 179 of the present judgment, the acts also satisfy those conditions.

182 Consequently, the answer to the question referred is that acts of reproduction such as those at issue in Case C-403/08, which are performed within the memory of a satellite decoder and on a television screen, fulfil the conditions laid down in Article 5(1) of the Copyright Directive and may therefore be carried out without the authorisation of the copyright holders concerned.

4. 'Communication to the public' within the meaning of Article 3(1) of the Copyright Directive (Question 6 in Case C-403/08)

183 By its question, the referring court asks, in essence, whether 'communication to the public' within the meaning of Article 3(1) of the Copyright Directive must be interpreted as covering transmission of the broadcast works, via a television screen and speakers, to the customers present in a public house.

184 It should be noted at the outset that Article 3(1) of the Copyright Directive does not define the concept of 'communication to the public' (Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 33).

185 In those circumstances, and in accordance with settled-case law, its meaning and its scope must be determined in light of the objectives pursued by the Copyright Directive and of the context in which the provision being interpreted is set (*SGAE*, paragraph 34 and the case-law cited).

186 In this regard, it is to be noted first of all that the principal objective of the Copyright Directive is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public. It follows that 'communication to the public' must be interpreted broadly, as recital 23 in the preamble to the directive indeed expressly states (see *SGAE*, paragraph 36).

187 Second, in accordance with recital 20 in its preamble, the Copyright Directive is based on principles and rules already laid down in the directives in force in the area of intellectual property, such as Directive 92/100 which has been codified by the Related Rights Directive (see *Infopaq International*, paragraph 36).

188 In those circumstances, and given the requirements of unity of the European Union legal order and its coherence, the concepts used by that body of directives must have the same meaning, unless the European Union legislature has, in a specific legislative context, expressed a different intention.

189 Finally, Article 3(1) of the Copyright Directive must, so far as possible, be interpreted in a manner that is consistent with international law, in particular taking account of the Berne Convention and the Copyright Treaty. The Copyright Directive is intended to implement that treaty which, in Article 1(4), obliges the Contracting Parties to comply with Articles 1 to 21 of the Berne Convention. The same obligation is, moreover, laid down in Article 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (see, to this effect, *SGAE*, paragraphs 35, 40 and 41 and the case-law cited).

190 It is in the light of those three factors that 'communication to the public' within the meaning of Article 3(1) of the Copyright Directive should be interpreted and that it should be assessed whether that concept covers transmission of the broadcast works, via a television screen and speakers, to the customers present in a public house.

191 As regards, first, the concept of communication, it is apparent from Article 8(3) of the Related Rights Directive and Articles 2(g) and 15 of the Performance and Phonograms Treaty that such a concept includes 'making the sounds or representations of sounds fixed in a phonogram audible to the public' and that it encompasses broadcasting or 'any communication to the public'.

192 More specifically, as Article 11*bis*(1)(iii) of the Berne Convention expressly indicates, that concept encompasses communication by loudspeaker or any other instrument transmitting, by signs, sounds or images, covering – in accordance with the explanatory memorandum accompanying the proposal for a copyright directive (COM(97) 628 final) – a means of communication such as display of the works on a screen.

193 That being so, and since the European Union legislature has not expressed a different intention as regards the interpretation of that concept in the Copyright Directive, in particular in Article 3 thereof (see paragraph 188 of the present judgment), the concept of communication must be construed broadly, as referring to any transmission of the protected works, irrespective of the technical means or process used.

194 The Court, proceeding on the basis of such an interpretation, has already held that a hotel proprietor carries out an act of communication when he gives his customers access to the broadcast works via television sets, by distributing in the hotel rooms, with full knowledge of the position, the signal received carrying the protected works. The Court has pointed out that such intervention is not just a technical means to ensure or improve reception of the original broadcast in the catchment area, but an act without which those customers are unable to enjoy the broadcast works, although physically within that area (see, to this effect, *SGAE*, paragraph 42).

195 In Case C-403/08, the proprietor of a public house intentionally gives the customers present in that establishment access to a broadcast containing protected works via a television screen and speakers. Without his intervention the customers cannot enjoy the works broadcast, even though they are physically within the broadcast's catchment area. Thus, the circumstances of such an act prove comparable to those in *SGAE*.

196 Accordingly, it must be held that the proprietor of a public house effects a communication when he intentionally transmits broadcast works, via a television screen and speakers, to the customers present in that establishment.

197 That said, in order for there to be a 'communication to the public' within the meaning of Article 3(1) of the Copyright Directive in circumstances such as those of the main proceedings, it is also necessary for the work broadcast to be transmitted to a new public, that is to say, to a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public (see, to this effect, *SGAE*, paragraphs 40 and 42, and the order of 18 March 2010 in Case C-136/09 *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon*, paragraph 38).

198 When those authors authorise a broadcast of their works, they consider, in principle, only the owners of television sets who, either personally or within their own private or family circles, receive the signal and follow the broadcasts. Where a broadcast work is transmitted, in a place accessible to the public, for an additional public which is permitted by the owner of the television set to hear or see the work, an intentional intervention of that kind must be regarded as an act by which the work in question is communicated to a new public (see, to this effect, *SGAE*, paragraph 41, and *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon*, paragraph 37).

199 That is so when the works broadcast are transmitted by the proprietor of a public house to the customers present in that establishment, because those customers constitute an additional public which was not considered by the authors when they authorised the broadcasting of their works.

200 In addition, in order for there to be communication to the public, the work broadcast must be transmitted to a 'public not present at the place where the communication originates', within the meaning of recital 23 in the preamble to the Copyright Directive.

201 In this regard, it is apparent from Common Position No 48/2000 that this recital follows from the proposal of the European Parliament, which wished to specify, in the recital, that communication to the public within the meaning of that directive does not cover 'direct representation or performance', a concept referring to that of 'public performance' which appears in Article 11(1) of the Berne Convention and encompasses interpretation of the works before the public that is in direct physical contact with the actor or performer of those works (see the Guide to the Berne Convention, an interpretative document drawn up by WIPO which, without being binding, nevertheless assists in interpreting that convention, as the Court observed in *SGAE*, paragraph 41).

202 Thus, in order to exclude such direct public representation and performance from the scope of the concept of communication to the public in the context of the Copyright Directive, recital 23 in its preamble explained that communication to the public covers all communication to the public not present at the place where the communication originates.

203 Such an element of direct physical contact is specifically absent in the case of transmission, in a place such as a public house, of a broadcast work via a television screen and speakers to the public which is present at the place of that transmission, but which is not present at the place where the communication originates within the meaning of recital 23 in the preamble to the Copyright Directive, that is to say, at the place of the representation or performance which is broadcast (see, to this effect, *SGAE*, paragraph 40).

204 Finally, it is to be observed that it is not irrelevant that a 'communication' within the meaning of Article 3(1) of the Copyright Directive is of a profit-making nature (see, to this effect, *SGAE*, paragraph 44).

205 In a situation such as that in the main proceedings, it is indisputable that the proprietor transmits the broadcast works in his public house in order to benefit therefrom and that that transmission is liable to attract customers to whom the works transmitted are of interest. Consequently, the transmission in question has an effect upon the number of people going to that establishment and, ultimately, on its financial results.

206 It follows that the communication to the public in question is of a profit-making nature.

207 In light of all the foregoing, the answer to the question referred is that ‘communication to the public’ within the meaning of Article 3(1) of the Copyright Directive must be interpreted as covering transmission of the broadcast works, via a television screen and speakers, to the customers present in a public house.

5. Effect of the Satellite Broadcasting Directive (Question 7 in Case C-403/08)

208 By its question, the referring court asks, in essence, whether the Satellite Broadcasting Directive has a bearing on the lawfulness of the acts of reproduction performed within the memory of a satellite decoder and on a television screen.

209 The Satellite Broadcasting Directive provides only for minimum harmonisation of certain aspects of protection of copyright and related rights in the case of communication to the public by satellite or cable retransmission of broadcasts from other Member States. Unlike the Copyright Directive, this minimum harmonisation does not provide criteria to determine the lawfulness of the acts of reproduction performed within the memory of a satellite decoder and on a television screen (see, by analogy, Case C-293/98 *Egeda* [2000] ECR I-629, paragraphs 25 and 26, and *SGAE*, paragraph 30).

210 Consequently, the answer to the question referred is that the Satellite Broadcasting Directive must be interpreted as not having a bearing on the lawfulness of the acts of reproduction performed within the memory of a satellite decoder and on a television screen.

IV – Costs

211 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. ‘Illicit device’ within the meaning of Article 2(e) of Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access must be interpreted as not covering foreign decoding devices (devices which give access to the satellite broadcasting services of a broadcaster, are manufactured and marketed with that broadcaster’s authorisation, but are used, in disregard of its will, outside the geographical area for which they have been issued), foreign decoding devices procured or enabled by the provision of a false name and address or foreign decoding devices which have been used in breach of a contractual limitation permitting their use only for private purposes.

2. Article 3(2) of Directive 98/84 does not preclude national legislation which prevents the use of foreign decoding devices, including those procured or enabled by the provision of a false name and address or those used in breach of a contractual limitation permitting their use only for private purposes, since such legislation does not fall within the field coordinated by that directive.

3. On a proper construction of Article 56 TFEU:

– **that article precludes legislation of a Member State which makes it unlawful to import into and sell and use in that State foreign decoding devices which give access to an encrypted satellite broadcasting service from another Member State that includes subject-matter protected by the legislation of that first State;**

– **this conclusion is affected neither by the fact that the foreign decoding device has been procured or enabled by the giving of a false identity and a false address, with the intention of circumventing the territorial restriction in question, nor by the fact that it is used for commercial purposes although it was restricted to private use.**

4. The clauses of an exclusive licence agreement concluded between a holder of intellectual property rights and a broadcaster constitute a restriction on competition prohibited by Article 101 TFEU where they oblige the broadcaster not to supply decoding devices enabling access to that right holder’s protected subject-matter with a view to their use outside the territory covered by that licence agreement.

5. Article 2(a) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that the reproduction right extends to transient fragments of the works within the memory of a satellite decoder and on a television screen, provided that those fragments contain elements which are the

expression of the authors' own intellectual creation, and the unit composed of the fragments reproduced simultaneously must be examined in order to determine whether it contains such elements.

6. Acts of reproduction such as those at issue in Case C-403/08, which are performed within the memory of a satellite decoder and on a television screen, fulfil the conditions laid down in Article 5(1) of Directive 2001/29 and may therefore be carried out without the authorisation of the copyright holders concerned.

7. 'Communication to the public' within the meaning of Article 3(1) of Directive 2001/29 must be interpreted as covering transmission of the broadcast works, via a television screen and speakers, to the customers present in a public house.

8. Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission must be interpreted as not having a bearing on the lawfulness of the acts of reproduction performed within the memory of a satellite decoder and on a television screen.

[Signatures]

(Jurisdiction in civil matters – Regulation (EC) No 44/2001 – Article 6(1) – More than one defendant – Directive 93/98/EEC – Article 6 – Protection of photographs – Directive 2001/29/EC – Article 2 – Reproduction – Use of a portrait photograph as a template to establish a photo-fit – Article 5(3)(d) – Exceptions and limitations as regards quotations – Article 5(3)(e) – Exceptions and limitations for the purposes of public security – Article 5(5))

In Case C-145/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Handelsgericht Wien (Austria), made by decision of 8 March 2010, received at the Court on 22 March 2010, in the proceedings

Eva-Maria Painer

v

Standard VerlagsGmbH,

Axel Springer AG,

Süddeutsche Zeitung GmbH,

Spiegel-Verlag Rudolf Augstein GmbH & Co KG,

Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský (Rapporteur), E. Juhász, G. Arestis and T. von Danwitz, Judges,

Advocate General: V. Trstenjak,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Ms Painer, by G. Zanger, Rechtsanwalt,
- Standard VerlagsGmbH, by M. Windhager, Rechtsanwältin,
- the Austrian Government, by E. Riedl, acting as Agent,
- the Spanish Government, by N. Díaz Abad, acting as Agent,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by M. Russo, avvocato dello Stato,
- the European Commission, by S. Grünheid, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 12 April 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 6(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) and Article 5(3)(d) and (e) and (5) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

2 The reference has been made in proceedings between Ms Painer, the applicant in the main proceedings, a freelance photographer, and five newspaper publishers, namely Standard VerlagsGmbH ('Standard'), Axel Springer AG ('Axel Springer'), Süddeutsche Zeitung GmbH, Spiegel-Verlag Rudolf Augstein GmbH & Co KG and Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG, concerning their use of photographs of Natascha K.

Legal context

International law

3 The Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the Agreement establishing the World Trade Organisation ('WTO'), signed at Marrakesh on 15 April 1994, was approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

4 Article 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights provides:

'Members shall comply with Articles 1 through 21 of the Berne Convention [for the Protection of Literary and Artistic Works (revised at Paris on 24 July 1971), in its version resulting from the amendment of 28 September 1979 ("the Berne Convention")] and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.'

5 Article 2(1) of the Berne Convention is in the following terms:

'The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art, illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.'

6 Article 10(1) of the Berne Convention stipulates:

'It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.'

7 Article 12 of the Berne Convention states:

'Authors of literary or artistic works shall enjoy the exclusive right of authorising adaptations, arrangements and other alterations of their works.'

8 Article 37(1)(c) of the Berne Convention provides:

'In case of differences of opinion on the interpretation of the various texts, the French text shall prevail.'

9 The World Intellectual Property Organisation ('WIPO') adopted in Geneva, on 20 December 1996, the WIPO Performances and Phonograms Treaty and the WIPO Copyright Treaty. Those two treaties were approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

10 Article 1(4) of the WIPO Copyright Treaty provides that Contracting Parties are to comply with Articles 1 to 21 of and the Appendix to the Berne Convention.

European Union ('EU') law

Regulation No 44/2001

11 Recitals 11, 12 and 15 in the preamble to Regulation No 44/2001 state:

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

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

...

(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. ...'

12 Article 2(1) of Regulation No 44/2001 is in the following terms:

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

13 Article 3(1) of that regulation provides:

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

14 Article 6(1) of that regulation, which forms part of Section 2 in Chapter II thereof, entitled 'Special jurisdiction', provides:

'A person domiciled in a Member State may also be sued ... where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

Directive 93/98/EEC

15 Recital 17 in the preamble to Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9) states:

'... the protection of photographs in the Member States is the subject of varying regimes; ... in order to achieve a sufficient harmonisation of the term of protection of photographic works, in particular of those which, due to their artistic or professional character, are of importance within the internal market, it is necessary to define the level of originality required in this Directive; ... a photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account; ... the protection of other photographs should be left to national law'.

16 Article 1(1) of that directive provides that protection of the rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention is to run for the life of the author and for 70 years after his death.

17 Article 6 of that directive provides:

'Photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs.'

18 Directive 93/98 was repealed by Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (OJ 2006 L 372, p. 12), which codified it and contains, in essence, the same provisions. Directive 2006/116 entered into force on 16 January 2007.

19 Nonetheless, given the material time in the main proceedings, the legislation applicable to them remains Directive 93/98.

Directive 2001/29

20 Recitals 6, 9, 21, 31, 32 and 44 in the preamble to Directive 2001/29 read as follows:

(6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights. ...

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property. ...

(21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the *acquis communautaire*. A broad definition of these acts is needed to ensure legal certainty within the internal market. ...

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. ...

(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future. ...

(44) When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other [protected] subject-matter.'

21 Article 1(1) of that directive states:

'This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.'

22 Article 2 of that directive, relating to reproduction right, provides:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works; ...'

23 Article 3(1) of that directive is in the following terms:

'Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.'

24 Article 5 of Directive 2001/29, entitled 'Exceptions and limitations', states in paragraph 3(d) and (e) thereof:

'Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

...

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings; ...'

25 Article 5(5) of that directive provides:

'The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

National law

26 The abovementioned provisions of Directive 2001/29 were transposed into the Austrian legal order by the Federal law on copyright in literary and artistic works and related rights (Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte, Urheberrechtsgesetz).

The dispute in the main proceedings and the questions referred for a preliminary ruling

27 Ms Painer has for many years worked as a freelance photographer, photographing, in particular, children in nurseries and day homes. In the course of that work, she took several photographs of Natascha K. designing the background, deciding the position and facial expression, and producing and developing them ('the contested photographs').

28 Ms Painer has, for more than 17 years, labelled the photographs she produces with her name. That labelling has been done in different ways which have varied over the years, by stickers and/or impressions in decorative portfolios or mounts. Those indications have always stated her name and business address.

29 Ms Painer sold the photographs which she produced, but without conferring on third parties any rights over them and without consenting to their publication. The price she charged for photographs corresponded solely to the price of the prints.

30 After Natascha K., then aged 10, was abducted in 1998, the competent security authorities launched a search appeal in which the contested photographs were used.

31 The defendants in the main proceedings are newspaper and magazine publishers. Only Standard is established in Vienna (Austria). The other defendants in the main proceedings are established in Germany.

32 Standard publishes the daily newspaper, *Der Standard*, which is distributed in Austria. Süddeutsche Zeitung GmbH publishes the daily, *Süddeutsche Zeitung*, which is distributed in Austria and Germany. Spiegel-Verlag Rudolf Augstein GmbH & Co KG publishes a weekly magazine in Germany, *Der Spiegel*, which also appears in Austria. Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG produces the daily, *Express*, which is published only in Germany. Axel Springer publishes the daily, *Bild*, the German edition of which is not distributed in Austria. The Munich edition of that newspaper, on the other hand, appears also in Austria. Axel Springer publishes, in addition, another daily newspaper, *Die Welt*, which is also distributed in Austria, and runs news websites on the internet.

33 In 2006 Natascha K. managed to escape from her abductor.

34 Following Natascha K.'s escape and prior to her first public appearance, the defendants in the main proceedings published the contested photographs in the abovementioned newspapers, magazines and websites without, however, indicating the name of the photographer, or indicating a name other than Ms Painer's as the photographer.

35 The coverage in the various media and websites differed in its choice of the contested photographs and accompanying text. The defendants in the main proceedings claim that they received the contested photographs from a news agency without Ms Painer's name being mentioned or with a name other than Ms Painer's name being indicated as the photographer's.

36 Several of those publications also published a portrait, created by computer from the contested photographs, which, since there was no recent photograph of Natascha K. until her first public appearance, represented the supposed image of Natascha K. (the contested photo-fit).

37 By summons before the Handelsgericht Wien, on 10 April 2007, Ms Painer sought an order that the defendants in the main proceedings immediately cease the reproduction and/or distribution, without her consent and without indicating her as author, of the contested photographs and the contested photo-fit.

38 Ms Painer also applied for an order against the defendants for accounts, payment of appropriate remuneration and damages for her loss.

39 At the same time, Ms Painer applied for an interlocutory injunction, on which a ruling has already been given by the highest court, the Oberster Gerichtshof (Supreme Court) by a judgment of 26 August 2009.

40 As is clear from the order for reference, the Oberster Gerichtshof held, applying the relevant national rules, that the defendants in the main proceedings did not need Ms Painer's consent to publish the contested photo-fit.

41 In that court's view, the contested photograph which had been used as a template for the contested photo-fit was, admittedly, a photographic work protected by copyright. However, the production and publication of the contested photo-fit was not an adaptation for which the consent of Ms Painer, as author of the photographic work, was needed, but a free use, which did not require her consent.

42 Indeed, the referring court considered that the question whether it was an adaptation or a free use depends on the creative effort in the template. The greater the creative effort in the template, the less conceivable is a free use. In the case of portrait photographs like the contested photographs, the creator enjoys only a small degree of individual formative freedom. For that reason, the copyright protection of that photograph is accordingly narrow. Furthermore, the contested photo-fit based on the template is a new and autonomous work which is protected by copyright.

43 In those circumstances, the Handelsgericht Wien decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 6(1) of [Regulation No 44/2001] to be interpreted as meaning that its application and therefore joint legal proceedings are not precluded where actions brought against several defendants for copyright infringements identical in substance are based on differing national legal grounds the essential elements of which are nevertheless identical in substance – such as applies to all European States in proceedings for a prohibitory injunction, not based on fault, in claims for reasonable remuneration for copyright infringements and in claims in damages for unlawful exploitation?

(2) (a) Is Article 5(3)(d) of Directive 2001/29 ..., in the light of Article 5(5) of that directive, to be interpreted as meaning that its application is not precluded where a press report quoting a work or other protected matter is not a literary work protected by copyright?

(b) Is Article 5(3)(d) of [Directive 2001/29], in the light of Article 5(5) thereof, to be interpreted as meaning that its application is not precluded where the name of the author or performer is not attached to the work or other protected matter quoted?

(3) (a) Is Article 5(3)(e) of Directive 2001/29, in the light of Article 5(5) thereof, to be interpreted as meaning that in the interests of criminal justice in the context of public security its application requires a specific, current and express appeal for publication of the image on the part of the security authorities, i.e. that publication of the image must be officially ordered for search purposes, or otherwise an offence is committed?

(b) If the answer to question 3a should be in the negative: are the media permitted to rely on Article 5(3)(e) of [Directive 2001/29] even if, without such a search request being made by the authorities, they should decide, of their own volition, whether images should be published "in the interests of public security"?

(c) If the answer to question 3b should be in the affirmative: is it then sufficient for the media to assert after the event that publication of an image served to trace a person or is it always necessary for there to be a specific appeal to readers to assist in a search in the investigation of an offence, which must be directly linked to the publication of the photograph?

(4) Are Article 1(1) of Directive 2001/29 in conjunction with Article 5(5) thereof and Article 12 of the Berne Convention ... , particularly in the light of Article 1 of the First Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms [signed at Rome on 4 November 1950] and Article 17 of the Charter of Fundamental Rights of the European Union, to be interpreted as meaning that photographic works and/or photographs, particularly portrait photos, are afforded “weaker” copyright protection or no copyright protection at all against adaptations because, in view of their “realistic image”, the degree of formative freedom is too minor?

[text deleted]

Consideration of the questions referred

The first question

72 By its first question, the referring court asks, in essence, whether Article 6(1) of Regulation No 44/2001 must be interpreted as precluding its application if actions against several defendants for substantially identical copyright infringements are brought on national legal grounds which vary according to the Member States concerned.

73 The rule of jurisdiction laid down in Article 6(1) of Regulation No 44/2001 provides that a person may, where he is one of a number of defendants, be sued in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

74 That special rule, because it derogates from the principle stated in Article 2 of Regulation No 44/2001 that jurisdiction be based on the defendant’s domicile, must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged by that regulation (see Case C-98/06 *Freeport* [2007] ECR I-8319, paragraph 35 and the case-law cited).

75 Indeed, as recital 11 in the preamble to Regulation No 44/2001 states, the rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor.

76 It is not apparent from the wording of Article 6(1) of Regulation No 44/2001 that the conditions laid down for application of that provision include a requirement that the actions brought against different defendants should have identical legal bases (*Freeport*, paragraph 38).

77 As regards its purpose, the rule of jurisdiction in Article 6(1) of Regulation No 44/2001, first, meets, in accordance with recitals 12 and 15 in the preamble to that regulation, the wish to facilitate the sound administration of justice, to minimise the possibility of concurrent proceedings and thus to avoid irreconcilable outcomes if cases are decided separately.

78 Secondly, that rule cannot however be applied so as to allow an applicant to make a claim against a number of defendants with the sole object of ousting the jurisdiction of the courts of the State where one of those defendants is domiciled (see, to that effect, Case 189/87 *Kalfelis* [1988] ECR 5565, paragraphs 8 and 9, and Case C-51/97 *Réunion européenne and Others* [1998] ECR I-6511, paragraph 47).

79 In that regard, the Court has stated that, in order for judgments to be regarded as irreconcilable within the meaning of Article 6(1) of Regulation No 44/2001, it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the same situation of fact and law (see *Freeport*, paragraph 40).

80 However, in assessing whether there is a connection between different claims, that is to say a risk of irreconcilable judgments if those claims were determined separately, the identical legal bases of the actions brought is only one relevant factor among others. It is not an indispensable requirement for the application of Article 6(1) of Regulation No 44/2001 (see, to that effect, *Freeport*, paragraph 41).

81 Thus, a difference in legal basis between the actions brought against the various defendants, does not, in itself, preclude the application of Article 6(1) of Regulation No 44/2001, provided however that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled (see, to that effect, *Freeport*, paragraph 47).

82 That reasoning is stronger if, as in the main proceedings, the national laws on which the actions against the various defendants are based are, in the referring court's view, substantially identical.

83 It is, in addition, for the referring court to assess, in the light of all the elements of the case, whether there is a connection between the different claims brought before it, that is to say a risk of irreconcilable judgments if those claims were determined separately. For that purpose, the fact that defendants against whom a copyright holder alleges substantially identical infringements of his copyright did or did not act independently may be relevant.

84 In the light of the foregoing considerations, the answer to the first question is that Article 6(1) of Regulation No 44/2001 must be interpreted as not precluding its application solely because actions against several defendants for substantially identical copyright infringements are brought on national legal grounds which vary according to the Member States concerned. It is for the referring court to assess, in the light of all the elements of the case, whether there is a risk of irreconcilable judgments if those actions were determined separately.

The fourth question

85 The fourth question, which it is appropriate to consider second, has been raised by the referring court in order to determine the correctness of the position according to which the defendants in the main proceedings did not need Ms Painer's consent to publish the contested photo-fit worked up from a portrait photograph, because the scope of the protection conferred on such a photograph was restricted, or even non-existent, because of the minor degree of formative freedom allowed by such photographs.

86 Therefore, the referring court's question must be understood as asking, in essence, whether Article 6 of Directive 93/98 must be interpreted as meaning that a portrait photograph can, under that provision, be protected by copyright and, if so, whether, because of the allegedly too minor degree of creative freedom such photographs can offer, that protection, particularly as regards the regime governing reproduction of works provided for in Article 2(a) of Directive 2001/29, is inferior to that enjoyed by other works, particularly photographic works.

87 As regards, first, the question whether realistic photographs, particularly portrait photographs, enjoy copyright protection under Article 6 of Directive 93/98, it is important to point out that the Court has already decided, in Case C-5/08 *Infopaq International* [2009] ECR I-6569, paragraph 35, that copyright is liable to apply only in relation to a subject-matter, such as a photograph, which is original in the sense that it is its author's own intellectual creation.

88 As stated in recital 17 in the preamble to Directive 93/98, an intellectual creation is an author's own if it reflects the author's personality.

89 That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices (see, *a contrario*, Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-0000, paragraph 98).

90 As regards a portrait photograph, the photographer can make free and creative choices in several ways and at various points in its production.

91 In the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software.

92 By making those various choices, the author of a portrait photograph can stamp the work created with his 'personal touch'.

93 Consequently, as regards a portrait photograph, the freedom available to the author to exercise his creative abilities will not necessarily be minor or even non-existent.

94 In view of the foregoing, a portrait photograph can, under Article 6 of Directive 93/98, be protected by copyright if, which it is for the national court to determine in each case, such photograph is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph.

95 As regards, secondly, the question whether such protection is inferior to that enjoyed by other works, particularly photographic works, it is appropriate to point out straightaway that the author of a protected work is, under Article 2(a) of Directive 2001/29, entitled to, among other things, the exclusive right to authorise or prohibit its direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.

96 In that regard, the Court has held that the protection conferred by that provision must be given a broad interpretation (see *Infopaq International*, paragraph 43).

97 Moreover, nothing in Directive 2001/29 or in any other directive applicable in this field supports the view that the extent of such protection should depend on possible differences in the degree of creative freedom in the production of various categories of works.

98 Therefore, as regards a portrait photograph, the protection conferred by Article 2(a) of Directive 2001/29 cannot be inferior to that enjoyed by other works, including other photographic works.

99 In the light of the foregoing, the answer to the fourth question is that Article 6 of Directive 93/98 must be interpreted as meaning that a portrait photograph can, under that provision, be protected by copyright if, which it is for the national court to determine in each case, such photograph is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph. Since it has been determined that the portrait photograph in question is a work, its protection is not inferior to that enjoyed by any other work, including other photographic works.

Question 3(a) and (b)

100 By question 3(a) and (b), the national court asks, in essence, whether Article 5(3)(e) of Directive 2001/29, read in the light of Article 5(5) of that directive, must be interpreted as meaning that, in a case such as that in the main proceedings, its application requires a specific, current and express appeal for publication of the image on the part of the security authorities for search purposes and, if that is not required, whether the media can rely on that provision should they decide, of their own volition, without a search request being issued, to publish a photograph in the interests of public security.

101 In that regard, the provisions of Directive 2001/29 do not expressly address the circumstances in which the interests of public security can be invoked with a view to the use of a protected work, meaning that the Member States which decide to enact such an exception enjoy a broad discretion in that respect (see, by analogy, Case C-462/09 *Stichting de Thuiskopie* [2011] ECR I-0000, paragraph 23).

102 In fact, such a discretion is, first, in accordance with the idea that each Member State is best placed to determine, in accordance with its national needs, the requirements of public security, in the light of historical, legal, economic or social considerations specific to it (see, by analogy, Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraph 56).

103 Secondly, that discretion is consistent with the Court's case-law to the effect that, in the absence of sufficiently precise criteria in a directive to delimit the obligations thereunder, it is for the Member States to determine, in their own territory, what are the most relevant criteria for ensuring compliance with that directive (see, to that effect, Case C-245/00 *SENA* [2003] ECR I-1251, paragraph 34, and Case C-433/02 *Commission v Belgium* [2003] ECR I-12191, paragraph 19).

104 That being so, the discretion which the Member States enjoy when they make use of the exception under Article 5(3)(e) of Directive 2001/29 must be exercised within the limits imposed by EU law.

105 In that regard, it is important to note, first, that it is settled case-law that, when adopting measures to implement EU legislation, national authorities must exercise their discretion in compliance with the general principles of EU law, which include the principle of proportionality (see, inter alia, Case C-313/99 *Mulligan and Others* [2002] ECR I-5719, paragraphs 35 and 36; Joined Cases C-231/00, C-303/00 and C-451/00 *Cooperativa Lattepiú and Others* [2004] ECR I-2869, paragraph 57; and Case C-496/04 *Slob* [2006] ECR I-8257, paragraph 41).

106 In accordance with that principle, measures which the Member States may adopt must be appropriate for attaining their objective and must not go beyond what is necessary to achieve it (Case C-434/02 *Arnold André* [2004] ECR I-11825, paragraph 45; Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 47; and *ABNA and Others*, paragraph 68).

107 Secondly, the discretion enjoyed by the Member States cannot be used so as to compromise the principal purpose of Directive 2001/29 which, as is apparent from recital 9 in its preamble, is to establish a high level of protection for, in particular, authors, which is crucial to intellectual creation.

108 Thirdly, the exercise of that discretion must comply with the need for legal certainty for authors with regard to the protection of their works as referred to in recitals 4, 6 and 21 in the preamble to Directive 2001/29. That requirement means that the use of a protected work, for the purposes of public security, must not be dependent on discretionary human intervention by a user of the protected work (see, to that effect, *Infopaq International*, paragraph 62).

109 Fourthly, Article 5(3)(e) of Directive 2001/29, being a derogation from the general principle established by that directive, namely the requirement of authorisation from the copyright holder for any reproduction of a protected work, must, according to settled case-law, be interpreted strictly (Case C-476/01 *Kapper* [2004] ECR I-5205, paragraph 72, and Case C-36/05 *Commission v Spain* [2006] ECR I-10313, paragraph 31).

110 Fifthly, the Member States' discretion is limited by Article 5(5) of Directive 2001/29, which makes the introduction of the exception under Article 5(3)(e) of that directive subject to three conditions, which are, first, that the exception may be applied only in certain special cases, second, that it does not conflict with a normal exploitation of the work and, finally, that it does not unreasonably prejudice the legitimate interests of the copyright holder.

111 In view of all those requirements and clarifications, the media, such as, in this case, newspaper publishers, cannot be allowed to confer on themselves the protection of public security. Only States, whose competent authorities are provided with appropriate means and coordinated structures, can be regarded as appropriate and responsible for the fulfillment of that objective of general interest by appropriate measures including, for example, assistance with a search appeal.

112 Such a publisher cannot, therefore, of its own volition, use a work protected by copyright by invoking an objective of public security.

113 However, having regard to the purpose of the press, in a democratic society governed by the rule of law, to inform the public, without restrictions other than those that are strictly necessary, it is conceivable that a newspaper publisher might, in specific cases, contribute to the fulfilment of an objective of public security by publishing a photograph of a person for whom a search has been launched. However, it should be required that such initiative is taken, first, within the framework of a decision or action taken by the competent national authorities to ensure public security and, second, by agreement and in coordination with those authorities, in order to avoid the risk of interfering with the measures taken by them. A specific, current and express appeal, on the part of the security authorities, for publication of a photograph for the purposes of an investigation is not, however, necessary.

114 The defendants' argument that, in the name of freedom of the press, the media should be entitled to avail themselves of Article 5(3)(e) of Directive 2001/29, without a search notice from the security authorities, cannot lead to a different conclusion. Indeed, as the Advocate General pointed out, in point 163 of her opinion, the sole purpose of that provision is to ensure the protection of public security and not to strike a balance between the protection of intellectual property and the freedom of the press.

115 In addition, as is clear from Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, and Article 11 of the Charter of Fundamental Rights of the European Union, freedom of the press is not intended to protect public security but it is the requirements of the protection of public security which can justify a restriction on that freedom.

116 In the light of the foregoing, the answer to question 3(a) and (b) is that Article 5(3)(e) of Directive 2001/29, read in the light of Article 5(5) of that directive, must be interpreted as meaning that the media, such as newspaper publishers, may not use, of their own volition, a work protected by copyright by invoking an objective of public security. However, it is conceivable that a newspaper publisher might, in specific cases, contribute to the fulfilment of such an objective by publishing a photograph of a person for whom a search has been launched. It should be required that such initiative is taken, first, within the framework of a decision or action taken by the competent national authorities to ensure public

security and, second, by agreement and in coordination with those authorities, in order to avoid the risk of interfering with the measures taken by them, without, however, a specific, current and express appeal, on the part of the security authorities, for publication of a photograph for the purposes of an investigation being necessary.

Question 3(c)

117 In view of the answer to question 3(a) and (b), there is no need to answer question 3(c).

The second question

Preliminary observations

118 As a preliminary point, it should be noted that in order to answer question 2(a) and (b) the Court must interpret the same provision of EU law, namely Article 5(3)(d) of Directive 2001/29.

119 Under that provision, Member States may provide for an exception to the author's exclusive right of reproduction of his work in respect of quotations for purposes such as criticism or review, provided that (i) they relate to a work or other subject-matter which has already been lawfully made available to the public; (ii) unless this turns out to be impossible, the source, including the author's name, is indicated; and (iii) their use is in accordance with fair practice, and to the extent required by the specific purpose.

120 That provision is intended thus to preclude the exclusive right of reproduction conferred on authors from preventing the publication, by means of quotation accompanied by comments or criticism, of extracts from a work already available to the public.

121 It is common ground that the work relied upon in the main proceedings is a portrait photograph of Natascha K.

122 It is appropriate to observe that the referring court starts from the assumption that a photographic work comes within the scope of Article 5(3)(d) of Directive 2001/29. Moreover, that assumption is not disputed by any of the parties to the main proceedings, by any of the Member States which have lodged observations or by the European Commission.

123 It is from that point of view that question 2(a) and (b) must be answered, without ruling on the correctness of the assumption or on the question of whether the contested photographs were in fact used for the purpose of quotation.

124 In that preliminary respect, it is also appropriate to define the meaning of the expression '*mis[e] à la disposition du public*' (made available to the public) in the French version of Article 5(3)(d) of Directive 2001/29.

125 In that regard, it is important to point out that neither Article 5(3)(d) of Directive 2001/29 nor any general provision of that directive defines what is meant by the French expression '*mis[e] à la disposition du public*'. Moreover, that expression is used in several contexts with different wording, as is illustrated, in particular, by Article 3(2) of that directive.

126 In those circumstances, according to settled case-law, Article 5(3)(d) of Directive 2001/29 must be interpreted, in so far as possible, in the light of the applicable rules of international law, and in particular those set forth in the Berne Convention (see Case C-306/05 *SGAE* [2006] ECR I-11519, paragraphs 35, 40 and 41, and *Football Association Premier League and Others*, paragraph 189), it being understood that, under Article 37 thereof, its French version is to prevail if there are differences of opinion on the interpretation of the various language versions.

127 It is clear from the French text of Article 10(1) of the Berne Convention, the material scope of which is comparable to that of Article 5(3)(d) of Directive 2001/29, that the only quotations permissible, under certain conditions, are quotations from a work which has already been lawfully made available to the public.

128 In those circumstances, the French expression '*mis[e] à la disposition du public [d'une oeuvre]*' (making a work available to the public), in the sense of Article 5(3)(d) of Directive 2001/29, must be understood as meaning the act of making that work available to the public. That interpretation is also confirmed not only by the expression 'made available to the public' but also by the expression '*der Öffentlichkeit zugänglich gemacht*' used unvaryingly in the English and German versions of both Article 5(3)(d) of Directive 2001/29 and Article 10(1) of the Berne Convention.

Question 2(a)

129 By question 2(a), the referring court asks, in essence, whether Article 5(3)(d) of Directive 2001/29, read in the light of Article 5(5) of that directive, must be interpreted as not precluding its application where a press report quoting a work or other protected subject-matter is not a literary work protected by copyright.

130 In that regard, it is appropriate to note at the outset that Article 5(3)(d) of Directive 2001/29 sets out a series of conditions for its application which do not include a requirement that a work or other protected subject-matter must be quoted as part of a literary work protected by copyright.

131 Contrary to the Italian Government's submission in its written observations, the part of the sentence 'provided that they relate to a work or other subject-matter which has already been lawfully made available to the public' in Article 5(3)(d) refers, unambiguously, to the work or other protected subject-matter quoted and not to the subject-matter in which the quotation is made.

132 As regards the context surrounding Article 5(3)(d) of Directive 2001/29, it is important to note that, as stated in recital 31 in the preamble to that directive, a 'fair balance' must be safeguarded between, on the one hand, the rights and interests of authors, and, on the other, the rights of users of protected subject-matter.

133 It is also important to note that while the conditions set out in Article 5(3)(d) of Directive 2001/29 must, according to the Court's case-law referred to in paragraph 109 of the present judgment, be interpreted strictly, since that provision is a derogation from the general rule established by that directive, the fact remains that the interpretation of those conditions must also enable the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed (see, to that effect, *Football Association Premier League and Others*, paragraphs 162 and 163).

134 Article 5(3)(d) of Directive 2001/29 is intended to strike a fair balance between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.

135 That fair balance is struck, in this case, by favouring the exercise of the users' right to freedom of expression over the interest of the author in being able to prevent the reproduction of extracts from his work which has already been lawfully made available to the public, whilst ensuring that the author has the right, in principle, to have his name indicated.

136 From those two opposing points of view, the issue of whether the quotation is made as part of a work protected by copyright or, on the other hand, as part of a subject-matter not protected by copyright, is irrelevant.

137 In the light of all the foregoing considerations, the answer to question 2(a) is that Article 5(3)(d) of Directive 2001/29, read in the light of Article 5(5) of that directive, must be interpreted as not precluding its application where a press report quoting a work or other protected subject-matter is not a literary work protected by copyright.

Question 2(b)

138 By question 2(b), the referring court is asking, in essence, whether Article 5(3)(d) of Directive 2001/29, read in the light of Article 5(5) of that directive, must be interpreted as precluding its application where the name of the author or performer of the work or other protected subject-matter quoted is not indicated.

139 The provisions of Article 5(3)(d) of Directive 2001/29 establish the obligation of principle that, for quotations, the source, including the author's name, unless that turns out to be impossible, be indicated, it being understood that the work or other protected subject-matter quoted has already been lawfully made available to the public.

140 In that regard, the order for reference states, without giving any details, that the defendants in the main proceedings received the contested photographs from a news agency.

141 Since the contested photographs had been, prior to their use by the defendants in the main proceedings, in the possession of a news agency, which then, according to the defendants, sent them to the defendants, it is legitimate to assume that it was as the result of a lawful disposal that the news agency came into possession of those photographs. It should therefore be considered that the name of the author of the contested photographs was indicated on that occasion. Indeed, in the absence of such indication, the relevant making available to the public would be unlawful and, consequently, Article 5(3)(d) of Directive 2001/29 would not be applicable.

142 Thus, since the name of the author of the contested photographs had already been indicated, it was not in the least impossible for a subsequent user of those photographs to indicate it, in compliance with the obligation under Article 5(3)(d) of Directive 2001/29.

143 However, it should also be noted that the main proceedings are unusual, in that they are taking place in the context of a criminal investigation, as part of which, following the kidnapping of Natascha K., in 1998, a search notice, with a reproduction of the contested photographs, was launched by the competent national security authorities.

144 Consequently, it is conceivable that the national security authorities were the cause of the making available to the public of the contested photographs which were the subject of subsequent use by the defendants in the main proceedings.

145 Such making available does not require, under Article 5(3)(e) of Directive 2001/29, in contrast to Article 5(3)(d) of that directive, the author's name to be indicated.

146 Consequently, the failure by an original user entitled to rely on Article 5(3)(e) to indicate, in making a protected work available to the public, its author's name does not affect the lawfulness of that act.

147 In this case, if the contested photographs were, in accordance with Article 5(3)(e) of Directive 2001/29, made available, originally, to the public by the competent national security authorities and if, at the time of that original lawful use, the author's name was not indicated, the subsequent use of those photographs by the press certainly required, in accordance with Article 5(3)(d) of that directive, the indication of their source but not necessarily the name of their author.

148 Indeed, since it is not for the press to establish the reasons for that failure, it is impossible for the press, in such a situation, to identify and/or indicate the author's name and, therefore, it must be regarded as exempt from the obligation of principle to indicate the author's name.

149 In the light of all the foregoing considerations, the answer to question 2(b) is that Article 5(3)(d) of Directive 2001/29, read in the light of Article 5(5) of that directive, must be interpreted as meaning that its application is subject to the obligation to indicate the source, including the name of the author or performer, of the work or other protected subject-matter quoted. However, if, in applying Article 5(3)(e) of Directive 2001/29, that name was not indicated, that obligation must be regarded as having been fulfilled if the source alone is indicated.

Costs

150 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 6(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as not precluding its application solely because actions against several defendants for substantially identical copyright infringements are brought on national legal grounds which vary according to the Member States concerned. It is for the referring court to assess, in the light of all the elements of the case, whether there is a risk of irreconcilable judgments if those actions were determined separately.

2. Article 6 of Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights must be interpreted as meaning that a portrait photograph can, under that provision, be protected by copyright if, which it is for the national court to determine in each case, such photograph is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph. Since it has been determined that the portrait photograph in question is a work, its protection is not inferior to that enjoyed by any other work, including other photographic works.

3. Article 5(3)(e) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, read in the light of Article 5(5) of that directive, must be interpreted as meaning that the media, such as newspaper publishers,

may not use, of their own volition, a work protected by copyright by invoking an objective of public security. However, it is conceivable that a newspaper publisher might, in specific cases, contribute to the fulfilment of such an objective by publishing a photograph of a person for whom a search has been launched. It should be required that such initiative is taken, first, within the framework of a decision or action taken by the competent national authorities to ensure public security and, second, by agreement and in coordination with those authorities, in order to avoid the risk of interfering with the measures taken by them, without, however, a specific, current and express appeal, on the part of the security authorities, for publication of a photograph for the purposes of an investigation being necessary.

4. Article 5(3)(d) of Directive 2001/29, read in the light of Article 5(5) of that directive, must be interpreted as not precluding its application where a press report quoting a work or other protected subject-matter is not a literary work protected by copyright.

5. Article 5(3)(d) of Directive 2001/29, read in the light of Article 5(5) of that directive, must be interpreted as meaning that its application is subject to the obligation to indicate the source, including the name of the author or performer, of the work or other protected subject-matter quoted. However, if, in applying Article 5(3)(e) of Directive 2001/29, that name was not indicated, that obligation must be regarded as having been fulfilled if the source alone is indicated.

[Signatures]

JUDGMENT OF THE COURT (Third Chamber)

15 March 2012 (*)

(Copyright and related rights — Directive 2006/115/EC — Articles 8 and 10 — Concepts of ‘user’ and ‘communication to the public’ — Installation in hotel bedrooms of televisions and/or radios to which the hotelier distributes a broadcast signal)

In Case C-162/10,

REFERENCE for a preliminary ruling under Article 267 TFEU, from the High Court (Commercial Division) (Ireland), made by decision of 23 March 2010, received at the Court on 7 April 2010, in the proceedings

Phonographic Performance (Ireland) Limited

v

Ireland,

Attorney General,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský (Rapporteur), E. Juhász, G. Arestis and T. von Danwitz, Judges,

Advocate General: V. Trstenjak,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 7 April 2011,

after considering the observations submitted on behalf of:

- Phonographic Performance (Ireland) Limited, by H. Sheehy, solicitor, and J. Newman, BL,
- Ireland, by D. O’Hagan, acting as Agent, and E. Fitzsimons and J. Jeffers, BL,
- the Greek Government, by G. Papadaki, M. Germani and G. Alexaki, acting as Agents,
- the Italian Government, by P. Gentili, acting as Agent,
- the French Government, by J. Gstalter, acting as Agent,
- European Commission, by J. Samnadda and S. La Pergola, acting as Agents.

after hearing the Opinion of the Advocate General at the sitting on 29 June 2011

gives the following

Judgment

- 1 This reference for a preliminary ruling relates to the interpretation of Articles 8 and 10 of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28).
- 2 The reference has been made in the course of proceedings between Phonographic Performance (Ireland) Limited (‘PPL’) and Ireland.

Legal context

International law

3 The World Intellectual Property Organisation ('WIPO') adopted in Geneva, on 20 December 1996, the WIPO Performances and Phonograms Treaty ('the WPPT') and the WIPO Copyright Treaty. Those two treaties were approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

4 Under Article 2(b), (d) and (g) of the WPPT:

'For the purposes of this Treaty:

(b) "phonogram" means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;

...

(d) "producer of a phonogram" means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds.

...

(g) "communication to the public" of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, "communication to the public" includes making the sounds or representations of sounds fixed in a phonogram audible to the public.'

5 Article 15 of the WPPT reads:

'(1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.

(3) Any Contracting Party may, in a notification deposited with the Director-General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.

(4) For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.'

European Union law

6 According to recitals 5, 7 and 16 of the preamble to Directive 2006/115:

'(5) The creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky. The possibility of securing that income and recouping that investment can be effectively guaranteed only through adequate legal protection of the rightholders concerned.

...

- (7) The legislation of the Member States should be approximated in such a way as not to conflict with the international conventions on which the copyright and related rights laws of many Member States are based.

...

- (16) Member States should be able to provide for more far-reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public.'

7 Article 7 of Directive 2006/115 provides:

- '1. Member States shall provide for performers the exclusive right to authorise or prohibit the fixation of their performances.
2. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.
3. A cable distributor shall not have the right provided for in paragraph 2 where it merely retransmits by cable the broadcasts of broadcasting organisations.'

8 Article 8(2) of that directive provides:

'Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.'

9 Article 10 of that directive is worded as follows:

- '1. Member States may provide for limitations to the rights referred to in this Chapter in respect of:
 - (a) private use;

...

2. Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organisations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works.

However, compulsory licences may be provided for only to the extent to which they are compatible with the Rome Convention.

3. The limitations referred to in paragraphs 1 and 2 shall be applied only in certain special cases which do not conflict with a normal exploitation of the subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

10 Directive 2006/115 codified and repealed Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61).

11 According to recital 9 of the preamble to Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10):

'Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity

in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.'

12 Article 3 of that directive states:

- '1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.
2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
 - (a) for performers, of fixations of their performances;
 - (b) for phonogram producers, of their phonograms;
 - (c) for the producers of the first fixations of films, of the original and copies of their films;
 - (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.
3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.'

National law

13 The Copyright and Related Rights Act 2000, ('the 2000 Act') provides in Section 97:

- '1. Subject to subsection (2), it is not an infringement of the copyright in a sound recording, broadcast or cable programme to cause a sound recording, broadcast or cable programme to be heard or viewed where it is heard or viewed:
 - (a) in part of the premises where sleeping accommodation is provided for the residents or inmates, and
 - (b) as part of the amenities provided exclusively or mainly for residents or inmates.
2. Subsection (1) does not apply in respect of any part of premises to which subsection (1) applies where there is a discrete charge made for admission to the part of the premises where a sound recording, broadcast or cable programme is to be heard or viewed.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 14 PPL is a collecting society which represents the rights which phonogram producers hold over sound recordings or phonograms in Ireland.
- 15 The main proceedings concern an action brought by PPL against Ireland for a declaration that Ireland, in adopting and maintaining in force Section 97 of the Act of 2000, has acted in breach of Article 4 TEU and for damages for that breach.
- 16 PPL alleges that it was on the ground of the exemption from liability provided for by Section 97(1) of the Act of 2000 that the operators of hotels and guesthouses (collectively 'hotels') did not pay equitable remuneration to it for the use, in hotel bedrooms in Ireland, of phonograms included amongst those made available under licence to PPL, by means of apparatus provided by persons responsible for the operation of those hotels as part of the service they provide.
- 17 The exemption from liability for hoteliers broadcasting protected phonograms infringes certain European directives adopted in the area of rights related to copyright, which provide for the right of phonogram producers to equitable remuneration when their phonograms are used under certain circumstances.

- 18 The High Court (Commercial Division) makes clear that the main proceedings concern only sound recordings or phonograms heard by guests in hotel bedrooms in Ireland and not in other parts of those establishments. Nor do the proceedings concern the use by hotel guests of transmissions which are interactive or on-demand.
- 19 Moreover, according to the referring court, if a hotel in Ireland provides televisions or radios in its bedrooms and, by cable or other technology, distributes to those televisions and radios a signal received centrally, then that hotel is not required by reason of Section 97(1) of the Act of 2000 to make any payment of equitable remuneration to phonogram producers for sound recordings included in TV or radio broadcasts.
- 20 Similarly, if a hotel places in its bedrooms other apparatus and makes available sound recordings in physical or digital form which may be played by guests thereon, that hotel is, likewise, not obliged to pay equitable remuneration to phonogram producers by reason of Section 97(1) of the Act of 2000.
- 21 Moreover, whilst the claim in the main proceedings only relates to use of sound recordings in hotel bedrooms, the referring court points out that Section 97(1) of the Act of 2000 also has the effect of removing the requirement of equitable remuneration for such use in hospitals, nursing homes, residential care facilities, prisons and all other similar institutions.
- 22 Finally, it makes clear that the sound recordings at issue in the proceedings are phonograms published for commercial purposes.
- 23 Against that background, the referring court took the view that, having regard to the differences between the rights protected by Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115, to the context in which the phrase ‘communication to the public’ is used in each, and the purpose of the respective provisions, that court should not apply to the concept ‘communication to the public’ the same meaning as the Court of Justice gave it in Case C-306/05 *SGAE* [2006] ECR I-11519).
- 24 It is in those circumstances that the High Court (Commercial Division) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- (1) Is a hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal a “user” making a “communication to the public” of a phonogram which may be played in a broadcast for the purposes of Article 8(2) of Codified Directive 2006/115/EC ...?
 - (2) If the answer to paragraph (1) is in the affirmative, does Article 8(2) of Directive 2006/115/EC ... oblige Member States to provide a right to payment of equitable remuneration from the hotel operator in addition to equitable remuneration from the broadcaster for the playing of the phonogram?
 - (3) If the answer to paragraph (1) is in the affirmative, does Article 10 of Directive 2006/115/EC ... permit Member States to exempt hotel operators from the obligation to pay “single equitable remuneration” on the grounds of “private use” within the meaning of Article 10(1)(a)?
 - (4) Is a hotel operator which provides in a guest bedroom apparatus (other than a television or radio) and phonograms in physical or digital form which may be played on or heard from such apparatus a “user” making a “communication to the public” of the phonograms within the meaning of Article 8(2) of Directive 2006/115/EC ...?
 - (5) If the answer to paragraph (4) is in the affirmative, does Article 10 of Directive 2006/115/EC ... permit Member States to exempt hotel operators from the obligation to pay “a single equitable remuneration” on the grounds of “private use” within the meaning of Article 10(1)(a) of Directive 2006/115/EC?

The questions referred for a preliminary ruling

The first question

- 25 By its first question, the referring court essentially wishes to know whether a hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal a ‘user’ making a ‘communication to the public’ of a broadcast phonogram for the purposes of Article 8(2) of Directive 2006/115/EC.

- 26 As a preliminary point, it must be borne in mind that, under Article 8(2) of Directive 2006/115, Member States are to provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public.
- 27 It follows from that provision that anyone who uses a phonogram for a broadcast or for communication to the public must be considered to be a 'user' for the purposes of that provision.
- 28 In those circumstances, it must be assessed whether, in a case such as that at issue in the main proceedings, there has been 'communication to the public'.
- 29 As regards the concept of 'communication to the public' within the meaning of Article 8(2) of Directive 92/100, codified by Directive 2006/115, the Court held in Case C-135/10 *SCF* ECR [2012], paragraph 76, that it requires an individual assessment. The same applies as regards the identity of the user and the question of the use of the phonogram at issue (*SCF*, paragraph 78).
- 30 Moreover, the Court made clear that, for the purposes of such an assessment, account has to be taken of several complementary criteria, which are not autonomous and are interdependent. Consequently, they must be applied individually and in their interaction with one another, given that they may, in different situations, be present to widely varying degrees (see *SCF*, paragraph 79).
- 31 Of those criteria, the Court emphasised, first and foremost, the indispensable role played by the user. The user makes an act of communication when it intervenes, in full knowledge of the consequences of its action, to give access to a broadcast containing the protected work to its customers. In the absence of that intervention, its customers, although physically within the area covered by the broadcast, would not, in principle, be able to enjoy the broadcast work (*SCF*, paragraph 82).
- 32 Second, the Court clarified certain aspects of the concept of 'public'.
- 33 According to the Court, the term 'public' refers to an indeterminate number of potential listeners and a fairly large number of people (see, to that effect, *SCF*, paragraph 84).
- 34 As regards, to begin with, the 'indeterminate' nature of the public, the Court has observed that, according to the definition of the concept of 'communication to the public' given by the WIPO glossary, which, while not legally binding, none the less sheds light on the interpretation of the concept of public, it means 'making a work ... perceptible in any appropriate manner to persons in general, that is, not restricted to specific individuals belonging to a private group' (*SCF*, paragraph 85).
- 35 Next, as regards, the criterion of 'a fairly large number of people', the Court has made clear that this is intended to indicate that, on the one hand, the concept of public encompasses a certain *de minimis* threshold, which excludes from the concept groups of persons which are too small, or insignificant (*SCF*, paragraph 86). On the other hand, in order to determine that number, account must be taken of the cumulative effects of making works available to potential audiences. In that connection, not only is it relevant to know how many persons have access to the same work at the same time but it is also necessary to know how many of them have access to it in succession (*SCF*, paragraphs 86 and 87).
- 36 Third, the Court has held that if it is relevant that a 'communication' within the meaning of Article 3(1) of Directive 2001/29 is of a profit-making nature, this must be all the more true in the case of the essentially economic right to equitable remuneration of the performers and phonogram producers under Article 8(2) of Directive 2006/115 (see, to that effect, *SCF*, paragraphs 88 and 89).
- 37 According to the Court, it is thus understood that the public which is the subject of the communication is both targeted by the user and receptive, in one way or another, to that communication, and not merely 'caught' by chance (*SCF*, paragraph 91).
- 38 It is in the light, inter alia, of those criteria and in accordance with the need for an individual assessment established in paragraph 29 of this judgment that it must be assessed whether, in a case such as that at issue in the main proceedings, a hotel operator which provides in guest bedrooms televisions and/or radios to which it

distributes a broadcast signal is making a communication to the public within the meaning of Article 8(2) of Directive 2006/115.

- 39 Although it is, in principle, for the national courts to determine whether that is the situation in a particular case and to make all definitive findings of fact in that regard, it must none the less be held that the Court has all the evidence necessary in relation to the case in the main proceedings to assess whether there is such an act of communication to the public.
- 40 It must be observed, first, that in the situation contemplated by the referring court, in which a hotel operator provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal, just as in the case leading to the judgment in *SGAE* (paragraph 42), although the guests of a hotel are in the area covered by the signal conveying the phonograms, they are able to listen to those phonograms only as a result of the deliberate intervention of that operator. Its role is thus indispensable, within the meaning of paragraph 31 of the present judgment.
- 41 As regards, next, the guests of a hotel such as those at issue in the main proceedings, it must be observed that they constitute an indeterminate number of potential listeners, insofar as the access of those guests to the services of that establishment is the result of their own choice and is limited only by the capacity of the establishment in question. In such a situation they are thus 'persons in general' in the sense of paragraph 34 of this judgment.
- 42 As regards, further, the number of potential listeners referred to in paragraph 33 of the present judgment, it must be observed that the Court has held that the guests of a hotel constitute a fairly large number of persons, such that they must be considered to be a public (*SGAE*, paragraph 38).
- 43 Finally, as regards the profit-making nature of the broadcast referred to in paragraphs 36 and 37 of this judgment, it must be held that the guests of a hotel may be described as 'targeted' and 'receptive'.
- 44 Indeed, the action of the hotel by which it gives access to the broadcast work to its customers constitutes an additional service which has an influence on the hotel's standing and, therefore, on the price of rooms (see, to that effect, *SGAE*, paragraph 44). Moreover, it is likely to attract additional guests who are interested in that additional service (see, by analogy, Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-9083, paragraph 205).
- 45 It follows that, in the present case, the broadcasting of phonograms by a hotel operator is of a profit-making nature.
- 46 It follows from the foregoing considerations that, in a case such as that in the main proceedings, a hotel operator is making a 'communication to the public' within the meaning of Article 8(2) of Directive 2006/115.
- 47 Having regard to the foregoing, the answer to the first question is that a hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal is a 'user' making a 'communication to the public' of a phonogram which may be played in a broadcast for the purposes of Article 8(2) of Directive 2006/115.

The second question

- 48 By its second question the referring court asks, essentially, whether a hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal is obliged to pay equitable remuneration under Article 8(2) of Directive 2006/115 in addition to that paid by the broadcaster.
- 49 It should be recalled, at the outset, that the Court has already made clear, as regards the concept of 'communication to the public' for the purposes of Article 3(1) of Directive 2001/29, that a hotel operator which carries out an act of communication to the public transmits a protected work to a new public, that is to say, to a public which was not taken into account by the authors of the protected work when they authorised its use by communication to the original public (see, to that effect, *SGAE* paragraphs 40 and 42).
- 50 It must be pointed out that the notion of 'new public' derived from the case-law cited in the previous paragraph must also be taken into account in the context of the application of Article 8(2) of Directive 2006/115.

- 51 When a hotel operator communicates a broadcast phonogram in its guest bedrooms, it is using that phonogram in an autonomous way and transmitting it to a public which is distinct from and additional to the one targeted by the original act of communication. Moreover, as observed in paragraph 45 of the present judgment, the hotel operator derives economic benefits from that transmission which are independent of those obtained by the broadcaster or the producer of the phonograms.
- 52 Consequently, in such a situation, a hotel operator is required, under Article 8(2) of Directive 2006/115, to pay equitable remuneration for the communication to the public of that phonogram in addition to that paid by the broadcaster.
- 53 In that respect, Ireland's argument that it follows from the words 'or' and 'single' in Article 8(2) of Directive 2006/115 that a hotel operator is not required to pay any remuneration for the indirect communication of phonograms to the public if a radio or television broadcaster has already paid equitable remuneration for the use of the phonograms in its broadcasts cannot succeed.
- 54 By using the word 'single' in that provision, the European Union legislature merely wished to make clear that it is not necessary for the Member States to make provision for the user to pay separate remuneration several times for the same act of communication to the public, as that single remuneration will, as is clear from the second sentence of that provision, be shared amongst the different beneficiaries of the equitable remuneration, that is to say, the performers and the phonogram producers. The conjunction 'or' in the expression 'by wireless means or for any communication to the public' must be interpreted as meaning that remuneration is due both in the case of a broadcast and in the case of communication to the public.
- 55 Having regard to the foregoing observations, the answer to the second question is that a hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal is obliged to pay equitable remuneration under Article 8(2) of Directive 2006/115 for the broadcast of a phonogram, in addition to that paid by the broadcaster.

The fourth question

- 56 By its fourth question, which should be examined third, the referring court asks, essentially, whether a hotel operator which provides in guest bedrooms, not televisions and/or radios, but other apparatus and phonograms in physical or digital format capable of being broadcast or heard by means of that apparatus, is a 'user' making a 'communication to the public' of a phonogram, for the purposes of Article 8(2) of Directive 2006/115.
- 57 In those circumstances, the Court is required to verify that the considerations underlying its reply to the first question are still relevant even in a situation where a hotel operator provides apparatus for his clients other than a television or radio, and phonograms in a physical or digital format capable of being broadcast or heard by means of that apparatus.
- 58 In that regard, it must be pointed out that the concept of 'communication to the public' in Article 8(2) of Directive 2006/115 must be interpreted with due regard for the equivalent concepts used, inter alia, by the WPPT, and in a manner compatible with those concepts, and taking account of the context in which they are used and the objective pursued by the relevant provisions of conventions (SCF, paragraph 55).
- 59 Article 2(g) of the WPPT, concerning communication to the public and referring to Article 15 of the WPPT stipulates that such communication includes making the sounds or representations of sounds fixed in a phonogram audible to the public.
- 60 In those circumstances, the concept of 'communication to the public' in Article 8(2) of Directive 2006/115 must be interpreted as meaning that it also includes making the sounds or representations of sounds fixed in a phonogram audible to the public.
- 61 Moreover, that finding is borne out by the wording itself of Article 8(2) of Directive 2006/115 which states that it concerns 'any' communication to the public, and thus all forms of communication which can be envisaged and carried out.
- 62 So, a hotel operator which provides in guest bedrooms apparatus other than a television or radio, and phonograms in a physical or digital format capable of being broadcast or heard by means of that apparatus, is

providing the two elements making it possible to make the sounds or representations of sounds fixed in a phonogram audible to the public, that is to say, phonograms.

- 63 Consequently, that form of communication falls within the scope of Article 8(2) of Directive 2006/115 interpreted in the light of Articles 2(g) and 15 of the WPPT read together.
- 64 Since, as is clear from paragraph 57 of this judgment, the fourth question differs from the first only as regards the form of transmission of the phonograms, it may be inferred that the operator and his customers are the same for the purposes of those two questions.
- 65 It may thus be presumed, first, that the operator of that hotel must be considered to be the 'user' for the purposes of Article 8(2) of Directive 2006/115 and, second, that the customers of that establishment must be considered to be a 'public' for the purposes of that provision, unless there is specific evidence which is such as to lead the Court to a different conclusion.
- 66 In that regard it must be assessed whether the particular form of transmission, by apparatus and by phonograms in physical or digital form which can be broadcast or heard by means of that apparatus, is such as to lead to a different conclusion from that reached in paragraph 40 of this judgment.
- 67 That is not the case. Since a hotel operator which installs such apparatus and such phonograms in the bedrooms of its hotel thereby provides its customers with the two elements necessary to enjoy the works in question, it follows that, without its intervention, the customers would not have access to those works. The role of that hotel operator is thus indispensable.
- 68 In the absence of any other specific evidence requiring examination, it must be concluded that, in a situation like that at issue in the main proceedings, there has been an act of 'communication to the public' of a phonogram, for the purposes of Article 8(2) of Directive 2006/115.
- 69 Having regard to the foregoing, the answer to the fourth question is that a hotel operator which provides in guest bedrooms, not televisions and/or radios to which it distributes a broadcast signal, but other apparatus and phonograms in physical or digital form which may be played on or heard from such apparatus, is a 'user' making a 'communication to the public' of a phonogram within the meaning of Article 8(2) of Directive 2006/115/EC. It is therefore obliged to pay 'equitable remuneration' under that provision for the transmission of those phonograms.

The third and fifth questions

- 70 By its third and fifth questions, which should be examined together, the referring court asks, essentially, whether Article 10(1)(a) of Directive 2006/115, which provides for a limitation of the right to equitable remuneration in the case of 'private use', allows the Member States to exempt a hotel operator who makes a 'communication to the public' of a phonogram, within the meaning of Article 8(2) of that directive, from the obligation to pay such remuneration.
- 71 As a preliminary point, it must be made clear that, as the Advocate General observed in point 153 of her Opinion, it is not the private nature or otherwise of the use of the work by guests of a hotel which is relevant in order to determine whether a hotel operator may rely on the limitation based on 'private use' within the meaning of Article 10(1)(a) of Directive 2006/115, but whether the use made of the work by the operator himself is private or not.
- 72 However, the 'private use' of a protected work communicated to the public by its user constitutes a contradiction in terms, since 'public' is, by definition, 'not private'.
- 73 Accordingly, in the case of a communication to the public within the meaning of Article 8(2) of Directive 2006/115, the limitation based on 'private use' within the meaning of Article 10(1)(a) of that directive, cannot apply.
- 74 However, that interpretation is not such as to deprive that provision of all practical effect. Rather, that provision retains a wider scope by covering uses other than communication to the public, such as 'fixation' within the meaning of Article 7 of that directive.

- 75 Moreover, to allow the user to benefit from the limitation referred to in Article 10(1)(e) of Directive 2006/115, when he makes a communication such as that at issue in the case in the main proceedings, would run counter to the provisions of Article 10(3) of that directive under which that limitation is applicable only in certain special cases which do not prejudice the normal exploitation of the work or other protected object or cause unjustified harm to the legitimate interests of the rightholder.
- 76 Such an interpretation would allow the user to evade the obligation to pay equitable remuneration for forms of use of the work which amount to commercial exploitation of it, which would cause unjustified harm to the legitimate interests of protected artists or performers precisely as a result of the right to equitable remuneration.
- 77 Having regard to the foregoing, the answer to the third and fifth questions is that Article 10(1)(a) of Directive 2006/115, which provides for a limitation to the right to equitable remuneration provided for by Article 8(2) of that directive in the case of 'private use', does not allow Member States to exempt a hotel operator which makes a 'communication to the public' of a phonogram, within the meaning of Article 8(2) of that directive, from the obligation to pay such remuneration.

Costs

- 78 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. **A hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal is a 'user' making a 'communication to the public' of a phonogram which may be played in a broadcast for the purposes of Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.**
2. **A hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal is obliged to pay equitable remuneration under Article 8(2) of Directive 2006/115 for the broadcast of a phonogram, in addition to that paid by the broadcaster.**
3. **A hotel operator which provides in guest bedrooms, not televisions and/or radios to which it distributes a broadcast signal, but other apparatus and phonograms in physical or digital form which may be played on or heard from such apparatus, is a 'user' making a 'communication to the public' of a phonogram within the meaning of Article 8(2) of Directive 2006/115/EC. It is therefore obliged to pay 'equitable remuneration' under that provision for the transmission of those phonograms.**
4. **Article 10(1)(a) of Directive 2006/115, which provides for a limitation to the right to equitable remuneration provided for by Article 8(2) of that directive in the case of 'private use', does not allow Member States to exempt a hotel operator which makes a 'communication to the public' of a phonogram, within the meaning of Article 8(2) of that directive, from the obligation to pay such remuneration.**

[Signatures]

OPINION OF ADVOCATE GENERAL

CRUZ VILLALÓN

delivered on 22 May 2014 [\(1\)](#)

Case C-201/13

Johan Deckmyn

and

Vrijheidsfonds VZW

v

Helena Vandersteen,

Christiane Vandersteen,

Liliana Vandersteen,

Isabelle Vandersteen,

Rita Dupont,

Amoras II CVOH

and

WPG Uitgevers België

(Request for a preliminary ruling
from the Hof van beroep te Brussel, Belgium)

(Directive 2001/29/EC — Copyright — Article 5(3)(k) of Directive 2001/29/EC — Reproduction right — Exceptions — Parody — Autonomous concept of Union law — Fundamental rights — General principles)

1. By the present request for a preliminary ruling, the Hof van beroep (Court of Appeal), Brussels has submitted to the Court several questions concerning the nature and meaning of the concept of ‘parody’, as one of the exceptions to the exclusive rights of reproduction, distribution and communication to the public of works and the exclusive right to make available to the public protected subject-matter, provided for as an option for the Member States in Article 5(3)(k) of Directive 2001/29/EC [\(2\)](#) (‘the Directive’). The appearance and composition of the graphic representation giving rise to the main proceedings have led the referring court to include the Charter of Fundamental Rights of the European Union (‘the Charter’) in the Union legislation that it considers relevant. Along the same lines, the Court invited the parties referred to in Article 23 of the Statute of the Court of Justice of the European Union to make submissions at the hearing as to the effect that certain rights under the Charter could have on the interpretation of the exception concerned.
2. The origin of this case lies in a calendar distributed at a public event, the cover of which reproduces that of an instalment of a well-known comic strip to which certain alterations have been made with the aim and result of conveying a message that is part of the ideology of the political party *Vlaams Belang*.
3. On that basis, and following clarification of the abovementioned concept of ‘parody’, the present case gives the Court — albeit only to the extent required to provide a helpful reply — the opportunity of ruling on a matter of unquestionably broad scope, namely: the treatment to be afforded to the fundamental rights by a civil court when applying, in the main proceedings, a concept that is part of European Union secondary law.

I – Legal framework

A – *Union law*

4. Recitals 3, 19 and 31 in the preamble to the Directive are worded as follows:

'(3) The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.

(19) The moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.'

5. Article 2 of the Directive provides:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works; ...'

6. The Directive provides in Articles 3 and 4 for the creation of other exclusive rights, namely the right of communication to the public of works, right of making available to the public other subject-matter and the right of distribution.

7. Article 5 of the Directive lays down exceptions and limitations. For the purposes of the present proceedings, attention should be drawn to the following exception:

'3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: ...

(k) use for the purpose of caricature, parody or pastiche; ...

4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

B – *National law*

8. The Law on copyright and related rights (Wet betreffende het auteursrecht en de naburige rechten) of 30 June 1994 provides in Article 1:

'1. The author of a literary or artistic work alone shall have the right to reproduce his work or to have it reproduced in any manner or form whatsoever (direct or indirect, provisional or permanent, in full or in part).

This right shall also comprise the exclusive right to authorise adaptation or translation of the work ...

The author of a literary or artistic work shall alone have the right to communicate it to the public by any process whatever, including by making it available to the public in such a way that members of the public may access it from a place and at a time individually chosen by them.

The author of a literary or artistic work alone shall have the right to authorise distribution of the original of the work or of copies thereof to the public, by purchase or otherwise. ...

2. The author of a literary or artistic work shall enjoy an inalienable moral right in his work.

Overall renunciation of the future exercise of this right shall be null and void. This right shall comprise the right to publicise the work. ...

He shall enjoy the right to respect for his work that shall permit him to oppose any alteration to that work.

Notwithstanding any renunciation, he shall retain the right to oppose any distortion, mutilation or other alteration to his work or any other act prejudicial to the same work that may damage his honour or reputation.'

9. Lastly, Article 22(1) reads as follows:

'Once a work has been lawfully published, its author may not prohibit ...

6. caricature, parody and pastiche, observing fair practice'.

II – The facts and the main proceedings

10. The main proceedings are concerned with two joined appeals in which the applicants at first instance claimed infringement of their copyright in the comic strip *Suske en Wiske*. (3)

11. The applicants are the heirs of Mr Willebrord Vandersteen, creator of the *Suske en Wiske* comic strip, and also two companies that acquired rights in that comic strip.

12. The defendants at first instance were Mr Johan Deckmyn, a member of the *Vlaams Belang* political party, and the Vrijheidsfonds, an association whose object is to support that political party financially and materially and to provide multimedia printing and distribution of publications.

13. At a reception in the city of Ghent to celebrate the New Year of 2011, Mr Johan Deckmyn handed out calendars in which he was named as the publisher responsible and on the cover of which there was, inter alia, a depiction of the then mayor of that city wearing a white tunic with the Belgian tricolour flag tied around his waist. According to the applicants, the cover featured the colour characteristic of the covers of *Suske en Wiske* and on the lower part of the drawing were the handwritten words: 'Fré [the cartoonist], freely adapted from Vandersteen'.

14. The image on the cover was the following:



15. The same drawing ('the cover at issue') also appeared on the Vlaams Belang website and in that party's publication *De Strop*, which is distributed in the Ghent area.

16. On 13 January 2011, an action was brought against Mr Johan Deckmyn and the Vrijheidsfonds before the Rechtbank van Eerste Aanleg (Court of First Instance), Brussels. The applicants alleged infringement of their copyright in the cover of an instalment of *Suske en Wiske*, drawn in 1991 by Mr Vandersteen and entitled *De Wilde Weldoener* (something along the lines of 'the compulsive benefactor'), which is reproduced below

17. According to the applicants, the cover of the calendar handed out is broadly similar to that of the abovementioned instalment of the comic strip, apart from the fact that, on the cover at issue, the benefactor from *Suske en Wiske* has been transformed into a real political figure while the people picking up the money that the benefactor in the comic-strip image distributes now wear burkas or have become people of colour.

18. The Rechtbank van Eerste Aanleg, sitting in an urgent procedure, upheld the action by judgment of 17 February 2011, holding that the unauthorised distribution of the calendar was an infringement of copyright and ordering the defendants to cease using the calendars and the altered cover in any form whatsoever and to pay a fine of EUR 5 000 in respect of every infringement committed in breach of the injunction, up to a maximum of EUR 500 000 per day on which the injunction is not complied with.

19. On 15 April 2011, the parties subject to the injunction lodged an appeal against that judgment with the Hof van beroep, Brussels, claiming essentially that the court lacked jurisdiction, that the Vrijheidsfonds had no connection with the case and that none of the defendants at first instance had any connection with the website of Vlaams Belang, that the applicants at first instance did not hold or had not established that they held any rights and that the disputed cover was an artistic creation drawn by the cartoonist Fré and not by Mr Vandersteen, and, lastly, that that artistic creation constituted a parody, pastiche or caricature for the purposes of Article 22(1)(6) of the Law of 30 June 1994.

20. For their part, the respondents claimed that the appeal should be dismissed while at the same time lodging a cross-appeal seeking to prohibit the defendants from using drawings of the characters Suske and Wiske, in any manner whatsoever, in any medium in which the term 'Vlaams Belang' appears. The respondents argue that the overall appearance of the original work, the characters Suske and Wiske, the font, the title and the typical colour of the cover of the comic strips are clearly recognisable on the cover at issue. Moreover, on that cover, the characters picking up the money distributed by the benefactor are in some cases covered with burkas and in others are people of colour, thereby conveying a discriminatory message. The respondents maintain that some of the recipients of the calendar initially had the impression that it was a gift from the publisher of *Suske en Wiske*. It was only once the calendar was opened and examined more closely that it was found in fact to be a promotion on behalf of the Vlaams Belang political party. The public thus had the impression that the respondents endorsed the campaign of Vlaams Belang, a party of the far right, which is not the case at all. The use of the original work in this way infringes the respondents' moral rights and exploitation rights. The drawing is not intended to ridicule either Mr Vandersteen or the comic-strip characters but rather the Mayor of Ghent, and it does not satisfy the conditions for parody which are that it must fulfil a critical purpose, display originality, have a humorous objective and the aim of ridiculing the original work, cause no confusion with the original work, and not reproduce more formal elements of the original work than strictly necessary in order to create the parody.

III – The questions referred for a preliminary ruling and the procedure before the Court of Justice

21. By decision of 8 April 2013, the Hof van beroep dismissed the appellants' objections to the admissibility of the case, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling under Article 267 TFEU:

1. Is the concept of "parody" an autonomous concept in EU law?
2. If so, must a parody satisfy the following conditions or conform to the following characteristics:
 - display an original character of its own (originality);
 - display that character in such a manner that the parody cannot reasonably be ascribed to the author of the original work;
 - seek to be humorous or to mock, regardless of whether any criticism thereby expressed applies to the original

work or to something or someone else;

– mention the source of the parodied work?

3. Must a work satisfy any other conditions or conform to other characteristics in order to be capable of being labelled as a parody?

22. The Commission lodged written observations.

23. In accordance with Article 61 of its Rules of Procedure, the Court invited the parties referred to in Article 23 of the Statute to make submissions on the possible impact of the Charter of Fundamental Rights of the European Union, in particular Article 1 (human dignity), Article 11(1) (freedom of expression and information), Article 13 (freedom of the arts and sciences), Article 17 (right to property); Article 21(1) (non-discrimination) and Article 22 (cultural, religious and linguistic diversity) thereof, on the interpretation of Article 5(3)(k) of Directive 2001/29.

24. The Commission and the Kingdom of Belgium appeared at the hearing held on 7 January 2014.

IV – Analysis

25. By its first question, the Hof van beroep asks whether the concept of ‘parody’, included as an exception in Article 5(3)(k) of Directive 2001/29, is an autonomous concept of Union law. By the second and third questions, submitted in case there should be an affirmative reply to the first question and which it is appropriate to answer together, the Hof van beroep asks the Court to set out the relevant criteria for determining the cases in which a work constitutes a parody for the purposes of Article 5(3)(k).

26. It should be observed that, in accordance with the Directive, the Member States are to provide for the exclusive right to authorise or prohibit reproduction of a work (Article 2) and the exclusive right to authorise or prohibit any communication to the public of a work (Article 3(1)). Irrespective of that, under Article 5(3), Member States may provide for a number of exceptions or limitations to those rights, and one of those possible exceptions is referred to in subparagraph (k) (‘use for the purpose of caricature, parody or pastiche’). The Belgian legislature made use of that option and included that exception in Article 22(1)(6) of the Law of 30 June 1994, cited above.

A – Preliminary remarks

27. Before proceeding to propose a reply to the questions asked by the referring court in connection with the concept of ‘parody’ for the purposes of Directive 2001/29, I believe that it is important to clarify all the matters about which the Court has *not* been asked.

28. In the first place, the Court has not been asked about the scope of the concept of ‘moral right’ in so far as it is an aspect of intellectual property expressly excluded from the scope of the Directive. Recital 19 in the preamble to Directive 2001/29 states unequivocally that ‘[t]he moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.’ (4) On that basis, the decision as to whether or not there has been an infringement of moral rights is left entirely to the assessment of the national court.

29. Nor, in the second place, has the referring court asked the Court about the possible scope in the present case of the ‘threefold condition’ (also known as the ‘three-stage test’), provided for in general terms in Article 5(5) of the Directive, according to which the parody exception is to be applied ‘in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder’. The determination of whether or not each of those conditions is satisfied in the present case is a matter which, again, will fall to the national court.

30. Nor, lastly, has the referring court asked about the possible scope, from the perspective of EU law, of the proviso laid down in Belgian law, which permits the parody exception, ‘observing fair practice’.

31. Having said that, it only remains for me to point out that the considerations which I shall set out below in reply to the questions submitted by the referring court must be deemed to be — and it is important for me to emphasise this — without prejudice to the manner in which the national court may deal with the categories to which I have just referred

when it disposes of the main proceedings.

B – *The first question*

32. By its first question, the Hof van beroep asks whether the concept of ‘parody’ is an autonomous concept of Union law.

33. The Hof van beroep appears to be inclined to assert that there is a need for an independent interpretation of the concept because of the requirement of the uniform application of Union law and the principle of equality, and also because of the lack of an express reference to the law of the Member States for the purposes of determining the meaning of ‘parody’. The Commission and the Kingdom of Belgium share the view that the concept of parody must be interpreted independently and uniformly, although both contend that the Member States have some discretion.

34. I too share that view. The Directive does not define the term ‘parody’ but nor does it include an express reference to the law of the Member States for the purpose of defining the term.

35. According to settled case-law of the Court, when a provision of EU law does not refer to the law of the Member States for the purpose of determining its meaning and scope, the necessity of a uniform application of EU law and the principle of equality require the provision to be given an independent and uniform interpretation, having regard to the context of the provision and the objective of the relevant legislation. (5) That enables the conclusion that the concept of ‘parody’ in Article 5(3)(k) of the Directive is an autonomous concept of Union law.

36. That conclusion is confirmed by the aim of the Directive itself, which, in accordance with its title, seeks to harmonise certain aspects of copyright and related rights in the information society. It is also with that aim that, according to recital 32 in its preamble, the Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public, taking account of the different legal traditions in Member States, while ensuring a functioning internal market. Again according to recital 32, Member States ‘should arrive at a coherent application of these exceptions and limitations ...’.

37. That conclusion is not invalidated by the fact that the exception referred to in Article 5(3)(k) of the Directive is optional, so that the Member States may decide whether they wish to provide for an exception in favour of caricatures, parodies and pastiches. As the Court has previously held in relation to the exception formulated in Article 5(2)(b) of the Directive, which is also optional, ‘[a]n interpretation according to which Member States which have introduced an identical exception of that kind, provided for by EU law ... are free to determine the limits in an inconsistent and unharmonised manner which may vary from one Member State to another, would be incompatible with the objective of that directive’. (6)

38. Finally, it must be pointed out that the nature of ‘autonomous concept’ of EU law does not mean that, when a directive — as is the case — does not provide sufficiently precise criteria for defining the obligations it lays down, Member States do not enjoy broad discretion for the purpose of determining those criteria. (7)

39. For the reasons set out, I propose that the Court’s reply to the first question should be that the concept of ‘parody’ is an autonomous concept of Union law.

C – *The second and third questions*

40. The first question having been answered in the affirmative, it is now necessary to turn to the remaining questions. It should be recalled that the second question asks about various possible necessary characteristics and conditions which a particular work must satisfy in order to be treated as a parody, with the ensuing consequences for the rules governing copyright. By the third question, the referring court simply asks whether regard must be had to other characteristics and conditions in addition to the ones that it suggests. On that basis, it seems to me to be perfectly feasible to combine those two questions into a single question.

41. In that connection, it should be observed at the outset that the Commission proposes that the concept of parody should be interpreted as meaning an imitation of a work protected by the Directive, which is not a caricature or a pastiche and which denotes a humorous or mocking intention. More particularly, according to the Commission, none of the characteristics suggested by the Hof van beroep in its second question constitutes a necessary element of the definition of the concept, although it acknowledges the particular relevance of the humorous or mocking element.

42. For its part, in its oral argument, the Kingdom of Belgium submitted that the distinction between ‘parody’, ‘caricature’ and ‘pastiche’ must not play a role in the definition of parody, stating that the three concepts are too similar for it to be possible to distinguish between them. According to the Kingdom of Belgium, a parody is an imitation, created for the purposes of mockery, of a work protected by the Directive, without there being any possibility of that imitation causing confusion with the original work. Parody, as a concept of Union law, does not encompass the concept of ‘fair practice’; the latter concept may be included at national level — and is used in the Belgian legislation — at the discretion of the Member States, although the limits of the discretion available to them are to be found in Union law, and in particular in the fundamental rights and the three conditions imposed by Article 5(5) of the Directive.

43. That said, it should be observed that the interpretation of Article 5(3)(k) of the Directive comes within the context of case-law of the Court of Justice, which is already fairly well-developed concerning Article 5 of the Directive. It follows from that case-law that the conditions set out in Article 5 must generally be interpreted strictly, for they provide for exceptions to the general rule established by the Directive to the effect that the copyright holder must authorise any reproduction of a protected work. (8) That requirement of strict interpretation also reflects the history of the provision, which, together with other exceptions, was introduced by the Council during the legislative procedure with a view to addressing the claim by some Member States that a number of additional strictly-defined exceptions should be included. (9)

44. Irrespective of the foregoing, it is to be borne in mind that the case-law of the Court is highly nuanced and leaves considerable latitude with regard to satisfaction of the specific features of each exception. Thus, the Court has expressed its support for broad discretion on the part of the Member States for the purposes of providing for the exception in Article 5(3)(e) of the Directive. (10) Moreover, the Court has also observed that the interpretation of those exceptions must safeguard their effectiveness. (11)

45. That being so, and in accordance with the case-law of the Court, the concept of parody, like all concepts of Union law, must be interpreted by considering the usual meaning of the terms of the provision in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part. (12)

46. Starting with the fact that the parody exception does not appear in isolation but rather, on the contrary, as part of a series of three categories in the form of a continuous list (‘caricature, (13) parody or pastiche’), (14) I do not believe that a comparison with each of the concepts with which it coexists is of particular relevance for the present purposes. It may be difficult in a specific case to assign a particular work to one concept or another when those concepts are not in competition with one another. That being so, it does not seem to me to be necessary to proceed any further with that distinction, since, in short, all those concepts have the same effect of derogating from the copyright of the author of the original work which, in one way or another, is present in the — so to speak — derived work.

47. Having clarified that and turning now to the question of the meaning of the word ‘parody’, I think it common sense to begin with the dictionary definitions of the term. Thus, in Spanish, a parody is, quite simply, an ‘[i]mitación burlesca’, (15) a definition which is almost identical to that in French: ‘imitation burlesque (d’une œuvre sérieuse)’. (16) In German, parody is defined as ‘komische Umbildung ernster Dichtung; scherz[afte] Nachahmung ...’, (17) in Dutch as ‘grappige nabootsing om iets bespottelijk te maken’ (18) and, finally, in English as: ‘A prose, verse or (occas[ionally]) other artistic composition in which the characteristic themes and the style of a particular work, author, etc. are exaggerated or applied to an inappropriate subject, esp[ecially] for the purposes of ridicule ...’. (19)

48. In addition to a common etymological origin (20) (the Greek word παρωδία), (21) a comparison of those definitions reveals that their essential features are substantially similar. Those common features are of two types. On the one hand, there are the — so to speak — structural features and, on the other hand, there are the functional features: in its most simplified formulation, a parody is, structurally, an ‘imitation’ and, functionally, ‘mocking’. Let us consider these separately.

1. The ‘structural’ features of parody

49. From what I am calling the ‘structural’ perspective, a parody is a *copy* and a *creation* at the same time.

50. To a greater or lesser extent, a parody is always a *copy*, for it is a work that is never completely original. On the contrary, a parody borrows elements from a previous work (regardless of whether or not that work is, in turn, entirely original), and, as a matter of principle, these borrowed elements are not secondary or dispensable but are, rather, essential to the meaning of the work, as there will be occasion to see. The earlier work, some of whose characteristics are copied, must at the same time be ‘recognisable’ to the public at which the parody is directed. That is also a premiss

of a parody as an author's work. In that connection, a parody always entails an element of tribute to, or acknowledgement of, the original work.

51. In addition, a parody is, naturally, always a *creation*. The alteration to some degree of the original work is part of the genius of the author of the parody. In short, it is the latter who, ultimately, has the most interest in that no confusion should arise between 'his' parody and the original, even if he is the author of both.

52. However, the difficulty clearly lies in the situation which, by definition, is now before the Court; in other words, the situation in which the author of the parody and the author of the work parodied are not one and the same. This brings us into a decidedly troubled field. I am not referring to the field of art theory, into which it is clearly not for me to enter, but rather the field of copyright. A cursory glance at intellectual property law, either at international level or at Member-State level, suffices to reveal the variety and intensity of the issues involved. (22)

53. From the perspective of EU law, in which the Directive has harmonised certain aspects of copyright in the information society, the specific issue arising is that of the degree to which the concept of parody must be determined by the provision of an optional exception of the kind in question.

54. In that connection, it seems clear to me that, in addition to drawing attention to the structural features I have identified as essential, EU law leaves certain matters to be determined by the national legal systems of the Member States — in short, their courts — in which that exception has been adopted.

55. Thus, more specifically, it is for the Member States to determine whether a parody entails sufficient creative elements in relation to the parodied work or whether it is little more than a copy with insignificant alterations. To that end, the national courts have developed various criteria, (23) such as, for example, whether the alleged parody could be confused with the original work, (24) whether there is sufficient 'distance' between it and the original work, so that the latter's characteristics are blurred, (25) or whether more elements of the original work were used than necessary for the purposes of parody. (26)

56. I believe that those and other specific criteria, aimed at identifying whether the case concerns a parody for the purposes of Directive 2001/29, must be included within the discretion left to the Member States by the Directive, in view of the statement in recital 32 in the preamble to the Directive that the list of exceptions takes account of the different legal traditions in Member States.

57. In its second question, the referring court has singled out a series of possible criteria apt for the identification of a particular work as a parody. On the basis of the foregoing considerations and as far as the structural aspect which I am analysing is concerned, it must be sufficient to reply as follows. Certainly, a parody must '... display ... an original character of its own', to use the words of the referring court, which means that, reasonably, it will not be confused with the original. In addition to this, and in line with the Commission's submissions, I believe that none of the structural criteria proposed by the referring court satisfies the condition that they should be elements necessary or essential to the definition of the concept from the perspective of Union law.

58. In short, as regards its structural aspect, a parody must strike a certain balance between elements of imitation and elements of originality, on the basis that the inclusion of unoriginal elements in fact corresponds to the intended effect of the parody. However, this now brings us to the functional aspect of parody.

2. The 'functional' aspect of parody

59. Three matters have to be addressed in this regard. In the first place, there is the matter of two possible purposes of parody, and, therefore, in practice two types of parody; in the second, there is the matter of the intentional aspect, and, in short, the 'effect' which a parody is intended to create; finally, there is the matter of the 'subject-matter' of the parody, which is where the question of the impact of fundamental rights arises.

a) The purpose of parody

60. First, I believe that this may be the appropriate place to deal with the issue of what should be called 'the purpose' of parody, which is implicit in the wording of the second question, in which the referring court asks whether a parody must be designed to provoke humour or to mock, 'regardless of whether any criticism thereby expressed applies to the original work or to something or someone else'.

61. In formulating this alternative, the Hof van beroep draws our attention to two different types of parody, according to whether the purpose or intention, which I shall not define yet, is directed at or concerned with the original work ('parody of'), or the original work parodied is merely the instrument of an intention aimed at a third-party individual or object ('parody with').

62. Those two possible types of parody were considered at the hearing. The question is whether both types are a parody for the purposes of the Directive or, on the contrary, only the type which is directed at the original work, in so far as it is a 'parodied' work in the strict sense of the term.

63. The question thus framed is important, for the case at issue in the main proceedings does not concern the latter type of parody. It is, without doubt, a case of parody 'with'. The cover of the comic-strip album has been manipulated to convey a message that has nothing to do with the original work, about which the image in question does not appear outwardly to express any opinion.

64. I am inclined to believe that the concept of parody in the Directive ought not to be confined to the case of a parody having no meaning beyond the original, work parodied. It could perhaps be argued that, from the point of view of literary theory, the most deeply-rooted type of parody is that which, whatever the intention, is essentially designed to refer to the original work. Irrespective of that, it cannot be denied that criticism of customs, social criticism and political criticism have also, from time immemorial and clearly for the purpose of conveying a message effectively, made use of the privileged medium entailing the alteration of a pre-existing work, which is sufficiently recognisable to the public at which that criticism is directed.

65. In short, I believe that the type of parody which, for ease of reference, we are calling 'parody with' is now sufficiently established in our 'communication culture' for it to be impossible to disregard it when defining the concept of 'parody' for the purposes of the Directive. That being said, it is now necessary to turn to the question of the effect sought by the author of the parody.

b) The effect of parody

66. We have already had an opportunity of seeing how the usual dictionary definitions contain a common intentional element related to the effect sought by means of the parody, so that the imitation is described alternatively as '*burlesca*', '*burlesque*', '*komisch*', '*scherzhaft*', '*grappige ... om iets bespottelijk te maken*', and lastly as '*for the purposes of ridicule*'.

67. In short, parody pursues a particular effect, almost as a necessary consequence of the reworking of an earlier work. It is that — so to speak — selective reception that must of itself have a particular effect on the addressees, at the risk of being a complete failure.

68. The issue which, to my mind, is more difficult is that of the restriction of this intentional or functional element to, or at least its definition as, mockery, humour, or comedy. Taking account, in particular, of the extreme seriousness which may underlie a humorous expression, and the significance, difficult to exaggerate, which tragicomedy has had in some of our cultures: what degree of humour can there be in a certain parody of the medieval chivalresque novels, to give a well-known example?

69. At all events, in accepting the reference to 'mockery' as the usual way of describing the intentional aspect of parody, I believe that the Member States have broad discretion when it comes to determining whether the work in question has the status of a parody. (27)

70. Finally, from the perspective I am calling functional, parody is a *form of artistic expression* and a manifestation of *freedom of expression*. It can be one thing as much as the other and it can be both things at once. The important point for the present purposes is that the case before the referring court predominantly falls within the context of freedom of expression, so that that the image in question is designed to convey a particular political message with supposedly greater effectiveness.

c) The subject-matter of the parody: the impact of the fundamental rights

71. At this juncture, we must return to the question of the form and subject-matter of the political message that the cover of the calendar handed out by Mr Deckmyn at the New Year reception held by the City of Ghent seeks to convey.

72. In the main proceedings, the parties debated before the civil court the concept of parody as an exception to

copyright provided for in the national legislation. The current holders of copyright in the work drew attention to, inter alia, the subject-matter and, in short, the unequivocal message of the cover at issue. The original work has been distorted by two changes: first, the ‘benefactor’ has been replaced by a political figure; second, the beneficiaries of the benefactor’s generosity, who were originally non-specific, have, in an equally unequivocal way, become immigrants, or, at all events, ‘foreign’ residents, in order to convey Vlaams Belang’s message. In so far as the original work, through such manipulation, has become a means of conveying a political message with which the holders of copyright in the work are fully entitled not to agree and in fact do not agree, the question arises whether the court seised of the proceedings must include the *subject-matter* of that political message in its assessment of the parody exception.

73. It was the referring court that mentioned in the request for a preliminary ruling certain of the rights laid down in the Charter, certainly with the intention of focusing the Court’s attention on the subject-matter of the picture at issue. It was that same concern that led the Court to ask the parties referred to in Article 23 of the Statute of the Court of Justice to make submissions on the possible impact on the interpretation of the concept of parody of certain fundamental rights referred to in the Charter (Article 1 (human dignity), Article 11(1) (freedom of expression and information), Article 13 (freedom of the arts and sciences), Article 17 (right to property); Article 21(1) (non-discrimination) and Article 22 (cultural, religious and linguistic diversity)).

74. In reply to that question, the Kingdom of Belgium expressed the view that the fundamental rights laid down in the Charter are undoubtedly relevant for the purposes of the interpretation of the concept of ‘parody’. It pointed out that, from a different perspective, copyright could be regarded as a limitation of the freedom of expression within the meaning of Article 52 of the Charter, meaning that the rights at issue must be examined by the national court. According to Belgium, the rights to be taken into consideration include not only intellectual property rights (including moral rights) and freedom of expression but also the other rights laid down in the Charter, including the rights referred to by the national court in its order.

75. For its part, the Commission observed that, in accordance with recital 3 in the preamble to the Directive, the legislature was seeking to respect fundamental rights, in particular, intellectual property and freedom of expression. It is therefore a question of reconciling those rights and striking a fair balance between them. The Directive must be interpreted in conformity with those two rights in particular. In the context of the application of the Directive, the national court must also respect other fundamental rights.

76. To what extent may the interpretation of the scope of the parody exception carried out by the national court be affected by the fundamental rights? That is, in short, the difficult question that must be answered as the final point of this Opinion.

77. Since the case-law of the Court on fundamental rights began, particularly in a context in which there is no declaration of rights in the traditional sense of the word, the Court has held that fundamental rights are recognised and guaranteed in the Union as ‘general principles’ of EU law. This is still affirmed today in Article 6(3) TEU, *in fine*. The reminder in paragraph 4 of *Internationale Handelsgesellschaft* is obligatory in that respect, while at the same time hardly necessary. (28)

78. At all events, that is how the original interpretation of fundamental rights in the context of the Union, as a category included in the general principles of EU law, has enabled those rights to be relied on as a general criterion for the interpretation of EU law. (29)

79. It should thus be no surprise either that the settled case-law pursuant to which European Union secondary law must be interpreted in conformity with primary law, including the Charter, (30) also has a bearing when a provision of secondary law applies as between individuals. (31) In particular, the Court has stressed the importance of striking a fair balance between the various fundamental rights applicable in cases in which they may be in competition. (32) In the concise but expressive words of the Court, ‘situations cannot exist which are covered in that way by EU law without those fundamental rights being applicable’. (33)

80. Against that background, it cannot be disputed that, in a situation such as that giving rise to the main proceedings, the first of the rights derived from the Charter which the court seised of the main proceedings must take into account is freedom of expression, laid down in Article 11(1) thereof. The Court, relying in turn on the case-law of the ECHR, has drawn attention to the prominent role of freedom of expression in a democratic society, (34) such as European civil society, particularly when freedom of expression appears as an instrument of and in the service of the European public space, either at Union level or at the level of each Member State. Pursuant to Article 10(2) of the European Convention on Human Rights, freedom of expression must also be respected where information or ideas offend, shock or

disturb. (35)

81. In short, provided that the parody does in fact satisfy the conditions referred to above, an interpretation of the concept of parody by the civil court in the circumstances of the case must, as a matter of principle, lead to favouring the exercise of freedom of expression by those specific means. However, the difficulty lies in the limits of the subject-matter of the message and this is addressed in the considerations below.

82. It must be pointed out straightaway that freedom of expression is never quite 'unlimited' in a democratic society, (36) and this for many different reasons of form and substance that need not be considered. In that regard, suffice it to recall the wording of Article 10(2) of the European Convention on Human Rights. This is also why the Charter encompasses not only freedom of expression but also other rights that may occasionally compete with it: human dignity (Article 1), first, together with another series of rights and freedoms, in particular the prohibition of discrimination on grounds of race or religion (Article 21).

83. At the very core of those limits it is possible to identify the presence of the most deeply rooted beliefs in European society, which is far from being a society without history or, in short, without culture. (37) In secondary law, those beliefs found particular expression in the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law. (38)

84. It is clear that a civil court seised of a case concerning intellectual property rights is not required primarily to give effect to such limits, which are part of criminal law, in a dispute between individuals. Civil courts are in no circumstances required to replace criminal courts in the suppression of such conduct. However, at the same time, it should be observed that civil courts in giving their interpretation cannot be unaware that 'the Charter exists'; that is to say, that it has a certain virtual existence, even in the context of civil proceedings.

85. Taking into account the 'presence' that fundamental rights must be acknowledged to have in the legal system as a whole, I believe that, in principle and strictly from the perspective of the concept of parody, a particular image cannot be excluded from that concept solely because the author of the original work does not agree with the message or because the latter may deserve to be rejected by a large section of public opinion. However, distortions of the original work which, in form or substance, convey a message radically opposed to society's most deeply held beliefs, (39) on which the European public space is constructed and exists, (40) should not be accepted as a parody and the authors of the work with whose assistance the parody is created are authorised to assert as much.

86. Finally, it is clear too that the European public space is constructed, even if only in part, on the sum of national public spaces that are not completely interchangeable. The Court has had occasion to assess that difference of identity, notably in *Omega*, (41) as far as human dignity is concerned.

87. The question whether, in the specific case, the alterations to the original work were made with respect for what I have described as the most deeply rooted beliefs in European society is a matter which it falls to the national court to decide.

88. In conclusion, I believe that when a civil court interprets a concept such as 'parody', it must, to the extent called for by the case, rely on the fundamental rights affirmed in the Charter, while being bound to weigh up those rights properly one against the other when the circumstances of the case so require.

V – Conclusion

89. For the reasons set out, I propose that the Court reply to the questions referred by the Hof van beroep as follows:

(1) The concept of 'parody' in Article 5(3)(k) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society is an autonomous concept of Union law.

(2) For the purposes of Article 5(3)(k) of Directive 2001/29, a 'parody' is a work which, for the purposes of mockery, combines elements of a clearly recognisable earlier work with elements sufficiently original to ensure that the work is not easily confused with the original work.

(3) When a civil court interprets a concept such as 'parody', it must, to the extent called for by the case, rely on the fundamental rights affirmed in the Charter of Fundamental Rights of the European Union, while being bound to weigh

up those rights properly one against the other when the circumstances of the case so require.

1 – Original language: Spanish.

2 – Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

3 – *Suske en Wiske* is a comic strip created in 1945 and very well known, particularly in Dutch-speaking areas.

4 – In accordance with Article 6bis(1) of the Berne Convention for the Protection of Literary and Artistic Works, an author has the right ‘to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation’. On the subject of moral rights, see Grosheide, W., *Moral rights*, in Derclaye, E., *Research Handbook on the Future of EU Copyright*, Cheltenham: Edward Elgar 2009, pp. 242 to 266, and von Lewinski, S., *International Copyright Law and Policy*, Oxford, OUP 2008, pp. 133 to 137.

5 – *Padawan*, C-467/08, EU:C:2010:620, paragraph 32; *Ekro*, 327/82, EU:C:1984:11, paragraph 11; *SENA*, C-245/00, EU:C:2003:68, paragraph 23; *A*, C-523/07, EU:C:2009:225, paragraph 34.

6 – *Padawan*, EU:C:2010:620, paragraph 36.

7 – *Painer*, C-145/10, EU:C:2011:798, paragraphs 101 to 103; *SENA*, EU:C:2003:68, paragraph 38; *Commission v Belgium*, C-433/02, EU:C:2003:567, paragraph 19.

8 – Order in *Infopaq International*, C-302/10, EU:C:2012:16, paragraph 27; *Painer*, C-145/10, EU:C:2011:798, paragraph 109; *Infopaq International*, C-5/08, EU:C:2009:465, paragraphs 56 and 57; *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 162; *Luksan*, C-277/10, EU:C:2012:65, paragraph 101.

9 – Council of the European Union, Position commune arrêtée par le Conseil en vue de l’adoption de la directive du Parlement européen et du Conseil sur l’harmonisation de certains aspects du droit d’auteur et des droits voisins dans la société de l’information, Exposé des motifs du Conseil 9512/1/00 REV 1 ADD 1, Rn. 35.

10 – *Painer*, EU:C:2011:798, paragraphs 100 and 101.

11 – *Football Association Premier League and Others*, EU:C:2011:631, paragraph 163.

12 – *Probst*, C-119/12, EU:C:2012:748, paragraph 20, and *Content Services*, C-49/11, EU:C:2012:419, paragraph 32.

13 – ‘Dibujo satírico en que se deforman las facciones y el aspecto de alguien. 2. Obra de arte que ridiculiza o toma en broma el modelo que tiene por objeto.’ [Satirical drawing in which a person’s features and appearance are distorted. 2. Work of art which ridicules or mocks its subject]. Real Academia Española, *Diccionario de la Lengua Española*, Pozuelo de Alarcón: Espasa Calpe, 22nd ed. 2001. Here and below, I do not refer to definitions in the sphere of music.

14 – ‘Imitación o plagio que consiste en tomar determinados elementos característicos de la obra de un artista y combinarlos, de forma que den la impresión de ser una creación independiente.’ [Imitation or plagiarism consisting of taking certain characteristic elements of an artist’s work and combining them so that they give the impression of being an independent creation]. Real Academia Española, *Diccionario de la Lengua Española*, Pozuelo de Alarcón: Espasa Calpe, 22nd ed. 2001.

15 – Real Academia Española, *Diccionario de la Lengua Española*, Pozuelo de Alarcón: Espasa Calpe, 22nd ed. 2001. I have left out the meanings associated with music.

16 – Rey-Debove, J. and Rey, A. (eds), *Le Nouveau Petit Robert*, Paris, Dictionnaires le Robert, 1993.

17 – Dudenredaktion, *Duden*, Mannheim, Dudenverlag, 25th ed. 2010.

18 – *Van Dale online*, www.vandale.nl.

19 – Brown, L. (ed.), *Shorter Oxford English Dictionary*, Oxford: OUP 6th ed. 2007.

20 – An origin shared by all the language versions of the Directive. In Bulgarian: ‘пародията’, in Czech: ‘parodie’, in Danish: ‘parodi’, in German: ‘Parodien’, in Estonian: ‘paroodias’, in Greek: ‘παρωδία’, in English: ‘parody’, in French: ‘parodie’, in Croat: ‘parodije’, in Italian: ‘parodia’, in Latvian: ‘parodijās’, in Lithuanian: ‘parodijai’, in Hungarian: ‘paródia’, in Maltese: ‘parodija’, in Dutch: ‘parodieën’, in Polish: ‘parodii’, in Portuguese: ‘paródia’, in Romanian: ‘parodierii’, in Slovak: ‘paródie’, in Slovenian: ‘parodije’, in Finnish: ‘parodiassa’, and in Swedish: ‘parodi’.

21 – The word appeared in Aristotle’s poetry: *Aristóteles, Poética* (translated and edited by García Bacca, J.), México: UNAM 1946, 1448 a.

22 – For comparative studies of the exception, see Mauch, K., *Die rechtliche Beurteilung von Parodien im nationalen Urheberrecht der Mitgliedstaaten der EU*, Frankfurt am Main, Peter Lang, 2003; Mendis, D., and Kretschmer, M., *The Treatment of Parodies under Copyright Law in Seven Jurisdictions*, Newport, Intellectual Property Office, 2013/23; Ruijsenaars, H., *Comic-Figuren und Parodien: Ein*

[23](#) – In some Member States, criteria in this regard have been developed in case-law even though the legislation itself does not provide for a parody exception, as is the case in Germany where the question was discussed in the context of Paragraph 24 of the Urheberrechtsgesetz.

[24](#) – In Spain: Article 39 of Real Decreto Legislativo (Royal Legislative Decree) 1/1996 of 12 April (RCL 1996, 1382), AP (Audiencia Provincial: Provincial Court), Barcelona (Section 15), 10 October 2003, 654/2001; AP, Madrid (Section 13), 2 February 2000, 280/1998; In France: Cour de Cassation (1re Ch. Civ.) 12 January 1988, RIDA 1988, 137, 98, Cour de Cassation (1re Ch. Civ.) 27 March 1990, Bull civ I N° 75, p. 54, Cour d'Appel de Paris (1re Ch.) 11 May 1993, RIDA 1993, 157, 340, Cour d'Appel de Versailles (1re Ch.) 17 March 1994, RIDA 1995, avr., 350, Cour d'Appel de Paris (1re Ch.) 25 January 2012, S.A. *Editrice du Monde / Société Messagerie Lyonnaise de Presse, Société Sonora Media*, TGI Paris (3ème Ch.), 13 February 2001, *SNC Prisma Presse et EURL Femme / Charles V. y Association Apodeline*.

[25](#) – BGH GRUR 1994, 206 — *Alcolix*, BGH GRUR 1994, 191, 193 — *Asterix-Persiflagen*, BGH NJW 2003, 3633, 3635 — *Gies-Adler*; BGH GRUR 2000, 703, 704 — *Mattscheibe*.

[26](#) – BGH GRUR 1971, 588, 589-590 — *Disney Parodie*. In its subsequent case-law, the BGH explicitly rejected that criterion. BGH GRUR 2000, 703, 704 — *Mattscheibe*.

[27](#) – For example, see BGH NJW 1958 — *Sherlock Holmes*; BGH NJW 1971, 2169, 2171 — *Disney-Parodie*; Cour d'Appel de Paris (2ème Ch.), 18 February 2011, 09/19272; AP de Barcelona (Sección 15a), 10 October 2003, 654/2001. Hess, G., *Urheberrechtsprobleme der Parodie*, Baden-Baden, Nomos, 1993, p. 134.

[28](#) – ‘... In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community ...’; *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, paragraph 4; see *Stauder*, 29/69, EU:C:1969:57, paragraph 7; *Nold*, 4/73, EU:C:1974:51, paragraph 13; Cf. Bryde, B.-O., *The ECJ's fundamental rights jurisprudence — a milestone in transnational constitutionalism*, in: Poiaras Maduro, M., and Azoulai, L. (eds), *The Past and Future of EU Law*, Oxford, Hart, 2010, p. 119; Kumm, M., *Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm*, in: *ibid.*, p. 106.

[29](#) – That connection between the fundamental rights and the category of general principles of a particular legal order, which is so characteristic of the doctrine of the fundamental rights in the Union, creates a spontaneous link with a particular vision of the fundamental rights which may be regarded as part of ‘the constitutional traditions common to the Member States’, also referred to in Article 6(3) TEU. In accordance with that interpretation, which is widespread in the Member States, albeit with a very different scope, the fundamental rights transcend their essentially ‘subjective’ dimension and contribute to the effect on the interpretation of the legal system as a whole. Cf. Wahl, R., *Lüth und die Folgen*, in: Henne, T., and Riedlinger, A. (eds), *Das Lüth-Urteil aus (rechts-)historischer Sicht*, Berlin, BWV, 2005, p. 371; Wahl, R., *Die objektiv-rechtliche Dimension der Grundrechte im internationalen Vergleich*, in: Merten, D., and Papier, H.-J. (eds), *Handbuch der Grundrechte. Band I*, Heidelberg, C.F. Müller, 2004, p. 745.

[30](#) – *Commission v Strack*, C-579/12 RX II, EU:C:2013:570, paragraph 40; *McDonagh*, C-12/11, EU:C:2013:43, paragraph 44; *Ordre des barreaux francophones et germanophone and Others*, C-305/05, EU:C:2007:383, paragraphs 28 and 29; *Klensch and Others*, 201/85 and 202/85, EU:C:1986:439, paragraph 21; and *Commission v Council*, 218/82, EU:C:1983:369, paragraph 15.

[31](#) – *Alemo-Herron and Others*, C-426/11, EU:C:2013:521, paragraph 30, and *Werhof*, C-499/04, EU:C:2006:168, paragraphs 31 to 33. See also the Opinion of Advocate General Trstenjak in *Dominguez*, C-282/10, EU:C:2011:559, point 83, and the Opinion of Advocate General Poiaras Maduro in *The International Transport Workers' Federation and The Finnish Seamen's Union*, C-438/05, EU:C:2007:292, points 29 to 44.

[32](#) – See *Promusicae*, C-275/06, EU:C:2008:54, paragraph 68; *Lindqvist*, C-101/01, EU:C:2003:596, paragraphs 84 to 87; and recitals 31 and 3 in the preamble to the Directive.

[33](#) – *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 21.

[34](#) – *Connolly v Commission*, C-274/99 P, EU:C:2001:127, paragraph 39; *Commission v Cwik*, C-340/00 P, EU:C:2001:701, paragraph 18; ECHR *Handyside v United Kingdom*, 7 December 1976, Series A no. 24, paragraph 49; and ECHR *Vogt v Germany*, 26 September 1995, Series A no. 323, paragraph 52.

[35](#) – See *Handyside v United Kingdom*, 7 December 1976, Series A no. 24, paragraph 49; *Soulas and Others v France*, 10 July 2008, 15948/03, paragraph 35; *Le Pen v France*, 20 April 2010, 18788/09; and Grabenwarter, C., *European Convention on Human Rights*, Munich, C.H. Beck, 2014, Art. 10 paragraph 28.

[36](#) – *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 79; *Familiapress*, C-368/95, EU:C:1997:325, paragraph 26; see also Article 10 of the European Convention on Human Rights.

[37](#) – Häberle, P., *Europäische Rechtskultur*, Baden-Baden, Nomos, 1994.

[38](#) – Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and

xenophobia by means of criminal law (OJ 2008 L 328, p. 55).

[39](#) – In that connection, see, for example, judgments of the Spanish Tribunal Constitucional (Constitutional Court) STC 214/1991 of 11 November 1991 (*Violeta Friedman*) and STC 176/1995 of 11 December 1995 (*Hitler=SS*).

[40](#) – See Curtin, D.M., ‘*Civil Society’ and the European Union: Opening Spaces for Deliberative Democracy?*, in: European University Institute (ed.), *Collected Courses of the Academy of European Law 1996 Volume VII Book 1*, The Hague, Kluwer, 1999, p. 185.

[41](#) – *Omega*, C-36/02, EU:C:2004:614, paragraph 34.

JUDGMENT OF THE COURT (Grand Chamber)

3 September 2014 (*)

(Reference for a preliminary ruling — Directive 2001/29/EC — Copyright and related rights — Reproduction right — Exceptions and limitations — Concept of ‘parody’ — Autonomous concept of EU law)

In **Case C-201/13**,

REQUEST for a preliminary ruling under Article 267 TFEU from the hof van beroep te Brussel (Belgium), made by decision of 8 April 2013, received at the Court on 17 April 2013, in the proceedings

Johan Deckmyn,

Vrijheidsfonds VZW

v

Helena Vandersteen,

Christiane Vandersteen,

Liliana Vandersteen,

Isabelle Vandersteen,

Rita Dupont,

Amoras II CVOH,

WPG Uitgevers België,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, A. Borg Barthet and M. Safjan, Presidents of Chambers, A. Rosas, G. Arestis, D. Šváby, A. Prechal (Rapporteur), C. Vajda and S. Rodin, Judges.

Advocate General: P. Cruz Villalón,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 January 2014,

after considering the observations submitted on behalf of:

- J. Deckmyn, by B. Siffert, advocaat,
- the Belgian Government, by J.-C. Halleux and C. Pochet, acting as Agents,
- the European Commission, by J. Samnadda, F. Wilman and T. van Rijn, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 May 2014

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5(3)(k) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

2 The request has been made in proceedings between Mr Deckmyn and the Vrijheidsfonds VZW, a non-profit association, and various heirs of Mr Vandersteen, author of the *Suske en Wiske* comic books (known in English as *Spike and Suzy*, and in French as *Bob and Bobette*), and the holders of the rights associated with those works (‘Vandersteen and Others’) as well, about the handing-out by Mr Deckmyn of a calendar that contained a reproduction of a drawing (‘the drawing at issue’) which resembled a drawing appearing on the cover of one of the books in the *Suske en Wiske* series.

Legal context

EU law

3 Recital 3 in the preamble to Directive 2001/29 states:

'The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.'

4 Recital 31 in the preamble to that directive states:

'A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. ...'

5 Article 5 of that directive, entitled 'Exceptions and limitations', provides in paragraph 3:

'Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3[, entitled respectively "Reproduction right" and "Right of communication to the public of works and right of making available to the public other subject-matter",] in the following cases: ...

(k) use for the purpose of caricature, parody or pastiche; ...'

Belgian law

6 Article 22(1) of the Law of 30 June 1994 on copyright and related rights (*Belgisch Staatsblad* of 27 July 1994, p. 19297) states:

'Once a work has been lawfully published, its author may not prohibit: ...

6. caricature, parody and pastiche, observing fair practice; ...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

7 Mr Deckmyn is a member of the Vlaams Belang political party, while the object of the Vrijheidsfonds, according to its articles of association, is to support that political party financially and materially, to the exclusion of any profit motive.

8 At the reception held on 9 January 2011 by the City of Ghent (Belgium) to celebrate the New Year, Mr Deckmyn handed out calendars for 2011 in which he is named as the editor. On the cover page of those calendars appeared the drawing at issue.

9 The drawing at issue resembled that appearing on the cover of the *Suske en Wiske* comic book entitled 'De Wilde Weldoener' (which may roughly be translated as 'The Compulsive Benefactor'), which was completed in 1961 by Mr Vandersteen. That drawing is a representation of one of the comic book's main characters wearing a white tunic and throwing coins to people who are trying to pick them up. In the drawing at issue, that character was replaced by the Mayor of the City of Ghent and the people picking up the coins were replaced by people wearing veils and people of colour.

10 Taking the view that the drawing at issue and its communication to the public constituted an infringement of their respective copyrights, Vandersteen and Others brought an action against Mr Deckmyn and the Vrijheidsfonds before the rechtbank van eerste aanleg te Brussel (Court of First Instance, Brussels), which ordered the defendants to cease all use of the drawing, failing which they would have to pay a periodic penalty.

11 Before the referring court hearing the appeal against the decision at first instance, Mr Deckmyn and the Vrijheidsfonds submitted, in particular, that the drawing at issue is a political cartoon which falls within the scope of parody accepted under point (6) of Article 22(1) of the Law of 30 June 1994 on copyright and related rights.

12 Vandersteen and Others dispute that interpretation, since, according to them, parody must meet certain criteria, which are not fulfilled in this case, namely: to fulfil a critical purpose; itself show originality; display humorous traits; seek to ridicule the original work; and not borrow a greater number of formal elements from the original work than is strictly necessary in order to produce the parody. In those circumstances, they also allege that the drawing at issue

conveyed a discriminatory message, since the characters who, in the original work, pick up the scattered coins, were replaced in the drawing at issue by people wearing veils and people of colour.

13 In those circumstances, the hof van beroep te Brussel (Court of Appeal, Brussels) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Is the concept of “parody” an autonomous concept of EU law?
2. If so, must a parody satisfy the following conditions or conform to the following characteristics:
 - display an original character of its own (originality);
 - display that character in such a manner that the parody cannot reasonably be ascribed to the author of the original work;
 - seek to be humorous or to mock, regardless of whether any criticism thereby expressed applies to the original work or to something or someone else;
 - mention the source of the parodied work?
3. Must a work satisfy any other conditions or conform to other characteristics in order to be capable of being labelled as a parody?

The questions referred for a preliminary ruling

The first question

14 It must be noted that the Court has consistently held that it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question (judgment in *Padawan*, C-467/08, EU:C:2010:620, paragraph 32 and the case-law cited).

15 It is clear from that case-law that the concept of ‘parody’, which appears in a provision of a directive that does not contain any reference to national laws, must be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union (see, to that effect, judgment in *Padawan*, EU:C:2010:620, paragraph 33).

16 That interpretation is not invalidated by the optional nature of the exception mentioned in Article 5(3)(k) of Directive 2001/29. An interpretation according to which Member States that have introduced that exception are free to determine the limits in an unharmonised manner, which may vary from one Member State to another, would be incompatible with the objective of that directive (see, to that effect, judgments in *Padawan*, EU:C:2010:620, paragraph 36, and *ACI Adam and Others*, C-435/12, EU:C:2014:254, paragraph 49).

17 Accordingly, the answer to the first question is that Article 5(3)(k) of Directive 2001/29 must be interpreted as meaning that the concept of ‘parody’ appearing in that provision is an autonomous concept of EU law.

The second and third questions

18 By its second and third questions, which it is appropriate to examine together, the referring court is asking the Court how the exception for parody, provided for under Article 5(3)(k) of Directive 2001/29, should be understood. In particular, it is asking whether the concept of parody requires certain conditions, which are listed in its second question, to be fulfilled.

19 It should be noted that, since Directive 2001/29 gives no definition at all of the concept of parody, the meaning and scope of that term must, as the Court has consistently held, be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part (see, to that effect, judgment in *Diakité*, C-285/12, EU:C:2014:39, paragraph 27 and the case-law cited).

20 With regard to the usual meaning of the term ‘parody’ in everyday language, it is not disputed, as the Advocate General stated in point 48 of his Opinion, that the essential characteristics of parody are, first, to evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humour or mockery.

21 It is not apparent either from the usual meaning of the term ‘parody’ in everyday language, or indeed, as rightly noted by the Belgian Government and the European Commission, from the wording of Article 5(3)(k) of Directive 2001/29, that the concept is subject to the conditions set out by the referring court in its second question, namely: that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; could reasonably be attributed to a person other than the author of the original work itself; should relate to the original work itself or mention the source of the parodied work.

22 That interpretation is not called into question by the context of Article 5(3)(k) of Directive 2001/29, which lays down an exception to the rights provided for in Articles 2 and 3 of that directive and must, therefore, be interpreted strictly (see, to that effect, judgment in *ACI Adam and Others*, EU:C:2014:254, paragraph 23).

23 The interpretation of the concept of parody must, in any event, enable the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed (see, to that effect, judgment in *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 163).

24 The fact that Article 5(3)(k) of Directive 2001/29 is an exception does therefore not lead to the scope of that provision being restricted by conditions, such as those set out in paragraph 21 above, which emerge neither from the usual meaning of ‘parody’ in everyday language nor from the wording of that provision.

25 As regards the objective referred to in Article 5(3)(k) of Directive 2001/29, the objectives of that directive in general must be recalled, which include, as is apparent from recital 3 in the preamble to that directive, a harmonisation which will help to implement the four freedoms of the internal market and which relates to observance of the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest. It is not disputed that parody is an appropriate way to express an opinion.

26 In addition, as stated in recital 31 in the preamble to Directive 2001/29, the exceptions to the rights set out in Articles 2 and 3 of that directive, which are provided for under Article 5 thereof, seek to achieve a ‘fair balance’ between, in particular, the rights and interests of authors on the one hand, and the rights of users of protected subject-matter on the other (see, to that effect, judgments in *Padawan*, EU:C:2010:620, paragraph 43, and *Painer*, C-145/10, EU:C:2011:798, paragraph 132).

27 It follows that the application, in a particular case, of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k).

28 In order to determine whether, in a particular case, the application of the exception for parody within the meaning of Article 5(3)(k) of Directive 2001/29 preserves that fair balance, all the circumstances of the case must be taken into account.

29 Accordingly, with regard to the dispute before the national court, it should be noted that, according to *Vandersteen and Others*, since, in the drawing at issue, the characters who, in the original work, were picking up the coins were replaced by people wearing veils and people of colour, that drawing conveys a discriminatory message which has the effect of associating the protected work with such a message.

30 If that is indeed the case, which it is for the national court to assess, attention should be drawn to the principle of non-discrimination based on race, colour and ethnic origin, as was specifically defined in Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22), and confirmed, inter alia, by Article 21(1) of the Charter of Fundamental Rights of the European Union.

31 In those circumstances, holders of rights provided for in Articles 2 and 3 of Directive 2001/29, such as *Vandersteen and Others*, have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message.

32 Accordingly, it is for the national court to determine, in the light of all the circumstances of the case in the main proceedings, whether the application of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, on the assumption that the drawing at issue fulfils the essential requirements set out in paragraph 20 above, preserves the fair balance referred to in paragraph 27 above.

33 Consequently, the answer to the second and third questions is that Article 5(3)(k) of Directive 2001/29 must be interpreted as meaning that the essential characteristics of parody, are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery. The concept of 'parody', within the meaning of that provision, is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work itself; that it should relate to the original work itself or mention the source of the parodied work.

34 However, the application, in a particular case, of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k).

35 It is for the national court to determine, in the light of all the circumstances of the case in the main proceedings, whether the application of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, on the assumption that the drawing at issue fulfils the essential requirements of parody, preserves that fair balance.

Costs

36 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. Article 5(3)(k) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that the concept of 'parody' appearing in that provision is an autonomous concept of EU law.

2. Article 5(3)(k) of Directive 2001/29 must be interpreted as meaning that the essential characteristics of parody, are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery. The concept of 'parody', within the meaning of that provision, is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work itself; that it should relate to the original work itself or mention the source of the parodied work.

However, the application, in a particular case, of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k).

It is for the national court to determine, in the light of all the circumstances of the case in the main proceedings, whether the application of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, on the assumption that the drawing at issue fulfils the essential requirements of parody, preserves that fair balance.

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

8 September 2016 (*)

(Reference for a preliminary ruling — Copyright and related rights — Directive 2001/29/EC — Information society — Harmonisation of certain aspects of copyright and related rights — Article 3(1) — Communication to the public — Definition — Internet — Hyperlinks giving access to protected works, made accessible on another website without the rightholder's consent — Works not yet published by the rightholder — Posting of such links for a profit)

In Case C-160/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 3 April 2015, received at the Court on 7 April 2015, in the proceedings

GS Media BV

v

Sanoma Media Netherlands BV,

Playboy Enterprises International Inc.,

Britt Geertruida Dekker,

THE COURT (Second Chamber),

composed of M. Ilešič (Rapporteur), President of the Chamber, C. Toader, A. Rosas, A. Prechal, and E. Jarašiūnas, Judges,

Advocate General: M. Wathelet,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 February 2016,

after considering the observations submitted on behalf of:

- GS Media BV, by R. Chavannes and D. Verhulst, advocaten,
- Sanoma Media Netherlands BV, Playboy Enterprises International Inc. and Ms Dekker, by C. Alberdingk Thijm and C. de Vries, advocaten,
- the German Government, by T. Henze and D. Kuon, acting as Agents,
- the French Government, by D. Segoin, D. Colas and G. de Bergues, acting as Agents,
- the Portuguese Government, by L. Inez Fernandes and T. Rendas, acting as Agents,
- the Slovak Government, by B. Ricziová, acting as Agent,
- the European Commission, by F. Wilman and T. Scharf and by J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 April 2016,
gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

2 The request has been made in proceedings between GS Media BV and Sanoma Media Netherlands BV ('Sanoma'), Playboy Enterprises International Inc. and Ms Britt Geertruida Dekker (together, 'Sanoma and Others'), concerning, inter alia, the posting on the GeenStijl.nl website ('the GeenStijl website'), operated by GS Media, of hyperlinks to other websites enabling photographs of Ms Dekker, taken for Playboy magazine ('the photos at issue'), to be viewed.

Legal context

3 Recitals 3, 4, 9, 10, 23 and 31 of Directive 2001/29 state:

'(3) The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. ...

...

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. ...

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. ... Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

...

(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. ...

...

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. ...'

4 Article 3 of that directive provides:

'1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

...

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.'

5 According to Article 5(3) and (5) of that directive:

'3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

...

c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible; ...

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

6 At the request of Sanoma, which is the publisher of Playboy magazine, on 13 and 14 October 2011 the photographer, Mr C. Hermès, took the photos at issue, which were to be published in the December 2011 edition of that magazine. In that context, Mr Hermès granted Sanoma authorisation, on an exclusive basis, to publish those photos. He also granted Sanoma authorisation to exercise the rights and powers arising from his copyright.

7 GS Media operates the website GeenStijl, which includes, according to information provided by that website, 'news, scandalous revelations and investigative journalism with lighthearted items and wacky nonsense' and which is viewed daily by more than 230 000 visitors, making it one of the 10 most visited websites in the area of news in the Netherlands.

8 On 26 October 2011, the editors of the GeenStijl website received a message from a person using a pseudonym, which included a hyperlink to an electronic file hosted on the website Filefactory.com ('the Filefactory website'), located in Australia and dedicated to data storage. That electronic file contained the photos at issue.

9 On the same day, Sanoma asked GS Media's parent company to prevent the photos at issue being published on the GeenStijl website.

10 On 27 October 2011, an article relating to those photos of Ms Dekker, entitled '...! Nude photos of ... [Ms] Dekker', was published on the GeenStijl website, which included part of one of the photos at issue, and which ended with the following words: 'And now the link with the pics you've been waiting for.' By clicking on a hyperlink accompanying that text, users were directed to the Filefactory website, on which another hyperlink allowed them to download 11 electronic files each containing one of those photos.

11 On the same day, Sanoma sent GS Media's parent company an email demanding that it confirm that the hyperlink to the photos at issue had been removed from the GeenStijl website. GS Media failed to respond to that demand.

12 However, at Sanoma's request, the photos at issue appearing on the Filefactory website were removed.

13 By letter of 7 November 2011, counsel for Sanoma and Others demanded that GS Media remove from the GeenStijl website the article of 27 October 2011, including the hyperlink, the photographs it contained and the reactions of users published on the same page of that website.

14 On the same day, an article about the dispute between GS Media and Sanoma and Others about the photos at issue was published on the GeenStijl website. That article ended with the following sentence: 'Update: Not yet seen the nude pics of [Ms. Dekker]? They are HERE.' That announcement was, once again, accompanied by a hyperlink to access the website Imageshack.us where one or more of the relevant photographs could be viewed. The operator of that website, however, also subsequently complied with Sanoma's request to remove them.

15 A third article, entitled 'Bye Bye Wave Wave Playboy', again contained a hyperlink to the photos at issue, appeared on 17 November 2011 on the GeenStijl website. Forum users of that website then posted new links to other websites where the photos at issue could be viewed.

16 In December 2011, the photos at issue were published in Playboy magazine.

17 Sanoma and Others brought an action before the rechtbank Amsterdam (Amsterdam District Court, Netherlands), claiming, in particular, that by posting hyperlinks and a cutout of one of the photos at issue on the GeenStijl website, GS Media had infringed Mr Hermès' copyright and acted unlawfully towards Sanoma and Others. The rechtbank Amsterdam (Amsterdam District Court) largely upheld that action.

18 The Gerechtshof Amsterdam (Amsterdam Court of Appeal, the Netherlands) set aside that decision, finding that, by posting the hyperlinks on the GeenStijl website, GS Media had not infringed Mr Hermès' copyright, since the photos at issue had already been made public before they were posted on the Filefactory website. In contrast, it found that, by posting those links, GS Media acted unlawfully toward Sanoma and Others, as visitors to that website accordingly were encouraged to view the photos at issue which were illegally posted on the Filefactory website. Without those hyperlinks, those photos would not have been easy to find. In addition, the Gerechtshof Amsterdam (Amsterdam Court of Appeal) held that, by posting a cutout of one of the photos at issue on the GeenStijl website, GS Media had infringed Mr Hermès' copyright.

19 GS Media brought an appeal against that judgment before the referring court, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

20 Sanoma and Others brought a cross-appeal, in which they refer in particular to the judgment of 13 February 2014, Svensson and Others, (C-466/12, EU:C:2014:76), claiming that the fact of making a hyperlink available to internet users to a website on which a work has been posted without the consent of the latter's copyright holder constitutes a communication to the public. Sanoma and Others submit, moreover, that access to the photos at issue on the Filefactory website was protected by restrictions within the meaning of that judgment which internet users could circumvent through the intervention of GS Media and its GeenStijl website, so that those photos have been made available to a wider public than the public which would normally have accessed those photos on the Filefactory website.

21 In the context of examining that cross-appeal, the referring court considers that it cannot be inferred with sufficient certainty either from the judgment of 13 February 2014, Svensson and Others, (C-466/12, EU:C:2014:76) or from the order of 21 October 2014, BestWater, (C-348/13, not published, EU:C:2014:2315) whether there is a 'communication to the public' if the work has in fact previously been published, but without the consent of the copyright holder.

22 On the one hand, it follows from that case-law of the Court that it must be established whether the intervention at issue enables a public to be reached which cannot be considered to have been included in the public for which the rightholder had previously given his consent, which is consistent with his exclusive right to exploit the work. On the other hand, if a work is already available on the internet for the general public, posting a hyperlink to the website on which the work is already posted will result in virtually no new public being reached. Furthermore, the fact that there are many works on the internet that have been communicated to the public without the rightholder's consent must also be taken into account. For the operator of a website it will not always be easy to check, if he intends to post a hyperlink to a website on which a work appears, that the rightholder has consented to the earlier posting of that work.

23 The referring court further observes, moreover, that the cross-appeal also raises the question of the conditions that must be met if they are to constitute 'restrictions' within the meaning of the judgment of 13 February 2014, Svensson and Others, (C-466/12, EU:C:2014:76). That court points out, in that regard, that the photos at issue were not impossible to find on the internet before GS Media posted the hyperlink on the GeenStijl website, without however being easy to find, so the fact of posting that link on its site greatly facilitated access to those photos.

24 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. (a) If anyone other than the copyright holder refers by means of a hyperlink on a website controlled by him to a website which is managed by a third party and is accessible to the general internet public, on which the work has been made available without the consent of the rightholder, does that constitute a "communication to the public" within the meaning of Article 3(1) of Directive 2001/29?

(b) Does it make any difference if the work was also not previously communicated, with the rightholder's consent, to the public in some other way?

(c) Is it important whether the 'hyperlinker' is or ought to be aware of the lack of consent by the rightholder for the placement of the work on the third party's website mentioned in 1(a) above and, as the case may be, of the fact that the work has also not previously been communicated, with the rightholder's consent, to the public in some other way?

2. (a) If Question 1 is answered in the negative: If the answer to question 1(a) is in the negative: in that case, is there, or could there be deemed to be, a communication to the public if the website to which the hyperlink refers, and thus the work, is indeed findable for the general internet public, but not easily so, with the result that the publication of the hyperlink greatly facilitates the finding of the work?

(b) In answering question 2(a), is it important whether the "hyperlinker" is or ought to be aware of the fact that the website to which the hyperlink refers is not easily findable by the general internet public?

3. Are there other circumstances which should be taken into account when answering the question whether there is deemed to be a communication to the public if, by means of a hyperlink, access is provided to a work which has not previously been communicated to the public with the consent of the rightholder?

Consideration of the questions referred

25 By its three questions, which should be examined together, the referring court asks, in essence, whether, and in what possible circumstances, the fact of posting, on a website, a hyperlink to protected works, freely available on another website without the consent of the copyright holder, constitutes a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29.

26 In that context, it raises the question of the relevance of the fact that the works in question have not yet been published in another way with the consent of that rightholder, that providing those hyperlinks makes it much easier to find those works, given that the website on which they are available is not easily findable by the general internet public, and that whoever posts those links knew or ought to have been aware of those facts and the fact that that rightholder did not consent to the publication of the works in question on that latter website.

27 It follows from Article 3(1) of Directive 2001/29 that Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

28 Under that provision, authors thus have a right which is preventive in nature and allows them to intervene, between possible users of their work and the communication to the public which such users might contemplate making, in order to prohibit such use (see, to that effect, judgments of 15 March 2012, SCF, C-135/10, EU:C:2012:140, paragraph 75, and 31 May 2016, Reha Training, C-117/15, EU:C:2016:379, paragraph 30).

29 As Article 3(1) of Directive 2001/29 does not define the concept of 'communication to the public', its meaning and its scope must be determined in light of the objectives pursued by that directive and of the context in which the provision being interpreted is set (see, to that effect, judgments of 7 December 2006, SGAE, C-306/05, EU:C:2006:764, paragraphs 33 and 34, and 4 October 2011, Football Association Premier League and Others, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 184 and 185).

30 In that regard, it should be borne in mind that it follows from recitals 9 and 10 of Directive 2001/29 that the latter's objective is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public. It follows that 'communication to the public' must be interpreted broadly, as recital 23 of the directive indeed expressly states (see, to that effect, judgments of 4 October 2011, Football Association Premier League and Others, C-403/08 and C-429/08, EU:C:2011:631, paragraph 186, and 7 March 2013, ITV Broadcasting and Others, C-607/11, EU:C:2013:147, paragraph 20).

31 At the same time, it follows from recitals 3 and 31 of Directive 2001/29 that the harmonisation effected by it is to maintain, in particular in the electronic environment, a fair balance between, on one hand, the interests of copyright holders and related rights in protecting their intellectual property rights, safeguarded by Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter') and, on the other, the protection of the interests and fundamental rights of users of protected objects, in particular their freedom of expression and of information, safeguarded by Article 11 of the Charter, and of the general interest.

32 As the Court has previously held, the concept of ‘communication to the public’ includes two cumulative criteria, namely, an ‘act of communication’ of a work and the communication of that work to a ‘public’ (judgments of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 16; 19 November 2015, *SBS Belgium*, C-325/14, EU:C:2015:764, paragraph 15; and 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 37).

33 The Court has, moreover, specified that the concept of ‘communication to the public’ requires an individual assessment (see judgment of 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, paragraph 29 and the case-law cited, relating to the concept of ‘communication to the public’, for the purposes of Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28), it having the same scope in that directive as in Directive 2001/29 (see, to that effect, judgment of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 33)).

34 For the purposes of such an assessment, account has to be taken of several complementary criteria, which are not autonomous and are interdependent. Since those criteria may, in different situations, be present to widely varying degrees, they must be applied both individually and in their interaction with one another (judgments of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraph 79; 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, paragraph 30; and 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 35).

35 Of those criteria, the Court emphasised, in the first place, the indispensable role played by the user and the deliberate nature of its intervention. The user makes an act of communication when it intervenes, in full knowledge of the consequences of its action, to give access to a protected work to its customers, and does so, in particular, where, in the absence of that intervention, its customers would not, in principle, be able to enjoy the broadcast work (see, to that effect, judgments of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraph 82 and the case-law cited, and 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, paragraph 31).

36 In the second place, it specified that the concept of the ‘public’ refers to an indeterminate number of potential viewers and implies, moreover, a fairly large number of people (see, to that effect, judgments of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraph 84 and the case-law cited, and 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, paragraph 33).

37 Moreover, it is settled case-law of the Court that, to be categorised as a ‘communication to the public’, a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a ‘new public’, that is to say, to a public that was not already taken into account by the copyright holders when they authorised the initial communication to the public of their work (judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 24, and order of 21 October 2014, *BestWater International*, C-348/13, not published, EU:C:2014:2315, paragraph 14 and the case-law cited).

38 In the third place, the Court has held that it is relevant that a ‘communication’, within the meaning of Article 3(1) of Directive 2001/29, is of a profit-making nature (see, to that effect, judgments of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 204; 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraph 88; and 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, paragraph 36).

39 It is in the light, in particular, of those criteria that it is to be assessed whether, in a situation such as that at issue in the main proceedings, the fact of posting, on a website, a hyperlink to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29.

40 In that regard, it should be recalled that, in the judgment of 13 February 2014, *Svensson and Others*, (C-466/12, EU:C:2014:76), the Court interpreted Article 3(1) of Directive 2001/29 as meaning that posting hyperlinks on a website to works freely available on another website does not constitute a ‘communication to the public’ as covered by that provision. That interpretation was also adopted in the order of 21 October 2014, *BestWater International*, (C-348/13, not published, EU:C:2014:2315) about such links using the technique known as ‘transclusion’ (‘framing’).

41 However, it follows from the reasoning of those decisions that, by them, the Court intended to refer only to the posting of hyperlinks to works which have been made freely available on another website with the consent of the rightholder, the Court having concluded that there was no communication to the public on the ground that the act of communication in question was not made to a new public.

42 In that context, it noted that, given that the hyperlink and the website to which it refers give access to the protected work using the same technical means, namely the internet, such a link must be directed to a new public. Where that is not the case, in particular, due to the fact that the work is already freely available to all internet users on another website with the authorisation of the copyright holders, that act cannot be categorised as a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29. Indeed, as soon as and as long as that work is freely available on the website to which the hyperlink allows access, it must be considered that, where the copyright holders of that work have consented to such a communication, they have included all internet users as the public (see, to that effect, judgment of 13 February 2014, *Svensson and Others*, EU:C:2014:76, paragraphs 24 to 28, and order of 21 October 2014, *BestWater International*, C-348/13, not published, EU:C:2014:2315, paragraphs 15, 16 and 18).

43 Accordingly, it cannot be inferred either from the judgment of 13 February 2014, *Svensson and Others*, (C-466/12, EU:C:2014:76) or from the order of 21 October 2014, *BestWater International*, (C-348/13, not published, EU:C:2014:2315) that posting, on a website, hyperlinks to protected works which have been made freely available on another website, but without the consent of the copyright holders of those works, would be excluded, as a matter of principle, from the concept of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29. Rather, those decisions confirm the importance of such consent under that provision, as the latter specifically provides that every act of communication of a work to the public is to be authorised by the copyright holder.

44 GS Media, the German, Portuguese and Slovak Governments and the European Commission claim, however, that the fact of automatically categorising all posting of such links to works published on other websites as 'communication to the public', since the copyright holders of those works have not consented to that publication on the internet, would have highly restrictive consequences for freedom of expression and of information and would not be consistent with the right balance which Directive 2001/29 seeks to establish between that freedom and the public interest on the one hand, and the interests of copyright holders in an effective protection of their intellectual property, on the other.

45 In that regard, it should be noted that the internet is in fact of particular importance to freedom of expression and of information, safeguarded by Article 11 of the Charter, and that hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information.

46 Furthermore, it may be difficult, in particular for individuals who wish to post such links, to ascertain whether website to which those links are expected to lead, provides access to works which are protected and, if necessary, whether the copyright holders of those works have consented to their posting on the internet. Such ascertaining is all the more difficult where those rights have been the subject of sub-licenses. Moreover, the content of a website to which a hyperlink enables access may be changed after the creation of that link, including the protected works, without the person who created that link necessarily being aware of it.

47 For the purposes of the individualised assessment of the existence of a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29, it is accordingly necessary, when the posting of a hyperlink to a work freely available on another website is carried out by a person who, in so doing, does not pursue a profit, to take account of the fact that that person does not know and cannot reasonably know, that that work had been published on the internet without the consent of the copyright holder.

48 Indeed, such a person, by making that work available to the public by providing other internet users with direct access to it (see, to that effect, judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraphs 18 to 23) does not, as a general rule, intervene in full knowledge of the consequences of his conduct in order to give customers access to a work illegally posted on the internet. In addition, where the work in question was already available with unrestricted access on the website to which the hyperlink provides access, all internet users could, in principle, already have access to it even the absence of that intervention.

49 In contrast, where it is established that such a person knew or ought to have known that the hyperlink he posted provides access to a work illegally placed on the internet, for example owing to the fact that he was notified thereof by the copyright holders, it is necessary to consider that the provision of that link constitutes a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29.

50 The same applies in the event that that link allows users of the website on which it is posted to circumvent the restrictions taken by the site where the protected work is posted in order to restrict the public's access to its own

subscribers, the posting of such a link then constituting a deliberate intervention without which those users could not benefit from the works broadcast (see, by analogy, judgment of 13 February 2014, Svensson and Others, C-466/12, EU:C:2014:76, paragraphs 27 and 31).

51 Furthermore, when the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder. In such circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29.

52 However, if there is no new public, there will be no communication to the 'public' within the meaning of that provision in the event that, referred to in paragraphs 40 to 42 of the present judgment, the works to which those hyperlinks allow access have been made freely available on another website with the consent of the rightholder.

53 Such an interpretation of Article 3(1) of Directive 2001/29 provides the high level of protection for authors sought by that directive. Indeed, under that directive and within the limits set by Article 5(3) thereof, copyright holders may act not only against the initial publication of their work on a website, but also against any person posting for profit a hyperlink to the work illegally published on that website and, under the conditions set out in paragraphs 49 and 50 of the present judgment, against persons having posted such links without pursuing financial gain. In that regard, it should in particular be noted that those rightholders, in all cases, have the possibility of informing such persons of the illegal nature of the publication of their work on the internet and of taking action against them if they refuse to remove that link, and those persons may not rely upon one of the exceptions listed in Article 5(3).

54 As regards the case in the main proceedings, it is undisputed that GS Media operates the GeenStijl website and that it provided the hyperlinks to the files containing the photos at issue, hosted on the Filefactory website, for profit. It is also undisputed that Sanoma had not authorised the publication of those photos on the internet. Moreover, it appears to follow from the presentation of the facts, as they result from the order for reference, that GS Media was aware of that latter fact and that it cannot therefore rebut the presumption that the posting of those links occurred in full knowledge of the illegal nature of that publication. In those circumstances, it appears that, subject to the checks to be made by the referring court, by posting those links, GS Media effected a 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, and it is unnecessary to assess in that context the other circumstances referred to by that court, referred to in paragraph 26 of the present judgment.

55 Having regard to the foregoing considerations, the answer to the questions raised is that Article 3(1) of Directive 2001/29 must be interpreted as meaning that, in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a 'communication to the public' within the meaning of that provision, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed.

On those grounds, the Court (Second Chamber) hereby rules:

Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that, in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a 'communication to the public' within the meaning of that provision, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed.

[Signatures]

OPINION OF ADVOCATE GENERAL

SZPUNAR

delivered on 12 December 2018 (1)

Case C-476/17

Pelham GmbH,

Moses Pelham,

Martin Haas

v

Ralf Hütter,

Florian Schneider-Esleben

(Request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling — Copyright and related rights — Right of reproduction — Reproduction of minimal parts of a phonogram (sampling) — Free use of a work — Consideration of the fundamental rights of the Charter of Fundamental Rights of the European Union)

Introduction

1. Sampling is the process of taking, by means of electronic equipment, a portion or sample (hence the name of the technique) of a phonogram for the purpose of using it as an element in a new composition in another phonogram. When reused, those samples are often mixed, modified and repeated in a loop in such a way as to be more or less recognisable in the new work. It should also be noted that those samples may be of different lengths; of a duration of between less than a second and several tens of seconds. Sampling is therefore a multifaceted phenomenon, thus making its legal characterisation difficult. (2)

2. Although the concept of composers reusing motifs from earlier works is probably as old as music itself, sampling is a new phenomenon made possible by modern recording and sound modification techniques, at first analogue, but now digital. Unlike the use of a fragment of another musical work in the composition of a new work, the idea behind sampling is to take the sounds fixed in the phonogram, that is to say the work performed and recorded, directly in order to incorporate them into the phonogram that contains the new work. Consequently, sampling is a phenomenon specific to the reality of music recorded in the form of phonograms. In other words, copying fragments from the score of a musical work to be incorporated into the score of a new work and subsequently performing that score does not constitute sampling.

3. Although sampling can be used in any musical genre, it is particularly important in rap and hip hop music which developed in the working-class areas of New York (United States) in the 1970s. (3) Rap and hip hop music is rooted in the practice of disc jockeys ('DJs') who splice, manipulate and mix sounds from music tracks recorded on vinyl. That practice has resulted in genuine compositions derived therefrom. Accordingly, sampling forms the basis of those musical genres. Some works may even consist only of a mix of samples.

4. Notwithstanding the importance of its role in that new musical creation, sampling is a genuine legal issue, especially since hip hop left the streets of the Bronx to enter the mainstream and became a significant source of revenue for its authors, performers and producers. The difficulty in the legal assessment of that phenomenon lies in the fact that it is not a question of the classic relationship between works under copyright law, but between phonogram, a commercial product, and work, an artistic creation. By sampling, the artist not only draws inspiration from the creations of others, but also appropriates the results of that effort and editorial investment in the form of the phonogram. That set-up, which is new in copyright law, (4) concerns issues such as the related rights of producers of phonograms, on the one hand, and the creative freedom of samplers, on the other.

5. This request for a preliminary ruling, which brings the issue of sampling within the scope of EU law, is the culmination of a lengthy legal saga at national level, (5) in which two of the highest German courts have already given a ruling. It is now for the Court of Justice to contribute to this debate in which 'postmodern' artistic freedom is set up against good old property rights.

Legal context

European Union law

6. Article 2(c) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (6) provides:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: ...

(c) for phonogram producers, of their phonograms; ...'

7. Under Article 5(3)(d), (k) and (o) and Article 5(5) of that directive:

'3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: ...

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose; ...

(k) use for the purpose of caricature, parody or pastiche; ...

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

...

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

8. Article 9(1)(b) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (7) provides:

'1. Member States shall provide the exclusive right to make available to the public, by sale or otherwise, the objects indicated in points (a) to (d), including copies thereof, hereinafter "the distribution right":

...

(b) for phonogram producers, in respect of their phonograms; ...'

9. Under the first subparagraph of Article 10(2) of that directive:

'Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organisations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works.'

German law

10. Directives 2001/29 and 2006/115 were transposed into German law by the Gesetz über Urheberrecht und verwandte Schutzrechte — Urheberrechtsgesetz (German Law on Copyright and Related Rights) of 9 September 1965 ('the UrhG'). The rights of phonogram producers are protected under Paragraph 85(1) of that law.

11. Paragraph 24 of the UrhG contains a general exception to copyright which is worded as follows:

'1. An independent work created in the free use of the work of another person may be published and exploited without the consent of the author of the work used.

2. Subparagraph 1 shall not apply to the use of a musical work in which a melody is recognisably taken from the work and used as the basis for a new work.'

Facts, the main proceedings, and the questions referred for a preliminary ruling

12. Mr Ralf Hütter and Mr Florian Schneider-Esleben, claimants at first instance and respondents in the appeal on a point of law in the main proceedings ('the respondents'), are members of the music group Kraftwerk. In 1977, the group published a phonogram which features the song *Metall auf Metall*. The respondents are the producers of that phonogram, but also the performers of the work in question and Mr Hütter is also the author (composer).

13. Pelham GmbH, a company governed by German law, defendant at first instance and appellant on a point of law in the main proceedings, is the producer of a phonogram which features the song *Nur mir*, performed, inter alia, by the singer Sabrina Setlur. Mr Moses Pelham and Mr Martin Haas, also defendants at first instance and appellants on a point of law in the main proceedings, are the authors of that work.

14. The respondents claim that Pelham, Mr Pelham and Mr Haas ('the appellants') copied — electronically sampled — approximately two seconds of a rhythm sequence from the song *Metall auf Metall* and incorporated it, as a continuous loop, in the song *Nur mir*. They submit that the appellants thus infringed the related right they hold as producers of the phonogram in question. In the alternative, the respondents invoke the intellectual property rights they hold as performers and allege an infringement of Mr Hütter's copyright in the musical work. In the further alternative, the respondents allege an infringement of competition law. However, the proceedings before the referring court concern only the rights of the respondents as producers of the phonogram.

15. The respondents requested the termination of the infringement, the award of damages, the provision of information and the surrender of the phonograms for the purposes of destruction. The court of first instance upheld the action and the appeal brought by the appellants in the main proceedings was unsuccessful. By judgment of 20 November 2008, the referring court, in response to an appeal on a point of law brought by the appellants, upheld the judgment of the appeal court and the case was referred back to the appeal court for further examination. The appeal court again dismissed the appeal brought by the appellants. By judgment of 13 December 2012, the referring court, in response to a second appeal on a point of law brought by the appellants, dismissed that appeal. That judgment was annulled by the Bundesverfassungsgericht (Federal Constitutional Court, Germany), (8) which referred the case back to the referring court.

16. In those circumstances, the Bundesgerichtshof (Federal Court of Justice, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- (1) Is there an infringement of the phonogram producer's exclusive right under Article 2(c) of Directive [2001/29] to reproduce its phonogram if very short audio snatches are taken from its phonogram and transferred to another phonogram?
- (2) Is a phonogram which contains very short audio snatches transferred from another phonogram a copy of the other phonogram within the meaning of Article 9(1)(b) of Directive [2006/115]?
- (3) Can the Member States enact a provision which — in the manner of Paragraph 24(1) of the [UrhG] — inherently limits the scope of protection of the phonogram producer's exclusive right to reproduce (Article 2(c) of Directive 2001/29) and to distribute (Article 9(1)(b) of Directive 2006/115) its phonogram in such a way that an independent work created in free use of its phonogram may be exploited without the phonogram producer's consent?
- (4) Can it be said that a work or other subject matter is being used for quotation purposes within the meaning of Article 5(3)(d) of Directive [2001/29] if it is not evident that another person's work or another person's subject matter is being used?
- (5) Do the provisions of EU law on the reproduction right and the distribution right of the phonogram producer (Article 2(c) of Directive 2001/29 and Article 9(1)(b) of Directive 2006/115) and the exceptions or limitations to those rights (Article 5(2) and (3) of Directive 2001/29 and Article 10(2), first sentence, of Directive 2006/115) allow any latitude in terms of implementation in national law?
- (6) In what way are the fundamental rights set out in the Charter of Fundamental Rights of the European Union ('the Charter') to be taken into account when ascertaining the scope of protection of the exclusive right of the phonogram producer to reproduce (Article 2(c) of Directive 2001/29) and to distribute (Article 9(1)(b) of Directive 2006/115) its phonogram and the scope of the exceptions or limitations to those rights (Article 5(2) and (3) of Directive 2001/29 and Article 10(2), first sentence, of Directive 2006/115)?

17. The request for a preliminary ruling was received at the Court on 4 August 2017. Written observations were submitted by the parties in the main proceedings, the German, French and United Kingdom Governments and the European Commission. All the parties concerned were represented at the hearing on 3 July 2018.

Analysis

18. In the present case, the Bundesgerichtshof (Federal Court of Justice) refers a number of questions to the Court for a preliminary ruling on the interpretation of EU law on copyright and related rights, and fundamental rights, in the event of circumstances such as those at issue in the main proceedings. I will consider those questions in the order in which they were submitted.

The first question referred

19. By its first question referred for a preliminary ruling, the referring court asks, in essence, whether Article 2(c) of Directive 2001/29 should be interpreted as meaning that taking an extract of a phonogram for the purpose of using it in another phonogram (sampling) infringes the exclusive right of the producer of the first phonogram to authorise or prohibit the reproduction of his phonogram within the meaning of that provision, where it is taken without the latter's permission.

20. The interested parties that have submitted observations in the present case have differing views on this subject. While the respondents and the French Government suggest that that question should be answered in the affirmative, the appellants, the other Governments and the Commission suggest, however, that the question should be answered in the negative. Before analysing the various arguments put forward, I believe it would be useful to examine a preliminary question.

Preliminary observations — Scope ratione temporis of Directive 2001/29

21. The referring court observes that Directive 2001/29, in Article 10 thereof, limits the temporal effect of that directive to any acts concluded after 22 December 2002, whereas the phonogram at issue in the main proceedings, which features the work entitled *Nur mir*, appeared in 1997.

22. It should be noted, however, that, according to Article 10(1) of Directive 2001/29, the directive applies in respect of all works and other subject-matter which are, on 22 December 2002, protected by the Member States' legislation, which is the case of the phonogram belonging to the respondents.

23. It is true that, under Article 10(2) of Directive 2001/29, the directive applies without prejudice to any acts concluded and rights acquired before 22 December 2002. It is also true that the Court has held, on the basis of that provision, that acts of using works or other subject-matter prior to that date are not affected by that directive. (9) However, the referring court takes the view that acts of exploitation of the phonogram at issue in the main proceedings also occurred after 22 December 2002. Directive 2001/29 is therefore applicable to those acts.

24. Having clarified that point, I will now examine the substance of the first question referred.

Substantive analysis

25. It is common ground between the parties in the main proceedings that the appellants reproduced an extract of approximately two seconds of a rhythm sequence from the phonogram of the work *Metall auf Metall* and incorporated it, as a continuous loop, with minimal modifications and in such a way as to be recognisable, as a rhythm sequence in the phonogram of the work *Nur mir*. (10)

26. In my opinion, it goes without saying that such an act amounts to reproduction within the meaning of Article 2 of Directive 2001/29, which concerns, as I recall, any 'direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part' of subject-matter. Sampling (generally) involves the direct and permanent reproduction, by digital means and in digital form, of a portion or sample of a phonogram. It therefore seems to be quite clear that that act amounts to an infringement of the right of the producers of the phonogram in question to authorise or prohibit such a reproduction made without their permission.

27. However, the appellants, certain Governments that have submitted observations, and the Commission have put forward a number of arguments to demonstrate that such a right of producers must be limited so that acts of reproduction such as the one at issue in the main proceedings do not fall within the scope of that exclusive right.

- *The de minimis threshold*

28. In the first place, those parties draw an analogy with the Court's case-law relating to copyright protection of extracts of works. The Court has held that copyright protection concerns works which are the expression of the intellectual creation of the author. Accordingly, extracts of works may be protected by copyright provided that they contain elements which are the expression of the intellectual creation of the author of the work. (11) With regard to the right of producers of phonograms protecting not intellectual creation but financial investment, some of the parties argue in the present case that that right protects only extracts of phonograms that are long enough to represent that investment. Consequently, taking — or sampling — very small extracts would not pose a threat to the financial interests of producers of phonograms and would not therefore fall within the scope of their exclusive right. Accordingly, according to some of the parties, the protection of the rights of phonogram producers is subject to a *de minimis* threshold, as is the protection of the rights of authors.

29. It seems to me that this reasoning is based on a misreading of the aforementioned case-law of the Court. In its judgment in *Infopaq International*, the Court found that the literary works at issue in that case consisted of words which, considered in isolation, were not protected by copyright. Only their original arrangement was protected as an intellectual creation of the author of the work. (12) That finding is obvious: the author of a literary work cannot appropriate common words or expressions, in the same way that a composer cannot claim an exclusive right over the notes or a painter a right over the colours. However, this in no way constitutes recognition of a *de minimis* threshold in the protection of works by copyright, but is simply the result of the definition of the work, within the meaning of copyright, as an intellectual creation of the author of the work. Although the Court held in that judgment that the reproduction of an extract comprising only eleven words of a newspaper article may fall within the scope of the exclusive right of reproduction set out in Article 2 of Directive 2001/29, (13) it is therefore difficult to find recognition of any *de minimis* threshold in that case-law.

30. The reasoning followed by the Court concerning extracts of a work cannot, however, be applied to phonograms. A phonogram is not an intellectual creation consisting of a composition of elements such as words, sounds, colours etc. A phonogram is a fixation of sounds which is protected, not by virtue of the arrangement of those sounds, but rather on account of the fixation itself. Consequently, although, in the case of a work, it is possible to distinguish the elements which may not be protected, such as words, sounds, colours etc., from the subject-matter which may be protected in the form of the original arrangement of those elements, such a distinction is not, however, possible in the case of a phonogram. A phonogram is not made up of small particles that are not protectable: it is protected as an indivisible whole. Moreover, in the case of a phonogram, there is no requirement for originality, because a phonogram, unlike a work, is protected, not by virtue of its creativeness, but rather on account of the financial and organisational investment. In other words, a sound or a word cannot be monopolised by an author as a result of its inclusion in a work. By contrast, from the moment they are recorded, the same sound performed by a musician or the same word read out loud constitute a phonogram which falls within the scope of copyright and related rights protection. The reproduction of such a recording is therefore the exclusive right of the producer of that phonogram. However, anyone may reproduce the same sound himself.

31. It is true that a similar concept of the *de minimis* threshold has been developed in the case-law of the United States courts on sampling. (14) It is, however, a radically different legal environment to that of continental Europe and EU law. Indeed, under US law, phonograms are protected by copyright in the same way as works and other subject-matter. It is therefore required that they display a minimum degree of originality. The existence of a *de minimis* threshold has been generally recognised in respect of all such subject-matter since the nineteenth century and that threshold is one of the criteria for assessing the application of the general exception of fair use. (15) I take the view that the reasoning of the US courts cannot therefore be applied to EU law.

32. Moreover, it seems to me that a *de minimis* threshold poses serious practical difficulties associated with its application. First of all, it is necessary to establish a threshold. Should it only be quantitative (length of the extract reproduced) or also qualitative (significance of the extract for the work in question)? In addition, should the threshold be assessed in relation to the source phonogram, the target work or both? To take the example of the phonograms at issue in the main proceedings, the extract taken by the appellants is approximately two seconds long. It would therefore seem that, a priori, it could fall below a *de minimis* threshold as claimed by some of the interested parties in the present case. However, it should be observed that the phonograms in question feature works belonging to two genres of music — electronic music in respect of *Metall auf Metall* and rap with regard to *Nur mir* — in which rhythm plays a key role in the composition of works. By copying a rhythm sequence from the song *Metall auf Metall* and incorporating it, as a continuous loop, in the song *Nur mir*, the appellants have effectively copied a substantial part of the first phonogram for use as the entire rhythm section of their work. (16) According to a qualitative approach, that would undoubtedly exceed any *de minimis* threshold. To be convinced of this, it is sufficient to delete the rhythm section in question from both phonograms and to listen to what remains. It is inevitable that the application of a *de minimis* threshold would lead to differences in national case-law and undermine the main objective pursued by Directive 2001/29, namely the harmonisation of copyright law within the Member States.

33. Lastly, it is, in my opinion, incorrect to limit the legitimate financial interests of producers of phonograms to protection against piracy, that is to say against the distribution or the communication of their phonograms as such to the public. Producers can exploit phonograms in other ways than by selling copies, such as authorising sampling and generating income therefrom. The fact that the right of the phonogram producer in the phonogram is aimed at protecting his financial investment does not preclude that right from covering other uses such as sampling. Furthermore, if the legislature has chosen to give producers, as an instrument to protect their financial interests, the exclusive right to authorise or prohibit any reproduction of their phonograms, in whole or in part, it does not seem logical to me to call that choice into question on the grounds that that such a right does not satisfy the objective pursued.

– **Level of protection equal to that of works**

34. Second, some of the interested parties that have submitted observations in the present case claim, again referring to the judgment in *Infopaq International*, (17) that producers of phonograms cannot be eligible for greater protection than that given to authors. I am not, however, convinced by that argument, for two reasons.

35. On the one hand, as in respect of the argument relating to the *de minimis* threshold, I take the view that that argument is based on a misinterpretation of the scope of the aforementioned judgment. In that judgment, the Court defined the concept of ‘work’ within the meaning of EU copyright law, by holding that it constituted the author’s own

intellectual creation. The same criterion for protection must be applied to extracts of a work, excluding from the protection the elements of that work which must clearly remain in the public domain, such as words taken in isolation or common expressions. It is therefore in no way a limitation of the protection but rather a definition of what should be protected. So far as concerns phonograms, the fact that the subject-matter of protection is different does not mean that the protection exceeds that given to works. Both works and phonograms are protected as a whole.

36. On the other hand, the right to the protection of the phonogram exists and applies quite independently of the protection of the work possibly featured in that phonogram. While the majority of phonograms contain the fixation of the performances of works protected by copyright, there are, however, other situations. The phonogram may, for example, contain the fixation of the performance of a work for which the protection has expired or even sounds which in no way constitute a work, such as sounds of nature. Such a phonogram constitutes the subject-matter of the protection in its own right. This is, moreover, confirmed by the definition of phonogram set out in the World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty (18), Article 2(b) of which states that a phonogram is 'the fixation of the sounds of a performance or of other sounds'. Although the rights of producers of phonograms are rights related to copyright, they are not, however, derived rights. Accordingly, the scope of protection of a phonogram is in no way subject to the scope of protection of the work that it may possibly contain.

- ***The analogy with the protection of the rights of makers of databases***

37. Third, some of the interested parties draw an analogy between the protection of phonograms and that of databases. Article 7(1) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (19) provides for a sui generis right for the maker of a database to prevent 'extraction and/or re-utilisation of the whole or of a substantial part' of that database. According to those parties, the situation of a producer of phonograms is similar to that of a maker of databases, in so far as, in both cases, the right granted to them is for the protection of their financial investments. Consequently, the protection of producers of phonograms should also be limited to the reproduction of a substantial part of the phonogram.

38. I am, however, more sympathetic to the argument put forward in that regard by the respondents, according to which a reading *a contrario* of Directive 2001/29 should be adopted in the present case. That directive contains no references to the protection of a substantial part of the phonogram. On the contrary, the producer of the phonogram is protected against unauthorised reproduction, 'in whole or in part', of the phonogram in question, in the same way as the author of a work (and, moreover, like the author of a database under Article 5(1) of Directive 96/9). Accordingly, the literal interpretation of Directives 96/9 and 2001/29 already excludes, in my opinion, any possibility of drawing an analogy between the scope of protection of a maker of databases and that of a producer of phonograms.

- ***Protection of the phonogram as a whole***

39. Fourth, nor can I agree with the argument put forward by the Commission that Article 11 of the WIPO Performances and Phonograms Treaty provides only for protection against the unauthorised reproduction of a phonogram as a whole. (20) Indeed, Article 11 of that treaty reproduces the wording of Article 10 of the Rome Convention. (21) According to the WIPO Guide to interpreting that convention, (22) at the Diplomatic Conference that adopted the text, the view was taken that 'the right of reproduction is not qualified, and is to be understood as including rights against partial reproduction of a phonogram'. (23) Article 11 of the abovementioned WIPO Treaty must therefore be interpreted in the same way. Furthermore, Article 2 of Directive 2001/29 expressly refers to the reproduction 'in part' of a phonogram.

40. I therefore propose that the answer to the first question referred for a preliminary ruling be that Article 2(c) of Directive 2001/29 must be interpreted as meaning that taking an extract of a phonogram for the purpose of using it in another phonogram (sampling) infringes the exclusive right of the producer of the first phonogram to authorise or prohibit the reproduction of his phonogram within the meaning of that provision, where it is taken without the latter's permission.

The second question referred

41. By its second question referred for a preliminary ruling, the referring court asks whether Article 9(1)(b) of Directive 2006/115 should be interpreted as meaning that a phonogram which contains extracts transferred from another phonogram (samples) is a copy of the other phonogram within the meaning of that provision.

42. The interested parties that have submitted observations in the present case, with the exception of the French Government, seem to analyse the first and second questions referred together and are inclined to give corresponding answers (although those answers differ from one party to the next). However, I rather take the view, as does the French government, that Article 9(1)(b) of Directive 2006/115 should be interpreted in the light of its objective and independently of Directive 2001/29.

43. Article 9 of Directive 2006/115 provides for a distribution right for, inter alia, phonogram producers. That right concerns making available to the public, by sale or otherwise, copies of subject-matter, including phonograms.

44. At international level, that same right is recognised under the Geneva Convention. (24) The European Union is not a party to that convention, but 22 Member States are. Moreover, that convention is probably referred to in recital 7 of Directive 2006/115 as one of the ‘international conventions on which the copyright and related rights laws of many Member States are based’ with which compliance should be ensured in the context of the harmonisation carried out by that directive.

45. The main purpose of the distribution right is to protect against what is commonly referred to as ‘piracy’, that is to say the production and distribution to the public of counterfeit copies of phonograms (and other subject-matter, such as films). Those copies, by replacing lawful copies, significantly decrease the revenue of phonogram producers and, consequently, the revenue that authors and performers may legitimately expect to receive from the sale of lawful copies. The threat of piracy is expressly referred to in recital 2 of Directive 2006/115 as one of the reasons for the adoption of that directive.

46. Piracy is characterised by the production and distribution of counterfeit copies of phonograms intended to replace lawful copies. It is for that reason that Article 1 of the Geneva Convention defines a duplicate as ‘an article which contains sounds taken directly or indirectly from a phonogram and which embodies all or a substantial part of the sounds fixed in that phonogram’. Only a copy of this kind gives listeners the opportunity to listen to the phonogram without having to purchase a lawful copy.

47. In so far as Article 9 of Directive 2006/115 provides for the same distribution right as the Geneva Convention and since both acts have the same objective — protection against piracy — I am of the opinion that the concept of ‘copy’ contained in that provision must be interpreted in a similar way to that convention and in the light of that objective, that is to say as meaning a copy which incorporates all or a substantial part of the sounds of a protected phonogram and which are intended to replace lawful copies thereof. I take the view that the scope of that provision is therefore narrower than that of Article 2 of Directive 2001/29.

48. Sampling is not used to produce a phonogram that replaces the original phonogram, but to create a new work independent of that phonogram. In the same way, a phonogram created through sampling does not incorporate all or a substantial part of the sounds of the original phonogram. Such a phonogram should not therefore be classified as a copy within the meaning of Article 9(1)(b) of Directive 2006/115.

49. Accordingly, I propose that the answer to the second question referred for a preliminary ruling is that Article 9(1)(b) of Directive 2006/115 must be interpreted as meaning that a phonogram which contains extracts transferred from another phonogram (samples) is not a copy of the other phonogram within the meaning of that provision.

The third question referred

50. By its third question referred for a preliminary ruling, the referring court asks, in essence, whether Article 2(c) of Directive 2001/29 and Article 9(1)(b) of Directive 2006/115 must be interpreted as precluding the application of a provision of the national law of a Member State, such as Paragraph 24(1) of the UrhG, according to which an independent work may be created in the free use of another work without the consent of the author of the work used, (25) to phonograms.

51. As I explained in my answer to the second question referred, Article 9 of Directive 2006/115 does not apply to reproductions of subject-matter which are not intended to replace lawful copies of thereof. This is particularly the case of independent works created by using elements of other works. Article 9 of Directive 2006/115, which does not apply to the situations governed by Paragraph 24 of the UrhG, does not preclude this. The analysis of the third question must therefore be limited to the interpretation of the provisions of Directive 2001/29.

52. Directive 2001/29 establishes, in Articles 2 to 4 thereof, the exclusive rights granted to certain categories of persons, in particular the right of phonogram producers to authorise or prohibit the reproduction of their phonograms, as provided for in Article 2(c) of that directive. Those rights are unconditional. However, Article 5 of Directive 2001/29 sets out a number of exceptions to and limitations on those exclusive rights that the Member States are authorised to make provision for under their national law. That list of exceptions and limitations is exhaustive, as confirmed by recital 32 of Directive 2001/29 and the Court's settled case-law. (26)

53. That list contains certain exceptions and limitations to exclusive rights to facilitate dialogue and artistic confrontation through the use of pre-existing works including, inter alia, the quotation exception provided for in Article 5(3)(d) of Directive 2001/29 and the caricature, parody or pastiche exception set out in Article 5(3)(k).

54. By contrast, the list of exceptions and limitations to exclusive rights set out in Article 5 of Directive 2001/29 does not include a general exception permitting the use of works of others for the purposes of creating a new work. It follows that the Member States are not entitled to provide for such an exception under national law if it were to extend further than the exceptions set out in Directive 2001/29, in particular those referred to in the previous paragraph.

55. That finding is not called into question by the fact that, as the referring court observes, under German law, the provisions of Paragraph 24(1) of the UrhG are not regarded as an exception to copyright, but rather as a limitation inherent in it. Article 5 of Directive 2001/29 does not distinguish between the exceptions and limitations to copyright (or related rights). Some of the situations provided for in that provision concern limitations which are as inherent in copyright as the possibility of free use of a work for the purposes of creating another. One can mention the example of the private copying exception, provided for in Article 5(2)(b) of Directive 2001/29. (27) The EU legislature nevertheless found it necessary to include that limitation in the list of possible exceptions and limitations.

56. Moreover, as the respondents rightly observe, to allow each Member State to introduce limitations not included in the list provided for in Article 5 of Directive 2001/29 which it considers to be inherent in copyright would threaten the effectiveness of the harmonisation of exceptions to copyright undertaken by the EU legislature. As stated in recital 31 of that directive, the elimination of differences in the application of those exceptions to copyright and related rights by the Member States is one of the objectives pursued by that directive.

57. It is true that Article 5(3)(o) of Directive 2001/29 contains a standstill clause as regards the application by the Member States of exceptions and limitations which already existed under national law at the time of entry into force of that directive. However, this is a question of the use of subject-matter in 'certain ... cases of minor importance'. I take the view that an exception as broad as that provided for in Paragraph 24(1) of the UrhG cannot be regarded as being limited to certain cases of minor importance. In addition, uses falling within the scope of Article 5(3)(o) of Directive 2001/29 must be limited to analogue uses. In any event, that provision cannot therefore cover the communication to the public by electronic means of phonograms containing extracts from other phonograms.

58. Lastly, according to Article 5(5) of Directive 2001/29, the exceptions and limitations provided for in that article apply only in certain special cases which do not adversely affect the normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder. That provision, commonly referred to as the 'three-step test', reflects similar provisions of international conventions on copyright and related rights. It constitutes a restriction of the exceptions and limitations applicable to exclusive rights. By contrast, that provision cannot be understood as authorising the introduction of exceptions and limitations not provided for or as extending the scope of the existing exceptions on the grounds that they do not adversely affect the normal exploitation of the work or other subject-matter or the legitimate interests of the holders of exclusive rights. (28)

59. I therefore propose that the answer to the third question referred for a preliminary ruling is that Article 2(c) of Directive 2001/29 must be interpreted as precluding the application of a provision of the national law of a Member State, such as Paragraph 24(1) of the UrhG, according to which an independent work may be created in the free use of another work without the consent of the author of the work used, to phonograms, in so far as it exceeds the scope of the exceptions and limitations to exclusive rights provided for in Article 5(2) and (3) of that directive.

The fourth question referred

60. By its fourth question referred for a preliminary ruling, the referring court asks, in essence, whether the quotation exception provided for in Article 5(3)(d) of Directive 2001/29 applies where an extract of a phonogram has been incorporated into another phonogram such that it forms an indistinguishable part of the second phonogram.
61. That question concerns the substantive issue of the application of the quotation exception in situations such as that at issue in the main proceedings.
62. The quotation exception has its origin and is mainly used in literary works. However, in my opinion, there is nothing to indicate that, under EU copyright law, the quotation exception may not concern other categories of works, in particular, musical works. (29) It must also be assumed that such a quotation may be effected through the reproduction of an extract of a phonogram, since the exceptions and limitations provided for in Article 5 of Directive 2001/29 concern the rights of phonogram producers as well as the rights of authors.
63. However, a quotation must satisfy a number of conditions in order to be considered lawful. Three of those conditions are particularly relevant with regard to use such as that at issue in the main proceedings.
64. The first of those conditions is expressly provided for in Article 5(3)(d) of Directive 2001/29 and concerns the purpose of the quotation in question. According to that provision, the quotation must be ‘for purposes such as criticism or review’. The use of the words ‘such as’ indicates that it is not an enumerative list of the purposes of the quotation, but rather an illustration. Many quotations, in particular artistic quotations, for example musical quotations, are not for purposes of criticism or review, but pursue other objectives. Nevertheless, the wording of the provision in question clearly indicates, in my opinion, that the quotation must enter into some kind of dialogue with the work quoted. Whether in confrontation, as a tribute to or in any other way, interaction between the quoting work and the work quoted is necessary.
65. The second condition for the lawfulness of a quotation, which arises in one way or another from the first, is the unaltered and distinguishable character of the quotation. Accordingly, in the first place, the extract quoted must be incorporated in the quoting work as such or, in any event, without modification (certain amendments being traditionally permitted, particularly translation). In the second place — this is the point directly raised by the question referred — the quotation must be incorporated into the quoting work so that it may be easily distinguished as a foreign element. That requirement may be inferred from the first condition: how could the quoting work enter into dialogue with or be compared to the work quoted if the two are indissociable from one another?
66. The two conditions referred to above make it possible to distinguish between quotation and plagiarism.
67. Sampling in general, and the use of the phonogram at issue in the main proceedings in particular, do not satisfy those conditions. The aim of sampling is not to enter into dialogue with, be used for comparative purposes, or pay tribute to the works used. Sampling is the act of taking extracts from other phonograms, which are used as raw materials, to be included in new works to form integral and unrecognisable parts. Moreover, those extracts are often modified and mixed in such a way that all original integrity is lost. It is not therefore a form of interaction but rather a form of appropriation. The case in point, where an extract from a phonogram — too short to allow any interaction — is repeated in a loop throughout the new phonogram for use as the rhythm section, is a perfect illustration.
68. In addition to those substantive conditions for the lawfulness of a quotation, Article 5(3)(d) of Directive 2001/29 also sets out a third formal requirement: to indicate the source, including the author’s name, unless it is not possible. Of course, in the case of a musical work, it is difficult (even if not impossible) to indicate the source of the quotation in the work itself. However, this can be done, for example, in the description of the quoting work, or even in its title. I do not believe that it is customary in hip hop or rap culture to indicate the sources of the samples that make up the works belonging to those genres of music. In any event, it is not apparent from the order for reference that the appellants tried to indicate the source of the extract used in the song *Nur mir* or the names of the respondents.
69. I therefore propose that the answer to the fourth question referred for a preliminary ruling be that the quotation exception provided for in Article 5(3)(d) of Directive 2001/29 does not apply where an extract of a phonogram has been incorporated into another phonogram without any intention of interacting with the first phonogram and in such a way that it forms an indistinguishable part of the second phonogram.
70. Among the exceptions and limitations provided for in Article 5(3) of Directive 2001/29 is the caricature, parody or pastiche exception (Article 5(3)(k) of Directive 2001/29) referred to above. That exception could possibly be taken

into account with regard to the use of extracts from one phonogram in another phonogram. That exception is not transposed as such into German law but could be inferred, according to the referring court, from Paragraph 24(1) of the UrhG. However, in my opinion, that court was right to dismiss the idea of applying that exception to the present case. That exception, like the quotation exception, presupposes interaction with the work used, or at least with its author, which is lacking in the case of sampling, such as that at issue in the main proceedings. (30)

The fifth question referred

71. By its fifth question referred for a preliminary ruling, the referring court seeks to determine the degree of latitude afforded to the Member States in transposing into their domestic law the provisions relating to the exclusive rights provided for in Articles 2 and 3 of Directive 2001/29 and Article 9 of Directive 2006/115 and the exceptions to those rights set out in Article 5 of Directive 2001/29 and Article 10 of Directive 2006/115. I note at the outset that the distribution right provided for in Article 9(1)(b) of Directive 2006/115 does not, in my opinion, apply to a situation such as that at issue in the main proceedings (31) and I will therefore analyse that question in the light of Directive 2001/29 alone.

72. As the referring court observes, that question arises from the case-law of the Bundesverfassungsgericht (Federal Constitutional Court) according to which, in so far as a directive affords the Member States no latitude in terms of transposing it into national law, the provisions transposing that directive into German law must be assessed, in principle, not in the light of fundamental rights guaranteed by the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany; 'the Basic Law') of 23 May 1949, but having regard to fundamental rights as guaranteed by the European Union's legal order. (32)

73. With regard to the review, in the light of fundamental rights, of national measures which implement the provisions of EU law, the Court considered, referring to Article 53 of the Charter, that, where an EU legal act calls for national implementing measures, 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 EU law are not thereby compromised. (33) Accordingly, a Member State cannot compromise the efficacy of a provision of EU law which is not contrary to the Charter by applying its own national standards of protection of fundamental rights. (34)

74. So far as concerns the degree of latitude afforded to the Member States in transposing Directive 2001/29, it is limited in several ways.

75. First, the rights set out in Articles 2 and 3 of Directive 2001/29, in particular the reproduction right of phonogram producers in respect of their phonograms, provided for in Article 2(c) of that directive, are worded unconditionally and the protection of those rights in the national law of the Member States is mandatory.

76. Second, the concepts used in the provisions of Directive 2001/29, which make no reference to the law of the Member States, are autonomous concepts of EU law. (35) This is the case, in particular, with regard to the concept of 'reproduction' within the meaning of Article 2 of that directive. (36) This is also the case of concepts which define the various exceptions and limitations to the exclusive rights governed by Directive 2001/29, in particular the concept of 'parody' used in Article 5(3)(k) of that directive. (37) The same must be true of the concept of 'quotation' within the meaning of Article 5(3)(d) of that directive.

77. Third and lastly, the exclusive rights provided for unconditionally and compulsorily for the Member States in Articles 2 to 4 of Directive 2001/29 are subject only to the exceptions and limitations listed exhaustively in Article 5(1) to (3) of that directive. In so far as those exceptions, except for one, are optional, the Member States have a degree of latitude in the choice and wording of the exceptions they consider appropriate to transpose into their national legislation. By contrast, they may not introduce exceptions not provided for or extend the scope of the existing exceptions. (38) It should be noted, however, that that degree of latitude is also limited, since some of those exceptions reflect the balance struck by the EU legislature between copyright and various fundamental rights, in particular the freedom of expression. Failing to provide for certain exceptions in domestic law could therefore be incompatible with the Charter. (39)

78. Accordingly, the Member States are required to ensure the protection, in their domestic law, of the exclusive rights set out in Articles 2 to 4 of Directive 2001/29, the scope of which is defined, where appropriate, by the Court's case-law, in so far as those rights can be limited only in the application of the exceptions and limitations listed

exhaustively in Article 5 of that directive. Member States cannot rely on a provision of national law, even one constitutional in nature or assuming the character of a fundamental right, to contest that obligation. (40) Member States are nevertheless free, as is the case for each directive in accordance with the third paragraph of Article 288 TFEU, as to the choice of form and methods they consider appropriate to implement in order to comply with that obligation. In the context of that choice, they may of course be guided, inter alia, by considerations of their constitutional principles and by fundamental rights, provided that the effectiveness of EU law is not undermined.

79. In the light of the foregoing, I propose that the answer to the fifth question referred for a preliminary ruling be that Member States are required to ensure the protection, in their domestic law, of the exclusive rights set out in Articles 2 to 4 of Directive 2001/29, in so far as those rights can be limited only in the application of the exceptions and limitations listed exhaustively in Article 5 of that directive. Member States are nevertheless free as to the choice of form and methods which they consider appropriate to implement in order to comply with that obligation.

The sixth question referred

Preliminary observations

80. By its sixth question referred for a preliminary ruling, the referring court asks how the fundamental rights set out in the Charter are to be taken into account when interpreting the scope of the exclusive rights of phonogram producers under Directives 2001/29 and 2006/115 and the limitations and exceptions to those rights provided for by those same directives.

81. In view of the wording, in very general terms, of that question, I doubt whether it would be useful for the referring court if it were answered in such a general way. However, it is clear that that question was raised in relation to the judgment of the Bundesverfassungsgericht (Federal Constitutional Court) (41) which, on the one hand, criticised the decision of the referring court upholding the judgment on appeal in favour of the respondents on the grounds of the freedom of artistic creation enshrined in Paragraph 5 of the Basic Law and, on the other, referred the case back to the referring court for reconsideration, where appropriate, in the light of the fundamental rights guaranteed by the European Union's legal order, by making a reference for a preliminary ruling to the Court if necessary.

82. It is therefore necessary to understand the sixth question referred for a preliminary ruling in the sense that the referring court asks, in essence, whether the freedom of the arts, enshrined in Article 13 of the Charter, constitutes a limitation or justifies the infringement of the exclusive right of phonogram producers to authorise or prohibit reproduction, in part, of their phonogram or use in another phonogram. In other words, that question raises the issue of the possible primacy of the freedom of the arts over the exclusive right of reproduction of phonogram producers.

83. Accordingly, the opposition between the freedom of the arts and the right related to copyright seems, at first view, paradoxical. The main objective of copyright and related rights is to promote the development of the arts by ensuring artists receive revenue from their works, so that they are not dependent on patrons and are free to pursue their creative activity. (42)

84. It is true that the present case does not directly concern the exclusive right of authors but rather the exclusive right of producers who benefit therefrom on account of their financial and organisational contribution. However, on the one hand, although the EU legislature has provided for exclusive rights for producers, it is because they contribute to the creation and dissemination of works in an auxiliary capacity. The right they hold in phonograms is a guarantee of a return on their investment. On the other hand, while a phonogram does not necessarily constitute the fixation of a performance of a work, it is normally the case of musical phonograms such as those at issue in the present case. In addition to producers, authors and performers are also normally involved in the making of a phonogram and their rights would also be infringed by the unauthorised use of the phonogram. While the case in the main proceedings may concern only the rights of phonogram producers, when the discussion turns to fundamental rights, the other interested parties cannot, in my opinion, be forgotten.

85. The present case is a perfect example. The respondents, in their capacity as the producers of the phonogram at issue, are also performing artists and one of them is the author of the work featured in that phonogram. (43) The configuration is similar on the other side of the dispute: the appellants are not only the composers of the work contained on the phonogram at issue but are also the producers thereof. The dispute in the main proceedings is not simply between an artist and a phonogram producer because those two functions are found on both sides. All of

these different interests must therefore be taken into account when striking a balance between respective fundamental rights.

The judgment of the Bundesverfassungsgericht (Federal Constitutional Court)

86. The aforementioned judgment of the Bundesverfassungsgericht (Federal Constitutional Court) (44) is mainly based on the interpretation of Paragraph 24(1) of the UrhG, in the light of the freedom of artistic creation enshrined in the first sentence of Paragraph 5(3) of the Basic Law. That court criticised the referring court for not taking sufficient account of the right of artistic freedom of the appellants in the interpretation of Paragraph 24(1) of the UrhG, in particular by finding that that provision did not apply where the artist was himself able to reproduce the sound sequence taken from a phonogram of another party. Such an interpretation entails a disproportionate restriction of creative freedom and, consequently, of the possibility of entering into an artistic dialogue. The remaining possibilities for the artist — whether to obtain a licence, reproduce the sounds himself or limit himself to the sounds available in existing sample databases — are insufficient, in particular in the case of musical genres which depend heavily on sampling such as hip hop.

87. Conversely, according to the Bundesverfassungsgericht (Federal Constitutional Court) the application of Paragraph 24(1) of the UrhG to sampling restricts the right to property, enshrined in Paragraph 14(1) of the Basic Law, of phonogram producers only slightly, in so far as the new works are not in competition with their phonograms. Paragraph 85(1) of the UrhG, which concerns the rights of phonogram producers, protects them only against commercial use made of their phonograms and piracy thereof, which is not the case of sampling, that being an artistic practice. Although, in the view taken by the Bundesverfassungsgericht (Federal Constitutional Court), the legislature could have provided for compensation for the holders of exclusive rights for the free use of a work (*freie Benutzung*) under Paragraph 24(1) of the UrhG, the absence of such compensation does not restrict the constitutional right to property.

88. Lastly, the Bundesverfassungsgericht (Federal Constitutional Court) adds that, in addition to the interpretation of Paragraph 24(1) of the UrhG in line with the freedom of the arts, the referring court can strike the correct balance between the rights in question by interpreting the rights of phonogram producers set out in Paragraph 85(1) of that law restrictively. Nevertheless, the Bundesverfassungsgericht (Federal Constitutional Court) observes that the case may thus fall within the scope of EU law in light of the harmonisation of the rights of phonogram producers under Directive 2001/29. In the event that that directive leaves no latitude to the Member States for its transposition, the referring court must ensure the protection of fundamental rights in accordance with the Charter, (45) if necessary by making a reference for a preliminary ruling to the Court. The referring court must also guarantee the maintenance of an inalienable minimum level of protection of fundamental rights, as defined in the Basic Law.

Assessment in the light of EU law

89. There is no restriction under EU copyright law of the exclusive rights set out in Directive 2001/29, similar to that provided for in Paragraph 24(1) of the UrhG. As I have discussed in the context of the answer to the third question referred, I take the view that that provision is not consistent with Directive 2001/29, in so far as it allows derogations from the exclusive rights which go farther than the exceptions set out in Article 5 of that directive, in particular the quotation, and caricature, parody or pastiche exceptions. However, those exceptions do not apply, in my opinion, to a situation such as that at issue in the main proceedings. (46) Reasoning similar to that followed by the Bundesverfassungsgericht (Federal Constitutional Court) is not therefore possible under EU law. How then should the exclusive right of reproduction of phonogram producers pursuant to Article 2(c) of Directive 2001/29 be assessed in the light of the fundamental rights enshrined in the Charter?

90. Copyright and related rights, inasmuch as they establish a rightholders' monopoly over intellectual or artistic property such as works, phonograms etc., are likely to restrict the exercise of certain fundamental rights, in particular, the freedom of expression and the freedom of the arts. In addition, intellectual property is itself protected as a fundamental right to property. It is therefore necessary to strike a balance between those rights, none of which are, in principle, superior to the others. (47) So far as concerns copyright, copyright law itself achieves this through the provision of a number of limitations and exceptions. The purpose of those limitations and exceptions is to strike a fair balance between, on the one hand, the rights and interests of rightholders of copyright and related rights and, on the other, various other public or private rights, including the protection of fundamental rights.

91. The freedom of the arts, referred to in the first sentence of Article 13 of the Charter, is a form of freedom of expression, set out in Article 11 of the Charter. The system provided for under the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), does not provide for such a freedom as an autonomous right, with the freedom of the arts being inferred from the freedom of expression enshrined in Article 10 of that convention.

92. Freedom of expression, from which the freedom of the arts emanates, concerns above all obtaining and disseminating ideas and information and, consequently, as regards art, the content of works. (48) It is the censorship of that content which is particularly likely to lead to a violation of the freedom of the arts. (49) I take the view, however, that the freedom of artists is less extensive so far as concerns acquiring the means of their creation. Artists must adapt to societal living conditions and the situation of the market on which they operate. The freedom of the arts does not free artists from the constraints of everyday life. Is it conceivable for a painter to rely on his freedom of creation so as not to pay for his paint and paintbrushes? (50) (51)

93. It is true that, in musical genres such as hip hop or rap, sampling plays a special role which provides not only the means of creation, but also constitutes an artistic process in itself. However, this cannot be a decisive argument in the legal discussion, since the interpretation of rules of law must be the same for all. If the sampling of extracts of phonograms without the authorisation of the rightholder were considered lawful, that would be true for hip hop artists as well as all other musicians.

94. Artists must be particularly aware of the limits and restrictions that life imposes on creative freedom where they concern the rights and fundamental freedoms of others, in particular their right to property, including intellectual property. In such cases, the balancing of different rights and interests is a particularly complex exercise and there is rarely a 'one size fits all' solution. That balancing exercise must, in a democratic society, be undertaken first of all by the legislature, which embodies the general interest. The legislature enjoys a broad margin of discretion in that regard. (52) The application of legislative solutions is then subject to the control of the courts which are in turn responsible for ensuring compliance with fundamental rights in the context of that application to specific cases. However, except in exceptional cases, (53) that control must normally be undertaken within the limits of the applicable provisions enjoying a presumption of validity, including with regard to fundamental rights. If only one solution were considered compatible with fundamental rights, the margin of discretion of the legislature would be zero.

95. As I have already stated, EU copyright law takes account of various rights and interests which could conflict with the exclusive rights of authors and other rightholders, in particular the freedom of the arts. Exceptions to the exclusive rights such as the quotation, and caricature, parody and pastiche exceptions facilitate dialogue and artistic confrontation through references to pre-existing works. Within the framework of the current rules, that confrontation may occur, in particular, in the following three ways. First, by the creation of works which, while drawing on pre-existing works, do not directly reproduce protected elements, second, in the context of existing limitations and exceptions to exclusive rights and finally, third, by obtaining the necessary authorisation.

96. However, I am not of the opinion that the freedom of the arts, as provided for in Article 13 of the Charter, requires the introduction or recognition of an exception similar to that provided for in Paragraph 24 of the UrhG, which covers uses such as those at issue in the main proceedings, in which the works or other subject-matter are used, not for purposes of interaction, but rather in the creation of new works bearing no relation to the pre-existing works. The requirement of obtaining a licence for such use does not restrict, in my opinion, the freedom of the arts to a degree that extends beyond normal market constraints, especially since those new works often generate significant revenue for their authors and producers. So far as concerns the argument that, in certain cases, obtaining a licence may prove impossible, for example in the event that the rightholders refuse, I take the view that the freedom of the arts cannot guarantee the possibility of free use of whatever is wanted for creative purposes.

97. Moreover, I do not believe that the financial interests of phonogram producers — the justification for their exclusive rights — are limited to protection against commercial use and piracy. Under EU law, this is true of the distribution right. (54) By contrast, the reproduction right is formulated broadly and covers all possible forms of exploitation of the phonogram. In addition, it seems fair that phonogram producers should share in the revenue derived from the exploitation of works created using their phonogram. Furthermore, in balancing fundamental rights, it is necessary to take account of the rights and material interests of phonogram producers, as well as the rights of performers and authors, including their moral rights. Moral rights, particularly the right to the integrity of the work, may legitimately preclude use of that work, even where that use is covered by an exception. (55)

98. The protection granted to phonogram producers under EU and international law may be considered excessive, in so far as it is equal to that of authors (as regards material rights). In my opinion, it should not be ruled out that the balancing of various rights and interests by the EU legislature may lead, in the future, to the introduction of an exception to the exclusive rights of authors and other rightholders for uses such as sampling. However, that is not for the Court to do. In the judicial review of the application of the current provisions, fundamental rights play a different role: a sort of *ultima ratio* which cannot justify departing from the wording of the relevant provisions except in cases of gross violation of the essence of a fundamental right. (56) Such is not the case, in my opinion, with regard to the process of sampling under EU copyright law.

99. I therefore propose that the answer to the sixth question referred for a preliminary ruling be that the exclusive right of phonogram producers under Article 2(c) of Directive 2001/29 to authorise or prohibit reproduction, in part, of their phonogram in the event of its use for sampling purposes is not contrary to the freedom of the arts as enshrined in Article 13 of the Charter.

Conclusion

100. In the light of all the foregoing, I propose that the Court should answer the questions referred for a preliminary ruling by the Bundesgerichtshof (Federal Court of Justice, Germany) as follows:

- (1) Article 2(c) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that taking an extract of a phonogram for the purpose of using it in another phonogram (sampling) infringes the exclusive right of the producer of the first phonogram to authorise or prohibit the reproduction of his phonogram within the meaning of that provision where it is taken without the latter's permission.
- (2) Article 9(1)(b) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property must be interpreted as meaning that a phonogram which contains extracts transferred from another phonogram (samples) is not a copy of the other phonogram within the meaning of that provision.
- (3) Article 2(c) of Directive 2001/29 must be interpreted as precluding the application of a provision of the national law of a Member State, such as Paragraph 24(1) of the Gesetz über Urheberrecht und verwandte Schutzrechte — Urheberrechtsgesetz (German Law on Copyright and Related Rights) of 9 September 1965, according to which an independent work may be created in the free use of another work without the consent of the author of the work used, to phonograms, in so far as it exceeds the scope of the exceptions and limitations to exclusive rights provided for in Article 5(2) and (3) of that directive.
- (4) The quotation exception provided for in Article 5(3)(d) of Directive 2001/29 does not apply where an extract of a phonogram has been incorporated into another phonogram without any intention of interacting with the first phonogram and in such a way that it forms an indistinguishable part of the second phonogram.
- (5) Member States are required to ensure the protection, in their domestic law, of the exclusive rights set out in Articles 2 to 4 of Directive 2001/29, in so far as those rights can be limited only in the application of the exceptions and limitations listed exhaustively in Article 5 of that directive. Member States are nevertheless free as to the choice of form and methods they consider appropriate to implement in order to comply with that obligation.
- (6) The exclusive right of phonogram producers under Article 2(c) of Directive 2001/29 to authorise or prohibit reproduction, in part, of their phonogram in the event of its use for sampling purposes is not contrary to the freedom of the arts as enshrined in Article 13 of the Charter of Fundamental Rights of the European Union.

¹ Original language: French.

² See, in particular, Piesiewicz, P., 'Dzieło muzyczne i nowe technologie (aspekty prawne "samplingu")', *Państwo i prawo*, n° 3/2006.

- [3](#) For the history of hip hop and rap, see Evans, T.M., 'Sampling, Looping, and Mashing... Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law', *Fordham Intellectual Property, Media and Entertainment Law Journal*, 2011, vol. 21, No 4, p. 843.
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- [4](#) Although one of the first cases concerning sampling, *Grand Upright Music, Ltd v. Warner Bros. Records Inc.*, heard by the United States District Court for the Southern District of New York (United States), dates back to 1991.
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- [5](#) The application initiating proceedings at first instance in the main proceedings was lodged on 8 March 1999.
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- [6](#) OJ 2001 L 167, p. 10.
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- [7](#) OJ 2006 L 376, p. 28.
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- [8](#) Judgment of 31 May 2016, 1 BvR 1585/13.
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- [9](#) See, to that effect, judgment of 27 June 2013, *VG Wort and Others* (C-457/11 to C-460/11, EU:C:2013:426, paragraph 1 of the operative part).
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- [10](#) It should be noted that there are several versions of that track. I am referring to the basic version, simply entitled *Nur mir*.
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- [11](#) Judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465, paragraph 39 and paragraph 1 of the operative part).
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- [12](#) Judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465, paragraphs 44 to 46).
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- [13](#) Judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465, paragraph 1 of the operative part).
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- [14](#) See, inter alia, judgment of the United States Court of Appeals, Ninth Circuit, of 2 June 2016, *VMG Salsoul, LLC v. Ciccone*.
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- [15](#) See Section 107 of the Copyright Law of the United States.
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- [16](#) The same finding was made, according to the information contained in the order for reference, by the appellate court in the main proceedings, according to which the extract at issue constitutes 'the dominant part' of the song *Metall auf Metall* and appears continuously in the song *Nur mir*.
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- [17](#) Judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465).
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- [18](#) WIPO Performances and Phonograms Treaty adopted in Geneva on 20 December 1996 and entered into force on 20 May 2002, to which the European Union is a party pursuant to Council Decision 2000/278/EC of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (OJ 2000 L 89, p. 6). In accordance with recital 15 of Directive 2001/29, that directive also serves to implement that treaty.
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- [19](#) OJ 1996 L 77, p. 20.
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- [20](#) That provision states that 'producers of phonograms shall enjoy the exclusive right of authorising the direct or indirect reproduction of their phonograms, in any manner or form'.
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- [21](#) Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, signed at Rome on 26 October 1961.
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- [22](#) *Guide to the Copyright and Related Rights Treaties administered by WIPO*, WIPO, Geneva, 2003.
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- [23](#) *Ibid.*, p. 154.
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- [24](#) Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms of 29 October 1971, entered into force on 18 April 1973.
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- [25](#) Paragraph 24 of the *UrhG* expressly refers only to the use of works. However, according to the referring court, that provision is intended to apply, by analogy, to the use of other subject-matter, inter alia, phonograms.
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- [26](#) See, in the last place, judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634, paragraph 16).
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- [27](#) See, with regard to the inherent nature of that limitation, my Opinion in *EGEDA and Others* (C-470/14, EU:C:2016:24, points 15 and 16).
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- [28](#) See, to that effect, judgment of 10 April 2014, *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraphs 26 and 27).
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- [29](#) See, inter alia, Mania, G., 'Cytat w muzyce — o potrzebie reinterpretacji przesłanek', *Zeszyty Naukowe Uniwersytetu Jagiellońskiego*, No 1/2017, p. 63 to 88. See, also, Vivant, M., Bruguière, J.-M., *Droit d'auteur et droits voisins*, Dalloz, Paris, 2015, p. 571. The Court appears tacitly to have accepted the quotation exception with regard to a photographic work (see judgment of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, paragraphs 122 and 123).
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[30](#) Admittedly, in its judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds* (C-201/13, EU:C:2014:2132), the Court did not impose strict requirements on the concept of parody. Nevertheless, it held that the concept of parody ‘evokes’ another work (see paragraph 2 of the operative part). In my opinion, it is moreover clear that, in the circumstances of the present case, the work entitled *Nur mir* is neither a parody nor a caricature of the work *Metall auf Metall*. As for the concept of pastiche, it consists in the imitation of the style of a work or an author without necessarily taking any elements of that work. However, the present case concerns the reverse situation whereby a phonogram is taken to create a work in a completely different style.

[31](#) See the section of this Opinion devoted to answering the second question.

[32](#) That case-law was recalled by the Bundesverfassungsgericht (Federal Constitutional Court) in its judgment of 31 May 2016, 1 BvR 1585/13, which is the basis of the present order for reference (see point 81 of this Opinion).

[33](#) Judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 60).

[34](#) See, to that effect, judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 63).

[35](#) See, in particular, judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465, paragraph 27).

[36](#) See, judgment of 16 July 2009, *Infopaq International* (C-5/08, EU:C:2009:465, paragraph 32).

[37](#) Judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds* (C-201/13, EU:C:2014:2132, paragraph 15).

[38](#) Judgment of 10 April 2014, *ACI Adam and Others* (C-435/12, EU:C:2014:254, paragraphs 26 and 27).

[39](#) See also my Opinion in *Funke Medien NRW* (C-469/17, EU:C:2018:870, points 38 and 39).

[40](#) See, to that effect, judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 59 and the case-law cited).

[41](#) Judgment of 31 May 2016, 1 BvR 1585/13.

[42](#) That function of copyright and related rights is, moreover, expressly confirmed by recitals 9 to 11 of Directive 2001/29.

[43](#) The rights they hold as authors and as performers have, moreover, been raised in the alternative in the proceedings at first instance (see point 14 of this Opinion).

[44](#) The present analysis is based on the English-language version of Press Release No 29/2016 of 31 May 2016 of the Bundesverfassungsgericht (Federal Constitutional Court), available on its website, and, with regard to the descriptive part, on commentaries on that judgment, in particular, Duhanic, I., ‘Copy this sound! The cultural importance of sampling for hip hop music in copyright law — a copyright law analysis of the sampling decision of the German Federal Constitutional Court’, *Journal of Intellectual Property Law and Practice*, 2016, vol. 11, No 12, p. 932 to 945; Mezei, P., ‘De Minimis and Artistic Freedom: Sampling on the Right Track?’, *Zeszyty Naukowe Uniwersytetu Jagiellońskiego*, 2018, vol. 139, No 1, p. 56 to 67; and Mimler, M.D., *Metall auf Metall* — German Federal Constitutional Court discusses the permissibility of sampling of music tracks, *Queen Mary Journal of Intellectual Property*, 2017, vol. 7, No 1, p. 119 to 127.

[45](#) In accordance with the case-law of the Bundesverfassungsgericht (Federal Constitutional Court) referred to in point 72 of this Opinion.

[46](#) See the section of this Opinion devoted to answering the fourth question referred.

[47](#) See, to that effect, most recently, judgment of 18 October 2018, *Bastei Lübbe* (C-149/17, EU:C:2018:841, paragraph 44).

[48](#) According to the formula adopted by the European Court of Human Rights (‘the ECtHR’), ‘freedom of expression, as secured in paragraph 1 of Article 10 [of the ECHR], constitutes one of the essential foundations of a democratic society, indeed one of the basic conditions for its progress and for the self-fulfilment of the individual. Subject to paragraph 2, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the population (ECtHR, 25 January 2007, *Vereinigung Bildender Künstler v. Austria*, CE:ECHR:2007:0125JUD006835401, § 26).

[49](#) See ECtHR, 25 January 2007, *Vereinigung Bildender Künstler v. Austria*, CE:ECHR:2007:0125JUD006835401).

[50](#) Admittedly, a different assessment could be made in the event that such difficulties are encountered by artists in order to prevent them from creating on the grounds, specifically, of the content of their work (see *Afterimage*, a film by A. Wajda) concerning the harassment of the Polish painter Władysław Strzemiński during the Stalin era. Those are, however, extreme conditions.

[51](#) In that regard, the ECtHR has held that ‘artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10 [of the ECHR]. Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, “duties and responsibilities”; their scope will depend on his situation and the means he uses’ (ECtHR, 25 January 2007, *Vereinigung Bildender Künstler v. Austria*, CE:ECHR:2007:0125JUD006835401, § 26).

[52](#) See, to that effect, ECtHR, 10 January 2013, *Ashby Donald and Others v. France* (CE:ECHR:2013:0110JUD003676908, § 40).

[53](#) See, for example, Case C-469/17 *Funke Medien NRW*, in which I delivered an Opinion on 25 October 2018 (EU:C:2018:870).

[54](#) See the section of this Opinion devoted to answering the second question referred.

[55](#) See, to that effect, judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds* (C-201/13, EU:C:2014:2132, paragraphs 27 to 31).

[56](#) See, to that effect, most recently, judgment of 18 October 2018, *Bastei Lübbe* (C-149/17, EU:C:2018:841, paragraph 46).

JUDGMENT OF THE COURT (Grand Chamber)

29 July 2019 [\(*\)](#)

(Reference for a preliminary ruling — Copyright and related rights — Directive 2001/29/EC — Information Society — Harmonisation of certain aspects of copyright and related rights — Sampling — Article 2(c) — Phonogram producer — Reproduction right — Reproduction ‘in part’ — Article 5(2) and (3) — Exceptions and limitations — Scope — Article 5(3)(d) — Quotations — Directive 2006/115/EC — Article 9(1)(b) — Distribution right — Fundamental rights — Charter of Fundamental Rights of the European Union — Article 13 — Freedom of the arts)

In Case C-476/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), by decision of 1 June 2017, received at the Court on 4 August 2017, in the proceedings

Pelham GmbH,

Moses Pelham,

Martin Haas

v

Ralf Hütter,

Florian Schneider-Esleben,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Arabadjiev, M. Vilaras, T. von Danwitz, C. Toader, F. Biltgen and C. Lycourgos, Presidents of Chambers, E. Juhász, M. Ilešič (Rapporteur), L. Bay Larsen and S. Rodin, Judges,

Advocate General: M. Szpunar,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 3 July 2018,

after considering the observations submitted on behalf of:

- Pelham GmbH, Mr Pelham and Mr Haas, by A. Walter, Rechtsanwalt,
- Mr Hütter and Mr Schneider-Esleben, by U. Hundt-Neumann and H. Lindhorst, Rechtsanwälte,
- the German Government, by T. Henze, M. Hellmann and J. Techert, acting as Agents,
- the French Government, by D. Colas, D. Segoin and E. Armoët, acting as Agents,
- the United Kingdom Government, by Z. Lavery and D. Robertson, acting as Agents, and by N. Saunders, Barrister,
- the European Commission, by T. Scharf and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 December 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(c) and Article 5(3)(d) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10), and of Article 9(1)(b) and of the first paragraph of Article 10(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28).

2 The request has been made in proceedings between Pelham GmbH, Mr M. Pelham and Mr M. Haas ('Pelham'), on the one hand, and Mr R. Hütter and Mr F. Schneider-Esleben ('Hütter and another'), on the other, concerning the use, in the recording of the song '*Nur mir*', composed by Mr Pelham and Mr Haas and produced by Pelham GmbH, of an approximately 2-second rhythm sequence from a phonogram of the group Kraftwerk, of which Hütter and another are members.

Legal context

International law

3 Article 1 of the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms, signed in Geneva on 29 October 1971 ('the Geneva Convention'), reads as follows:

'For the purposes of this Convention:

- (a) "phonogram" means any exclusively aural fixation of sounds of a performance or of other sounds;
- (b) "producer of phonograms" means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds;
- (c) "duplicate" means an article which contains sounds taken directly or indirectly from a phonogram and which embodies all or a substantial part of the sounds fixed in that phonogram;
- (d) "distribution to the public" means any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public or any section thereof.'

4 Article 2 of the Geneva Convention provides:

'Each Contracting State shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.'

European Union law

Directive 2001/29

5 Recitals 3, 4, 6, 7, 9, 10, 31 and 32 of Directive 2001/29 state:

(3) The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

...

(6) Without harmonisation at [EU] level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.

(7) The [EU] legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the functioning of the internal market need not be removed or prevented.

...

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. ...

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

...

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. ... In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.

(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.'

6 Under the heading 'Reproduction right', Article 2 of Directive 2001/29 provides:

'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

...

(c) for phonogram producers, of their phonograms;

...'

7 Article 5 of Directive 2001/29 sets out the exceptions and limitations to the rights referred to in Articles 2 to 4 thereof. Article 5(3) and (5) provides:

‘3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

...

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

...

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.’

Directive 2006/115

8 Recitals 2, 5 and 7 of Directive 2006/115 state:

‘(2) Rental and lending of copyright works and the subject matter of related rights protection is playing an increasingly important role in particular for authors, performers and producers of phonograms and films. Piracy is becoming an increasing threat.

...

(5) The creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky. The possibility of securing that income and recouping that investment can be effectively guaranteed only through adequate legal protection of the rightholders concerned.

...

(7) The legislation of the Member States should be approximated in such a way as not to conflict with the international conventions on which the copyright and related rights laws of many Member States are based.’

9 Under the heading ‘Object of harmonisation’, Article 1(1) of that directive provides:

‘In accordance with the provisions of this Chapter, Member States shall provide, subject to Article 6, a right to authorise or prohibit the rental and lending of originals and copies of copyright works, and other subject matter as set out in Article 3(1).’

10 Under the heading ‘Distribution right’, Article 9(1) of the directive provides:

‘Member States shall provide the exclusive right to make available to the public, by sale or otherwise, the objects indicated in points (a) to (d), including copies thereof, hereinafter “the distribution right”:

...

(b) for phonogram producers, in respect of their phonograms;

...’

11 The first paragraph of Article 10(2) of Directive 2006/115 reads as follows:

‘... any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organisations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works.’

German law

12 Paragraph 24 of the Gesetz über Urheberrecht und verwandte Schutzrechte — Urheberrechtsgesetz (Law on copyright and related rights) of 9 September 1965 (BGBl. 1965 I, p. 1273; ‘the UrhG’) provides:

‘1. An independent work created in the free use of the work of another person may be published and exploited without the consent of the author of the work used.

2. Subparagraph 1 shall not apply to the use of a musical work in which a melody is recognisably taken from the work and used as the basis for a new work.’

13 Paragraph 85(1) of the UrhG, which transposes Article 2(c) of Directive 2001/29 and Article 9 of Directive 2006/115, provides, in its first sentence, first and second cases, that the producer of a phonogram has the exclusive right to reproduce and distribute the phonogram.

The case in the main proceedings and the questions referred for a preliminary ruling

14 Hütter and another are members of the group Kraftwerk. In 1977, that group published a phonogram featuring the song ‘*Metall auf Metall*’.

15 Mr Pelham and Mr Haas composed the song ‘*Nur mir*’, which was released on phonograms recorded by Pelham GmbH in 1997.

16 Hütter and another submit that Pelham electronically copied (‘sampled’) approximately 2 seconds of a rhythm sequence from the song ‘*Metall auf Metall*’ and used that sample in a continuous loop in the song ‘*Nur mir*’, although it would have been possible for them to play the adopted rhythm sequence themselves.

17 As the phonogram producers, Hütter and another’s principal claim is that Pelham infringed their copyright-related right. In the alternative, they claim that their intellectual property right as performers and Mr Hütter’s copyright in the musical work were infringed. In the further alternative, they claim that Pelham infringed competition law.

18 Hütter and another brought an action before the Landgericht Hamburg (Regional Court, Hamburg, Germany) seeking a prohibitory injunction, damages, the provision of information and the surrender of the phonograms for the purposes of their destruction.

19 That court upheld the action, and Pelham’s appeal before the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany) was dismissed. Following an appeal on a point of law (*Revision*) brought by Pelham before the Bundesgerichtshof (Federal Court of Justice, Germany), the judgment of the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg) was overturned and the case was referred back to that court for re-examination. That court dismissed Pelham’s appeal a second time. In a judgment of 13 December 2012, the Bundesgerichtshof (Federal Court of Justice) once again dismissed Pelham’s appeal on a point of law. That judgment was overturned by the Bundesverfassungsgericht (Federal Constitutional Court, Germany), which referred the case back to the referring court.

20 The referring court notes that the outcome of the *Revision* proceedings turns on the interpretation of Article 2(c) and Article 5(3)(d) of Directive 2001/29 and of Article 9(1)(b) and Article 10(2) of Directive 2006/115.

21 According to the referring court, it must, in the first place, be determined whether, by using Hütter and another’s sound recording in the production of its own phonogram, Pelham encroached on the exclusive right of Hütter and another to reproduce and distribute the phonogram featuring the song ‘*Metall auf Metall*’, as laid down in Paragraph 85(1) of the UrhG, which transposes Article 2(c) of Directive 2001/29 and Article 9 of Directive 2006/115. In particular, it must be determined whether such an infringement can be found where, as in the present case, 2 seconds of a rhythm sequence are taken from a phonogram then transferred to another phonogram, and whether that amounts to a copy of another phonogram within the meaning of Article 9(1)(b) of Directive 2006/115.

22 In the second place, if it is found that there has been an infringement of the phonogram producer’s right, the question arises of whether Pelham may rely on the ‘right to free use’, laid down in Paragraph 24(1) of the UrhG, which is applicable by analogy to the phonogram producer’s right, according to which an independent work created in the free use of the work of another person may be published or exploited without the consent of the author of the work used. The referring court notes, in that context, that that provision has no express equivalent in EU law and therefore asks

whether that right is consistent with EU law in the light of the fact that that provision limits the scope of protection of the phonogram producer's exclusive right to reproduce and distribute his or her phonogram.

23 In the third place, the national law exceptions and limitations to the reproduction right referred to in Article 2(c) of Directive 2001/29 and to the distribution right referred to in Article 9(1)(b) of Directive 2006/115 are based on Article 5(3) of Directive 2001/29 and the first paragraph of Article 10(2) of Directive 2006/115. However, the referring court harbours doubts as to the interpretation of those provisions in circumstances such as those at issue in the main proceedings.

24 In the fourth place, the referring court notes that EU law must be interpreted and applied in the light of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union ('the Charter'). In that context, it asks whether the Member States have any discretion for the purposes of the transposition into national law of Article 2(c) and Article 5(2) and (3) of Directive 2001/29 and of Article 9(1)(b) and the first paragraph of Article 10(2) of Directive 2006/115. The referring court notes that, according to case-law of the Bundesverfassungsgericht (Federal Constitutional Court), national legislation which transposes an EU directive must be measured, as a rule, not against the fundamental rights guaranteed by the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany) of 23 May 1949 (BGBl. 1949 I, p. 1), but solely against the fundamental rights guaranteed by EU law, where that directive does not allow the Member States any discretion in its transposition. That court also harbours doubts as to the interpretation of those fundamental rights in circumstances such as those at issue in the main proceedings.

25 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is there an infringement of the phonogram producer's exclusive right under Article 2(c) of Directive 2001/29 to reproduce its phonogram if very short audio snatches are taken from its phonogram and transferred to another phonogram?

(2) Is a phonogram which contains very short audio snatches transferred from another phonogram a copy of the other phonogram within the meaning of Article 9(1)(b) of Directive 2006/115?

(3) Can the Member States enact a provision which — in the manner of Paragraph 24(1) of [the UrhG] — inherently limits the scope of protection of the phonogram producer's exclusive right to reproduce (Article 2(c) of Directive 2001/29) and to distribute (Article 9(1)(b) of Directive 2006/115) its phonogram in such a way that an independent work created in free use of its phonogram may be exploited without the phonogram producer's consent?

(4) Can it be said that a work or other subject matter is being used for quotation purposes within the meaning of Article 5(3)(d) of Directive 2001/29 if it is not evident that another person's work or another person's subject matter is being used?

(5) Do the provisions of EU law on the reproduction right and the distribution right of the phonogram producer (Article 2(c) of Directive 2001/29 and Article 9(1)(b) of Directive 2006/115) and the exceptions or limitations to those rights (Article 5(2) and (3) of Directive 2001/29 and the first paragraph of Article 10(2) of Directive 2006/115) allow any latitude in terms of implementation in national law?

(6) In what way are the fundamental rights set out in [the Charter] to be taken into account when ascertaining the scope of protection of the exclusive right of the phonogram producer to reproduce (Article 2(c) of Directive 2001/29) and to distribute (Article 9(1)(b) of Directive 2006/115) its phonogram and the scope of the exceptions or limitations to those rights (Article 5(2) and (3) of Directive 2001/29 and the first paragraph of Article 10(2) of Directive 2006/115)?'

Consideration of the questions referred

The first and sixth questions

26 By its first and sixth questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 2(c) of Directive 2001/29 must, in the light of the Charter, be interpreted as meaning that the exclusive right granted to a phonogram producer to reproduce and distribute his or her phonogram allows him to prevent another person from taking a sound sample, even if very short, of his or her phonogram for the purposes of including that sample in another phonogram.

27 Under Article 2(c) of Directive 2001/29, Member States are to provide for the exclusive right of phonogram producers 'to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part' of their phonograms.

28 Directive 2001/29 does not define the concept of 'reproduction ... in whole or in part' of a phonogram for the purposes of that provision. The meaning and scope of those words must, as the Court has consistently held, be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part (judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraph 19 and the case-law cited).

29 It is clear from the wording of Article 2(c) of Directive 2001/29 stated in paragraph 27 above, that the reproduction by a user of a sound sample, even if very short, of a phonogram must, in principle, be regarded as a reproduction 'in part' of that phonogram within the meaning of the provision, and that such a reproduction therefore falls within the exclusive right granted to the producer of such a phonogram under that provision.

30 That literal interpretation of Article 2(c) of Directive 2001/29 is consistent, first, with the general objective of that directive which is, as follows from recitals 4, 9 and 10, to establish a high level of protection of copyright and related rights, and, second, the specific objective of the exclusive right of the phonogram producer, referred to in recital 10, which is to protect a phonogram producer's investment. As stated in that recital, the investment required to produce products such as phonograms, is considerable to such an extent that it is necessary in order to guarantee phonogram producers the opportunity of satisfactory returns.

31 However, where a user, in exercising the freedom of the arts, takes a sound sample from a phonogram in order to use it, in a modified form unrecognisable to the ear, in a new work, it must be held that such use does not constitute 'reproduction' within the meaning of Article 2(c) of Directive 2001/29.

32 It must be borne in mind, in that regard, that it follows from recitals 3 and 31 of Directive 2001/29 that the harmonisation effected by that directive aims to safeguard, in particular in the electronic environment, a fair balance between, on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property rights now guaranteed by Article 17(2) of the Charter and, on the other hand, the protection of the interests and fundamental rights of users of protected subject matter as well as of the public interest (see, to that effect, judgment of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 41).

33 The Court has thus previously held that there is nothing whatsoever in the wording of Article 17(2) of the Charter or in the Court's case-law to suggest that the intellectual property rights enshrined in that article are inviolable and must for that reason be protected as absolute rights (judgments of 24 November 2011, *Scarlet Extended*, C-70/10, EU:C:2011:771, paragraph 43; of 16 February 2012, *SABAM*, C-360/10, EU:C:2012:85, paragraph 41; and of 27 March 2014, *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, paragraph 61).

34 A balance must be struck between that right and other fundamental rights, including freedom of the arts, enshrined in Article 13 of the Charter, which, in so far as it falls within the scope of freedom of expression, enshrined in Article 11 of the Charter and in Article 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds (see, to that effect, ECtHR, 24 May 1988, *Müller and Others v. Switzerland*, CE:ECHR:1988:0524JUD001073784, § 27, and ECtHR, 8 July 1999, *Karataş v. Turkey*, CE:ECHR:1999:0708JUD002316894, § 49).

35 In that context, it should be noted that the technique of 'sampling', which consists in a user taking a sample from a phonogram, most often by means of electronic equipment, and using the sample for the purposes of creating a new work, constitutes a form of artistic expression which is covered by freedom of the arts, as protected in Article 13 of the Charter.

36 In exercising that freedom, the user of a sound sample, when creating a new work, may decide to modify the sample taken from a phonogram to such a degree that that sample is unrecognisable to the ear in that new work.

37 Thus, to regard a sample taken from a phonogram and used in a new work in a modified form unrecognisable to the ear for the purposes of a distinct artistic creation, as constituting 'reproduction' of that phonogram within the meaning of Article 2(c) of Directive 2001/29 would not only run counter to the usual meaning of that word in everyday

language, within the meaning of the case-law set out in paragraph 28 above, but would also fail to meet the requirement of a fair balance set out in paragraph 32 above.

38 In particular, such an interpretation would allow the phonogram producer to prevent another person from taking a sound sample, even if very short, from his or her phonogram for the purposes of artistic creation in such a case, despite the fact that such sampling would not interfere with the opportunity which the producer has of realising satisfactory returns on his or her investment.

39 In the light of the foregoing considerations, the answer to the first and sixth questions is that Article 2(c) of Directive 2001/29 must, in the light of the Charter, be interpreted as meaning that the phonogram producer's exclusive right under that provision to reproduce and distribute his or her phonogram allows him or her to prevent another person from taking a sound sample, even if very short, of his or her phonogram for the purposes of including that sample in another phonogram, unless that sample is included in the phonogram in a modified form unrecognisable to the ear.

The second question

40 By its second question, the referring court asks, in essence, whether Article 9(1)(b) of Directive 2006/115 must be interpreted as meaning that a phonogram which contains sound samples transferred from another phonogram constitutes a 'copy', within the meaning of that provision, of that phonogram.

41 Under Article 9(1)(b) of Directive 2006/115, Member States are to provide phonogram producers with the exclusive right to make available to the public, by sale or otherwise, their phonograms, including copies thereof.

42 Neither Article 9 of Directive 2006/115 nor any other provision of that directive defines the concept of 'copy' within the meaning of that article.

43 That concept must therefore be interpreted by taking into account the legislative context of the provision in question and the purposes of the relevant legislation.

44 It must be borne in mind that the phonogram producer's exclusive distribution right provided for in Article 9(1)(b) of Directive 2006/115 is intended to afford a producer, through adequate legal protection of intellectual property rightholders, with the possibility of recouping investments made by him or her in order to produce phonograms, since those investments can prove to be especially high and risky, as stated in recitals 2 and 5 of Directive 2006/115.

45 In that regard, it is clear from recital 2 of Directive 2006/115 that the protection conferred on a phonogram producer under that directive aims, in particular, to fight piracy, that is, as the Advocate General stated in point 45 of his Opinion, the production and distribution to the public of counterfeit copies of phonograms. The distribution of such copies poses a particularly serious threat to the interests of such phonogram producers in that it is capable of significantly decreasing the revenue that they receive by making phonograms available.

46 As the Advocate General stated in point 46 of his Opinion, only an article which reproduces all or a substantial part of the sounds fixed in a phonogram is, by its nature, intended to replace lawful copies of that phonogram and, therefore, capable of constituting a copy of that phonogram within the meaning of Article 9(1) of Directive 2006/115.

47 That is not, by contrast, the case of an article which, without reproducing all or a substantial part of the sounds fixed in a phonogram, merely embodies sound samples, where relevant in a modified form, transferred from that phonogram for the purposes of creating a new and distinct work from that phonogram.

48 That interpretation of Article 9(1)(b) of Directive 2006/115 in the light of its purposes is supported by the legislative context of which that provision is part.

49 In that regard, as stated in recital 7 of Directive 2006/115, that directive aims to approximate the legislation of the Member States in such a way as not to conflict with the international conventions on which the copyright and related rights laws of many Member States are based.

50 The Geneva Convention is one of those conventions, which, according to its preamble, has, inter alia, the aim of addressing the widespread and increasing unauthorised duplication of phonograms and the damage that this is occasioning to the interests of producers.

51 Article 2 of that convention contains an analogous provision to Article 9(1)(b) of Directive 2006/115 which specifically provides that the producers of phonograms are to be protected against the making and distribution to the public of 'duplicates' of their phonograms without their consent.

52 According to Article 1(c) of the Geneva Convention, a 'duplicate' means an article which contains sounds taken directly or indirectly from a phonogram and which embodies 'all or a substantial part' of the sounds fixed in that phonogram.

53 It is true that the provisions of the Geneva Convention do not form part of the EU legal order, in that, first, the European Union is not a contracting party to that convention and, second, the European Union cannot be regarded as having taken the place of its Member States as regards its application, if only because not all of those States are parties to that convention (see, by analogy, judgment of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraph 41). The fact remains, however, that it is one of the international conventions referred to in paragraph 49 above and therefore the provisions of Directive 2006/115 must be interpreted, so far as possible, in the light of that convention (see, to that effect, judgments of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraph 35; of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 189; and of 19 December 2018, *Syed*, C-572/17, EU:C:2018:1033, paragraph 20).

54 It follows that it should be considered, as did the Advocate General in points 46 and 47 of his Opinion, that the concept of 'copy' within the meaning of Article 9(1)(b) of Directive 2006/115 must be interpreted consistently with the same concept as it is used in Article 1(c) and Article 2 of the Geneva Convention.

55 In the light of the foregoing considerations, the answer to the second question is that Article 9(1)(b) of Directive 2006/115 must be interpreted as meaning that a phonogram which contains sound samples transferred from another phonogram does not constitute a 'copy', within the meaning of that provision, of that phonogram, since it does not reproduce all or a substantial part of that phonogram.

The third question

56 The referring court notes that, according to Paragraph 24(1) of the *UrhG*, applicable by analogy to a phonogram producer's right, an independent work created using the work of another person may be used and exploited without the consent of the author of the work used. It states that such a 'right to free use' does not constitute a derogation from copyright as such but rather sets out an inherent limitation to its scope of protection, based on the idea that it is not possible to conceive of a cultural creation without that creation building upon the previous work of other authors.

57 In those circumstances, since it is clear from the answer to the second question that a reproduction such as that at issue in the main proceedings does not fall within the scope of Article 9(1)(b) of Directive 2006/115, it must be held that, by its third question, the referring court asks, in essence, whether a Member State may, in its national law, lay down an exception or limitation, other than those provided for in Article 5 of Directive 2001/29, to the phonogram producer's right provided for in Article 2(c) of Directive 2001/29.

58 As is clear both from the Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society of 10 December 1997 (COM(97) 628 final) and from recital 32 of Directive 2001/29, the list of exceptions and limitations contained in Article 5 of that directive is exhaustive, as the Court has also pointed out on several occasions (judgments of 16 November 2016, *Soulier and Doke*, C-301/15, EU:C:2016:878, paragraph 34, and of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 16).

59 In that regard, it has been recalled, in paragraph 32 above, that the harmonisation effected by Directive 2001/29 aims to safeguard, in particular in the electronic environment, a fair balance between, on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property rights and, on the other hand, the protection of the interests and fundamental rights of users of protected subject matter as well as of the public interest.

60 The mechanisms allowing those different rights and interests to be balanced are contained in Directive 2001/29 itself, in that it provides inter alia, first, in Articles 2 to 4 thereof, rightholders with exclusive rights and, second, in Article 5 thereof, for exceptions and limitations to those rights which may, or even must, be transposed by the Member States, since those mechanisms must nevertheless find concrete expression in the national measures transposing that directive

and in their application by national authorities (see, to that effect, judgment of 29 January 2008, *Promusicae*, C-275/06, EU:C:2008:54, paragraph 66 and the case-law cited).

61 The Court has repeatedly held that the fundamental rights now enshrined in the Charter, the observance of which the Court ensures, draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories (see, to that effect, judgment of 27 June 2006, *Parliament v Council*, C-540/03, EU:C:2006:429, paragraph 35 and the case-law cited).

62 Article 5(5) of Directive 2001/29 also contributes to the fair balance mentioned in paragraph 32 above, in that it requires that the exceptions and limitations provided for in Article 5(1) to (4) of the directive be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.

63 In that context, to allow, notwithstanding the express intention of the EU legislature, set out in paragraph 58 above, each Member State to derogate from an author's exclusive rights, referred to in Articles 2 to 4 of Directive 2001/29, beyond the exceptions and limitations exhaustively set out in Article 5 of that directive, would endanger the effectiveness of the harmonisation of copyright and related rights effected by that directive, as well as the objective of legal certainty pursued by it (judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraphs 34 and 35). It is expressly clear from recital 31 of that directive that the differences that existed in the exceptions and limitations to certain restricted acts had direct negative effects on the functioning of the internal market of copyright and related rights, since the list of the exceptions and limitations set out in Article 5 of Directive 2001/29 is aimed at ensuring such proper functioning of the internal market.

64 In addition, as is clear from recital 32 of that directive, the Member States are required to apply those exceptions and limitations consistently. The requirement of consistency in the implementation of those exceptions and limitations could not be ensured if the Member States were free to provide for such exceptions and limitations beyond those expressly set out in Directive 2001/29 (see, to that effect, judgment of 12 November 2015, *Hewlett-Packard Belgium*, C-572/13, EU:C:2015:750, paragraphs 38 and 39), since the Court has moreover previously held that no provision of Directive 2001/29 envisages the possibility for the scope of such exceptions or limitations to be extended by the Member States (see, to that effect, judgment of 10 April 2014, *ACI Adam and Others*, C-435/12, EU:C:2014:254, paragraph 27).

65 In the light of the foregoing considerations, the answer to the third question is that a Member State cannot, in its national law, lay down an exception or limitation other than those provided for in Article 5 of Directive 2001/29 to the phonogram producer's right provided for in Article 2(c) of that directive.

The fourth question

66 By its fourth question, which concerns a situation in which it is found that there has been an infringement of the phonogram producer's exclusive right provided for in Article 2(c) of Directive 2001/29, the referring court asks, in essence, whether Article 5(3)(d) of that directive must be interpreted as meaning that the concept of 'quotations', referred to in that provision, extends to a situation in which it is not possible to identify the work concerned by the quotation in question.

67 Under Article 5(3)(d) of Directive 2001/29, Member States may provide for exceptions or limitations to the exclusive rights of reproduction and of communication to the public referred to in Articles 2 and 3 of that directive in the case of quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose.

68 First of all, it must be considered, as did the Advocate General in points 62 and 63 of his Opinion, that, in the light of the wording in Article 5(3)(d) of Directive 2001/29 which refers to 'a work or other subject-matter', the exception or limitation provided for in that article may apply to the use of a protected musical work, provided that the conditions provided for in that article are satisfied.

69 In particular, for Article 5(3)(d) of Directive 2001/29 to apply, as has been stated in paragraph 67 above, the use in question must be made 'in accordance with fair practice, and to the extent required by the specific purpose', so that the

use at issue for the purposes of quotation must not be extended beyond the confines of what it necessary to achieve the informatory purpose of that particular quotation.

70 Since Directive 2001/29 gives no definition of the term 'quotation', the meaning and scope of that term must, according to the Court's settled case-law set out in paragraph 28 above, be determined by considering its usual meaning in everyday language, while also taking into account the legislative context in which it occurs and the purposes of the rules of which it is part.

71 As regards the usual meaning of the word 'quotation' in everyday language, it should be noted that the essential characteristics of a quotation are the use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user, since the user of a protected work wishing to rely on the quotation exception must therefore have the intention of entering into 'dialogue' with that work, as the Advocate General stated in point 64 of his Opinion.

72 In particular, where the creator of a new musical work uses a sound sample taken from a phonogram which is recognisable to the ear in that new work, the use of that sample may, depending on the facts of the case, amount to a 'quotation', on the basis of Article 5(3)(d) of Directive 2001/29 read in the light of Article 13 of the Charter, provided that that use has the intention of entering into dialogue with the work from which the sample was taken, within the meaning referred to in paragraph 71 above, and that the conditions set out in Article 5(3)(d) are satisfied.

73 However, as the Advocate General stated in point 65 of his Opinion, there can be no such dialogue where it is not possible to identify the work concerned by the quotation at issue.

74 In the light of the foregoing considerations, the answer to the fourth question is that Article 5(3)(d) of Directive 2001/29 must be interpreted as meaning that the concept of 'quotations', referred to in that provision, does not extend to a situation in which it is not possible to identify the work concerned by the quotation in question.

The fifth question

75 As a preliminary matter, it should be noted, as is clear from paragraph 24 above, that the fifth question relates, in particular, to the application by the referring court, for the purposes of disposing of the case in the main proceedings, of Article 2(c) and Article 5(3)(d) of Directive 2001/29, and of Article 9(1)(b) and the first paragraph of Article 10(2) of Directive 2006/115.

76 In that context, the referring court asks whether those provisions of EU law allow the Member States discretion in their transposition, since, according to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court), national legislation which transposes an EU directive must be measured, as a rule, not against the fundamental rights guaranteed by the Basic Law for the Federal Republic of Germany, but solely against the fundamental rights guaranteed by EU law, where that directive does not allow the Member States any discretion in its transposition.

77 As regards the answer to the second and fourth questions, it must be held that, by its fifth question, the referring court asks, in essence, whether Article 2(c) of Directive 2001/29 must be interpreted as constituting measures of full harmonisation.

78 In that regard, it should be stated that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law in the territory of that State (judgment of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraph 59).

79 It should be noted in that connection that, since the transposition of a directive by the Member States is covered, in any event, by the situation, referred to in Article 51 of the Charter, in which the Member States are implementing Union law, the level of protection of fundamental rights provided for in the Charter must be achieved in such a transposition, irrespective of the Member States' discretion in transposing the directive.

80 That said, where, in a situation in which action of the Member States is not entirely determined by EU law, a national provision or measure implements EU law 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 EU law

are not thereby compromised (judgments of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraph 60, and of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 29).

81 Thus, it is consistent with EU law for national courts and authorities to make that application subject to the condition, emphasised by the referring court, that the provisions of a directive 'allow [some] discretion in terms of implementation in national law', provided that that condition is understood as referring to the degree of the harmonisation effected in those provisions, since such an application is conceivable only in so far as those provisions do not effect full harmonisation.

82 In the present case, the objective of Directive 2001/29 is to harmonise only certain aspects of the law on copyright and related rights, of which a number of provisions also disclose the intention of the EU legislature to grant a degree of discretion to the Member States in the implementation of the directive (see, to that effect, judgment of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paragraph 57).

83 As regards the exclusive right of holders, referred to in Article 2(c) of Directive 2001/29, it has been stated, in paragraph 27 above, that, according to that provision, Member States are to provide for the exclusive right of phonogram producers 'to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part' of their phonograms.

84 That provision therefore defines a phonogram producer's exclusive right of reproduction in the European Union in unequivocal terms. Furthermore, that provision is not qualified by any condition, nor is it subject, in its implementation or effects, to any measure being taken in any particular form.

85 It follows that Article 2(c) of Directive 2001/29 constitutes a measure of full harmonisation of the corresponding substantive law (see, by analogy, as regards the exclusive right of an EU trade mark proprietor, judgments of 20 November 2001, *Zino Davidoff and Levi Strauss*, C-414/99 to C-416/99, EU:C:2001:617, paragraph 39, and of 12 November 2002, *Arsenal Football Club*, C-206/01, EU:C:2002:651, paragraph 43).

86 In the light of the foregoing considerations, the answer to the fifth question is that Article 2(c) of Directive 2001/29 must be interpreted as constituting a measure of full harmonisation of the corresponding substantive law.

Costs

87 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. Article 2(c) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must, in the light of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that the phonogram producer's exclusive right under that provision to reproduce and distribute his or her phonogram allows him to prevent another person from taking a sound sample, even if very short, of his or her phonogram for the purposes of including that sample in another phonogram, unless that sample is included in the phonogram in a modified form unrecognisable to the ear.

2. Article 9(1)(b) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property must be interpreted as meaning that a phonogram which contains sound samples transferred from another phonogram does not constitute a 'copy', within the meaning of that provision, of that phonogram, since it does not reproduce all or a substantial part of that phonogram.

3. A Member State cannot, in its national law, lay down an exception or limitation, other than those provided for in Article 5 of Directive 2001/29, to the phonogram producer's right provided for in Article 2(c) of that directive.

4. Article 5(3)(d) of Directive 2001/29 must be interpreted as meaning that the concept of 'quotations', referred to in that provision, does not extend to a situation in which it is not possible to identify the work concerned by the quotation in question.

5. Article 2(c) of Directive 2001/29 must be interpreted as constituting a measure of full harmonisation of the corresponding substantive law.

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

26 April 2017 (*)

(Reference for a preliminary ruling — Intellectual and industrial property — Directive 2001/29/EC — Harmonisation of certain aspects of copyright and related rights — Article 3(1) — Communication to the public — Definition — Sale of a multimedia player — Add-ons — Publication of works without the consent of the right holder — Access to streaming websites — Article 5(1) and (5) — Right of reproduction — Exceptions and limitations — Lawful use)

In **Case C-527/15**,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rechtbank Midden-Nederland (District Court of Central Netherlands, Netherlands), made by decision of 30 September 2015, received at the Court on 5 October 2015, in the proceedings

Stichting Brein

v

Jack Frederik Wullems, also trading under the name Filmspeler,

THE COURT (Second Chamber),

composed of M. Ilešič (Rapporteur), President of the Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Second Chamber, A. Prechal, C. Toader and E. Jarašiūnas, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 September 2016,

after considering the observations submitted on behalf of:

- Stichting Brein, by D. Visser and P. de Leeuwe, advocaten,
- J.F. Wullems, also trading under the name Filmspeler, by J. van Groenendaal, D. Stols and F. Blokhuis, advocaten,
- the Spanish Government, by V. Ester Casas, acting as Agent,
- the French Government, by D. Colas and D. Segoin, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,
- the Portuguese Government, by L. Inez Fernandes, T. Rendas and M. Figueiredo, acting as Agents,
- the European Commission, by J. Samnadda and by T. Scharf and F. Wilman, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 December 2016, gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(1) and Article 5(1) and (5) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

2 The request has been made in proceedings between Stichting Brein, a foundation that protects the interests of copyright holders, and Mr Jack Frederik Wullems, concerning the sale by him of a multimedia player enabling free access to audiovisual works protected by copyright without the consent of the right holders.

Legal context

EU law

3 Recitals 9, 10, 23, 27 and 33 of Directive 2001/29 state:

‘(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as “on-demand” services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment....

(23) This Directive should harmonise further the author’s right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts. ...

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive....

(33) The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.’

4 Article 2 of Directive 2001/29, entitled ‘Reproduction right’, reads as follows:

‘Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.’

5 Article 3 of that directive, entitled ‘Right of communication to the public of works and right of making available to the public other subject matter’, states:

‘1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

- (a) for performers, of fixations of their performances;
- (b) for phonogram producers, of their phonograms;
- (c) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.’

6 Article 5(1) and (5) of that directive provides:

‘1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary, or
- (b) a lawful use

of a work or other subject matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2....

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.’

Netherlands law

7 Article 1 of the Auteurswet (Netherlands Law on copyright, ‘the Law on copyright’) provides:

‘Copyright is the exclusive right of the author of a literary, scientific or artistic work or his successors in title, to publish it and to reproduce it, subject to the limitations laid down by law.’

8 Article 12 of the Law on copyright is worded as follows:

‘1. Publication of a literary, scientific or artistic work shall include:

- 1° the publication of a reproduction of the work, in full or in part; ...’

9 Article 13a of that law provides:

‘Reproduction of a literary, scientific or artistic work shall not include a temporary act of reproduction which is transient or incidental, and an integral and essential part of a technological process and whose sole purpose is to enable

- (a) the transmission in a network between third parties by an intermediary, or
- (b) the lawful use

of a work, and which has no independent economic significance.’

10 Article 2 of the Wet op de Naburige Rechten (Law on neighbouring rights) provides:

‘1. A performer shall have the exclusive right to authorise one or more of the following acts: ...

- d. the broadcast, repeat broadcast, making available to the public or any other form of communication of a performance, a recording of a performance or a reproduction thereof. ...’

11 Article 6 of the Law on neighbouring rights provides:

‘1. A phonogram producer shall have the exclusive right to authorise: ...

- c. the broadcast, repeat broadcast, making available to the public or other form of publication of a phonogram manufactured by him or a reproduction thereof. ...’

12 Article 7a of the Law on neighbouring rights is worded as follows:

‘1. The producer of the first fixations of films shall have the exclusive right to authorise: ...

- c. the making available to the public of the first fixation of a film or a reproduction thereof. ...’

13 Article 8 of the Law on neighbouring rights provides:

‘A broadcasting organisation shall have the exclusive right to authorise one or more of the following acts: ...

e. the making available to the public of recordings of programmes or reproductions thereof or any other form of publication thereof, whatever the technical facilities used for that purpose. ...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 Stichting Brein is a Netherlands foundation for the protection of the interests of copyright holders.

15 Mr Wullems sells, on a number of internet sites, including his own site www.filmspeler.nl, various models of a multimedia player. That player, sold under the name 'filmspeler', is a device which acts as a medium between, on the one hand, a source of visual and/or sound data and, on the other hand, a television screen.

16 On that player, Mr Wullems installed an open source software, which makes it possible to play files through a user-friendly interface via structured menus, and integrated into it, without alteration, add-ons available on the internet, created by third parties, some of which specifically link to websites on which protected works are made available to internet users without the consent of the copyright holders.

17 Those add-ons contain links which, when they are activated by the remote control of the multimedia player, connect to streaming websites operated by third parties, some of which give access to digital content with the authorisation of the copyright holders, whilst others give access to such content without their consent. In particular, the add-ons' function is to retrieve the desired content from streaming websites and make it start playing, with a simple click, on the multimedia player sold by Mr Wullems connected to a television screen.

18 As is clear from the order for reference, Mr Wullems advertised the 'filmspeler' multimedia player, stating that it made it possible, in particular, to watch on a television screen, freely and easily, audiovisual material available on the internet without the consent of the copyright holders.

19 On 22 May 2014 Stichting Brein asked Mr Wullems to stop selling the multimedia player. On 1 July 2014, it brought an action against Mr Wullems before the referring court seeking an order that, in essence, he stop selling multimedia players such as 'filmspeler' and offering hyperlinks that give users illegal access to protected works.

20 Before the referring court, Stichting Brein submitted that, by marketing the 'filmspeler' multimedia player, Mr Wullems made a 'communication to the public', in breach of Articles 1 and 12 of the Law on copyright and Articles 2, 6, 7a and 8 of the Law on neighbouring rights. Those provisions must, it submitted, be interpreted in the light of Article 3 of Directive 2001/29, which they transpose into the Netherlands law. The referring court considers, in that regard, that the case-law of the Court does not make it possible to answer with certainty the question of whether there is a communication to the public in circumstances such as those at issue in the main proceedings.

21 In addition, before the referring court, Mr Wullems submitted that streaming broadcasts of works protected by copyright from an illegal source was covered by the exception listed in Article 13a of the Law on copyright, which must be interpreted in the light of Article 5(1) of Directive 2001/29, which it transposes into Netherlands law. According to the referring court, the Court has not yet given a ruling on the meaning of the requirement of a 'lawful use' within the meaning of Article 5(1)(b) of Directive 2001/29.

22 In those circumstances, the Rechtbank Midden-Nederland (District Court, Midden-Nederland, Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Must Article 3(1) of Directive 2001/29 be interpreted as meaning that there is "a communication to the public" within the meaning of that provision, when someone sells a product (multimedia player) in which he has installed add-ons containing hyperlinks to websites on which copyright-protected works, such as films, series and live broadcasts are made directly accessible, without the authorisation of the right holders?

(2) Does it make any difference

– whether the copyright-protected works as a whole have not previously been published on the internet or have only been published through subscriptions with the authorisation of the right holder?

– whether the add-ons containing hyperlinks to websites on which copyright-protected works are made directly accessible without the authorisation of the right holders are freely available and can also be installed in the multimedia player by the users themselves?

– whether the websites and thus the copyright-protected works made accessible thereon — without the authorisation of the right holders — can also be accessed by the public without the multimedia player?

(3) Should Article 5 of Directive 2001/29 be interpreted as meaning that there is no “lawful use” within the meaning of Article 5(1)(b) of that directive if a temporary reproduction is made by an end user during the streaming of a copyright-protected work from a third-party website where that copyright-protected work is offered without the authorisation of the right holder(s)?

(4) If the answer to the third question is in the negative, is the making of a temporary reproduction by an end user during the streaming of a copyright-protected work from a website where that copyright-protected work is offered without the authorisation of the right holder(s) then contrary to the “three-step test” referred to in Article 5(5) of Directive 2001/29?’

Consideration of the questions referred

The first and second questions

23 By its first and second questions, which should be examined together, the referring court asks, in essence, whether the concept of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29, must be interpreted as covering the sale of a multimedia player, such as that at issue in the main proceedings, on which there are pre-installed add-ons, available on the internet, containing hyperlinks to websites — that are freely accessible to the public — on which copyright-protected works have been made available to the public without the consent of the right holders.

24 It follows from Article 3(1) of Directive 2001/29 that Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

25 Under that provision, authors thus have a right which is preventive in nature and allows them to intervene between possible users of their work and the communication to the public which such users might contemplate making, in order to prohibit such communication (see, to that effect, judgments of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 30, and of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 28 and the case-law cited).

26 As Article 3(1) of Directive 2001/29 does not define the concept of ‘communication to the public’, its meaning and its scope must be determined in light of the objectives pursued by that directive and the context in which the provision being interpreted is set (judgment of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 29 and the case-law cited).

27 In that regard, it should be borne in mind that it follows from recitals 9 and 10 of Directive 2001/29 that the latter’s objective is to establish a high level of protection for authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public. It follows that ‘communication to the public’ must be interpreted broadly, as recital 23 of the directive indeed expressly states (judgments of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 36, and of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 30 and the case-law cited).

28 The Court has also specified that the concept of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29, requires an individual assessment (judgment of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 33 and the case-law cited).

29 It is clear from Article 3(1) of Directive 2001/29 that the concept of ‘communication to the public’ includes two cumulative criteria, namely an ‘act of communication’ of a work and the communication of that work to a ‘public’ (judgments of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 37, and of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 32 and the case-law cited).

30 In order to determine whether a user is making a communication to the public within the meaning of Article 3(1) of Directive 2001/29 it is necessary to take into account several complementary criteria, which are not autonomous and are interdependent. Consequently, those criteria must be applied both individually and in their interaction with one another, since they may, in different situations, be present to widely varying degrees (see, to that effect, judgments of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraphs 78 and 79; of 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, paragraph 30; and of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 34).

31 Amongst those criteria, the Court has emphasised, above all, the essential role played by the user. The user makes an act of communication when he intervenes, in full knowledge of the consequences of his action, to give access to a protected work to his customers and does so, in particular, where, in the absence of that intervention, his customers would not, in principle, be able to enjoy the broadcast work (see, to that effect, judgments of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 46, and of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 35 and the case-law cited).

32 Next, it has specified that the concept of the ‘public’ refers to an indeterminate number of potential viewers and implies, moreover, a fairly large number of people (judgments of 7 March 2013, *ITV Broadcasting and Others*, C-607/11, EU:C:2013:147, paragraph 32; of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 41; and of 8 September 2016, *GS Media* C-160/15, EU:C:2016:644, paragraph 36 and the case-law cited).

33 The Court has also noted that, according to a settled line of case-law, to be categorised as a ‘communication to the public’, a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a ‘new public’, that is to say, to a public that was not already taken into account by the copyright holders when they authorised the initial communication to the public of their work (judgments of 7 March 2013, *ITV Broadcasting and Others*, C-607/11, EU:C:2013:147, paragraph 26; of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 24; and of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 37).

34 Finally, the Court has underlined, on many occasions, that the profit-making nature of a communication, within the meaning of Article 3(1) of Directive 2001/29, is not irrelevant (see in particular the judgments of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 204; of 7 March 2013, *ITV Broadcasting and Others*, C-607/11, EU:C:2013:147, paragraph 42; and of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 38).

35 As regards, in the first place, the question of whether the sale of a multimedia player, such as that at issue in the main proceedings, is an ‘act of communication’, within the meaning of Article 3(1) of Directive 2001/29, it must be noted, as recital 23 of Directive 2001/29 states, that the author’s right of communication to the public, provided for in Article 3(1), covers any transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.

36 Furthermore, as is apparent from Article 3(1) of Directive 2001/29, for there to be an ‘act of communication’, it is sufficient, in particular, that a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity (see the judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 19 and the case-law cited).

37 The Court has already held, in that regard, that the provision, on a website, of clickable links to protected works published without any access restrictions on another site, affords users of the first site direct access to those works (judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 18; see also, to that effect, order of 21 October 2014, *BestWater International*, C-348/13, EU:C:2014:2315, paragraph 15, and the judgment of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 43).

38 That is also the case for the sale of a multimedia player, such as that at issue in the main proceedings.

39 It is true, as recital 27 of Directive 2001/29 states, that the mere provision of physical facilities for enabling or making a communication does not in itself amount to ‘communication’ within the meaning of that directive.

40 The Court has nevertheless held, in that respect, as regards the provision of television sets in hotel rooms, that while the ‘mere provision of physical facilities’ does not as such amount to a communication to the public within the meaning of Directive 2001/29, it remains the case that that facility may make public access to broadcast works technically possible. Therefore, if, by means of television sets thus installed, the hotel distributes the signal to customers staying in its rooms, then communication to the public takes place, irrespective of the technique used to transmit the signal (judgment of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraph 46).

41 In the same way, it must be held that the present case does not concern a situation of the ‘mere’ provision of physical facilities for enabling or making a communication. As the Advocate General noted in paragraphs 53 and 54 of his opinion, Mr Wullems, with full knowledge of the consequences of his conduct, pre-installs onto the ‘filmspeler’ multimedia player that he markets add-ons that specifically enable purchasers to have access to protected works published — without the consent of the copyright holders of those works — on streaming websites and enable those purchasers to watch those works on their television screens (see, by analogy, judgment of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraph 42). That intervention enabling a direct link to be established between websites

broadcasting counterfeit works and purchasers of the multimedia player, without which the purchasers would find it difficult to benefit from those protected works, is quite different from the mere provision of physical facilities, referred to in recital 27 of Directive 2001/29. In that regard, it is clear from the observations presented to the Court that the streaming websites at issue in the main proceedings are not readily identifiable by the public and the majority of them change frequently.

42 Consequently, it must be held that the provision of a multimedia player such as that at issue in the main proceedings enables, in view of the add-ons pre-installed on it, access via structured menus to links that those add-ons which, when activated by the remote control of that multimedia player, offer its users direct access to protected works without the consent of the copyright holders and must be regarded as an act of communication within the meaning of Article 3(1) of Directive 2001/29.

43 In the second place, in order to be categorised as a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29, the protected works must also in fact be communicated to a ‘public’ (judgment of 7 March 2013, *ITV Broadcasting and Others*, C-607/11, EU:C:2013:147, paragraph 31).

44 In that regard, the Court has stated, first, that the concept of ‘public’ encompasses a certain *de minimis* threshold, which excludes from the concept groups of persons which are too small, or insignificant. Second, in order to determine that number, the cumulative effect of making the works available to potential recipients should be taken into account. Thus, it is relevant to know not only how many persons have access to the same work at the same time, but also how many of them have access to it in succession (see, to that effect, judgments of 15 March 2012, *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, paragraph 35; of 27 February 2014, *OSA*, C-351/12, EU:C:2014:110, paragraph 28; and of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 43 and the case-law cited).

45 In the present case, it must be observed that, according to the referring court, the ‘filmspeler’ multimedia player has been purchased by a fairly large number of people. Furthermore, the communication at issue in the main proceedings covers all persons who could potentially acquire that media player and have an internet connection. Those people may access the protected works at the same time, in the context of the streaming of the works at issue on the internet. Thus, that communication is aimed at an indeterminate number of potential recipients and involves a large number of persons (see, by analogy, judgment of 7 March 2013, *ITV Broadcasting and Others*, C-607/11, EU:C:2013:147, paragraphs 35 and 36).

46 It follows that, by the communication in question, the protected works are indeed communicated to a ‘public’ within the meaning of Article 3(1) of Directive 2001/29.

47 Furthermore, as regards whether the works were communicated to a ‘new’ public, within the meaning of the case-law cited in paragraph 33 above, it should be noted that the Court, in its judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraphs 24 and 31) and in its order of 21 October 2014, *BestWater International* (C-348/13, EU:C:2014:2315), held that such a public is a public which was not taken into account by the copyright holders when they authorised the initial communication. In its judgment of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644, paragraph 43), the Court observed that those decisions confirmed the importance of the consent of the holder of the copyright in protected works that have been made freely available on a website, having regard to Article 3(1) of Directive 2001/29 which specifically provides that every act of communication of a work to the public must be authorised by the copyright holder.

48 It is clear from the judgments referred to in the previous paragraph that posting hyperlinks on a website to a protected work which has been made freely available on another website with the consent of copyright holders of that work does not constitute a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29. In that regard, the Court held that as soon as and as long as that work is freely available on the website to which the hyperlink allows access, it must be considered that, where the copyright holders of that work have consented to such a communication, they have included all internet users as the public, such that the communication in question is not made to a new public. However, the same finding cannot be deduced from those judgments failing such an authorisation (see to that effect, the judgment of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraphs 42 and 43).

49 The Court therefore held, first of all, that where it is established that such a person knew or ought to have known that the hyperlink he posted provides access to a work illegally placed on the internet, the provision of that link constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29. The Court added, next, that the same applies in the event that that link allows users of the website on which it is posted to circumvent the restrictions taken by the site where the protected work is posted in order to restrict the public’s access to its own

subscribers, the posting of such a link then constituting a deliberate intervention without which those users could not benefit from the works broadcast. Finally, the Court stated that, when the posting of hyperlinks is carried out for profit, it can be expected that the person posting such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder. In such circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally published on the internet constitutes a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29 (see judgment of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraphs 49 to 51).

50 In the present case, it is common ground that the sale of the 'filmerspeler' multimedia player was made in full knowledge of the fact that the add-ons containing hyperlinks pre-installed on that player gave access to works published illegally on the internet. As was noted in paragraph 18 above, the advertising of that multimedia player specifically stated that it made it possible, in particular, to watch on a television screen, freely and easily, audiovisual material available on the internet without the consent of the copyright holders.

51 In addition, it cannot be disputed that the multimedia player is supplied with a view to making a profit, the price for the multimedia player being paid in particular to obtain direct access to protected works available on streaming websites without the consent of the copyright holders. As the Portuguese Government has pointed out, the main attraction of such a multimedia player for potential purchasers lies precisely in the fact that add-ons are pre-installed on it which enable users to gain access to sites on which copyright-protected films are made available without the consent of the copyright holders.

52 Therefore, it is necessary to hold that the sale of such a multimedia player constitutes a 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29.

53 In the light of the foregoing considerations, the answer to the first and second questions referred is that the concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, must be interpreted as covering the sale of a multimedia player, such as that at issue in the main proceedings, on which there are pre-installed add-ons, available on the internet, containing hyperlinks to websites — that are freely accessible to the public — on which copyright-protected works have been made available without the consent of the right holders.

The third and fourth questions

Admissibility

54 In its observations, the Commission submitted that the third and fourth questions are hypothetical since they relate to the streaming of works protected by copyright and not to the sale of a multimedia player.

55 In that regard, it must be borne in mind that, according to the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in 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 EU law, the Court is, in principle, bound to give a ruling (see, in particular, judgment of 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraph 18 and the case-law cited).

56 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated 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, in particular, 22 September 2016, *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paragraph 19 and the case-law cited).

57 However, that is not the case here. A connection between the third and fourth questions and the actual facts of the case in the main proceedings is established, the referring court having stated, in response to a request for clarification made by the Court under Article 101 of its rules of procedure, that a reply to those questions is necessary for it to rule on the arguments of the applicant in the main proceedings who sought, inter alia, a ruling by the referring court that the streaming of works protected by copyright from an illegal source is not a 'lawful use' within the meaning of Article 5 of Directive 2001/29.

58 It follows that the questions referred are admissible.

Substance

59 By its third and fourth questions, which should be examined together, the referring court asks, in essence, whether the provisions of Article 5(1) and (5) of Directive 2001/29 must be interpreted as meaning that acts of temporary reproduction, on a multimedia player such as that at issue in the main proceedings, of a copyright protected work obtained by streaming from a website belonging to a third party offering that work without the consent of the copyright holder satisfies the conditions set out in those provisions.

60 Under Article 5(1) of Directive 2001/29, an act of reproduction may be exempted from the reproduction right provided for in Article 2 thereof only if it satisfies five conditions, that is, where

- the act is temporary;
- it is transient or incidental;
- it is an integral and essential part of a technological process;
- the sole purpose of that process is to enable a transmission in a network between third parties by an intermediary or a lawful use of a work or protected subject matter; and
- that act does not have any independent economic significance.

61 First of all, it must be borne in mind that those conditions are cumulative in the sense that non-compliance with any one of them will lead to the act of reproduction not being exempted, pursuant to Article 5(1) of Directive 2001/29, from the reproduction right provided for in Article 2 of that directive (judgment of 16 July 2009, *Infopaq International*, C-5/08, EU:C:2009:465, paragraph 55, order of 17 January 2012, *Infopaq International*, C-302/10, EU:C:2012:16, paragraph 26).

62 Furthermore, it is clear from the case-law of the Court that the conditions set out above must be interpreted strictly because Article 5(1) of Directive 2001/29 is a derogation from the general rule established by that directive that the copyright holder must authorise any reproduction of his protected work (judgments of 16 July 2009, *Infopaq International*, C-5/08 EU:C:2009:465, paragraphs 56 and 57, and of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 162; order of 17 January 2012, *Infopaq International*, C-302/10, EU:C:2012:16, paragraph 27, and judgment of 5 June 2014, *Public Relations Consultants Association*, C-360/13, EU:C:2014:1195, paragraph 23).

63 That is all the more so given that the exemption must be interpreted in the light of Article 5(5) of Directive 2001/29, under which that exemption is to be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the right holder (judgment of 16 July 2009, *Infopaq International*, C-5/08, EU:C:2009:465, paragraph 58).

64 As regards the condition that the sole purpose of the process in question is to enable the transmission in a network between third parties by an intermediary or a lawful use of a work or protected subject matter, the referring court observes that the acts of reproduction at issue in the main proceedings do not seek to enable such a transmission. It is necessary therefore to examine whether those acts have the sole purpose of enabling a lawful use of a work or protected subject matter.

65 In that respect, as is apparent from recital 33 of Directive 2001/29, a use should be considered lawful where it is authorised by the right holder or where it is not restricted by the applicable legislation (see also judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 168, and order of 17 January 2012, *Infopaq International*, C-302/10, EU:C:2012:16, paragraph 42).

66 Since the use of the works at issue was not, in the case in the main proceedings, authorised by the copyright holders, it is necessary to assess whether the aim of the acts in question is to enable a use of the works that is not restricted by the applicable legislation. That assessment must take account, as recalled in paragraph 63 above, of the fact that the exemption referred to Article 5 of Directive 2001/29 only applies in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

67 In its judgment of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraphs 170 to 172), the Court held that, from the television viewers' standpoint, the ephemeral acts

of reproduction at issue in that case, which enabled the proper functioning of the satellite decoder and the television screen, enabled the broadcasts containing protected works to be received. The Court held, in that regard, that the mere reception of those broadcasts in itself — that is to say, the picking up of the broadcasts and their visual display in a private circle — did not reveal an act restricted by the relevant legislation and such reception was to be considered lawful in the case of broadcasts from a Member State when brought about by means of a foreign decoding device. The Court concluded that the sole purpose of the acts of reproduction at issue was to enable a ‘lawful use’ of the works within the meaning of Article 5(1)(b) of Directive 2001/29.

68 Similarly, in its order of 17 January 2012, *Infopaq International* (C-302/10, EU:C:2012:16, paragraphs 44 and 45), the Court held that the drafting of a summary of newspaper articles, even though it was not authorised by the holders of the copyright over these articles, was not restricted by the applicable legislation with the result that the use at issue could not be considered to be unlawful.

69 By contrast, in circumstances such as those at issue in the main proceedings, and having regard, in particular, to the content of the advertising of the multimedia player at issue mentioned in paragraph 18 above and the fact, noted in paragraph 51 above, that the main attraction of that player for potential purchasers is the pre-installation of the add-ons concerned, it must be held that it is, as a rule, deliberately and in full knowledge of the circumstances that the purchaser of such a player accesses a free and unauthorised offer of protected works.

70 It must also be held that, as a rule, temporary acts of reproduction, on a multimedia player such as that at issue in the main proceedings, of copyright-protected works obtained from streaming websites belonging to third parties offering those works without the consent of the copyright holders are such as to adversely affect the normal exploitation of those works and causes unreasonable prejudice to the legitimate interests of the right holder, because, as the Advocate General observed in points 78 and 79 of his opinion, that practice would usually result in a diminution of lawful transactions relating to the protected works, which would cause unreasonable prejudice to copyright holders (see, to that effect, judgment of 10 April 2014, *ACI Adam and Others*, C-435/12, EU:C:2014:254, paragraph 39).

71 It follows that those acts do not satisfy the conditions set out in Article 5(1) and (5) of Directive 2001/29.

72 In the light of all the foregoing considerations, the answer to the third and fourth questions referred is that Article 5(1) and (5) of Directive 2001/29 must be interpreted as meaning that acts of temporary reproduction, on a multimedia player, such as that at issue in the main proceedings, of a copyright-protected work obtained by streaming from a website belonging to a third party offering that work without the consent of the copyright holder does not satisfy the conditions set out in those provisions.

Costs

73 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. The concept of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as covering the sale of a multimedia player, such as that at issue in the main proceedings, on which there are pre-installed add-ons, available on the internet, containing hyperlinks to websites — that are freely accessible to the public — on which copyright-protected works have been made available to the public without the consent of the right holders.

2. Article 5(1) and (5) of Directive 2001/29 must be interpreted as meaning that acts of temporary reproduction, on a multimedia player, such as that at issue in the main proceedings, of a copyright-protected work obtained by streaming from a website belonging to a third party offering that work without the consent of the copyright holder does not satisfy the conditions set out in those provisions.

[Signatures]

PART D. OTHER MATERIALS

Neutral Citation Number: [2022] EWHC 1379 (IPEC)

Claim No. IP-2021-000001

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY ENTERPRISE COURT (Ch.D)**

Royal Courts of Justice
Rolls Building, London, EC4 1NL

8 June 2022

Before:

JOHN KIMBELL Q.C.
(sitting as a Deputy High Court Judge)

B E T W E E N:

SHAZAM PRODUCTIONS LTD

Claimant

- and -

(1) ONLY FOOLS THE DINING EXPERIENCE LTD
(2) IMAGINATION WORKSHOP PTY LTD
(3) ALISON GAY POLLARD-MANSERGH
(4) PETER GORDON MANSERGH
(5) KATHARINE MARY GILLHAM
(6) IMAGINATION WORKSHOP LIMITED
(7) IMAGINATION WORKSHOP FESTIVAL LIMITED
(8) JARED HARFORD

Defendants

JONATHAN HILL (instructed by Ashfords LLP) for the Claimant
THOMAS ST QUINTIN (instructed by Brandsmiths) for the First to Third and Fifth to Eighth
Defendants

Hearing dates 1 - 3 March 2022

Crown Copyright ©

John Kimbell QC, sitting as a Deputy High Court Judge:

A. INTRODUCTION

1. Only Fools and Horses ('**OFAH**') is a well-known television comedy. It was originally broadcast by the BBC in 64 episodes over seven series (1981 – 1991) and a number of Christmas specials until 2003. The scripts for all the episodes of OFAH ('**the Scripts**') were written by John Sullivan OBE. He died in 2011.
2. OFAH has as its subject the ups and downs in the life of the Trotter family. It is set in South London during the 1980s and 1990s. The main characters are a market trader, Derek Trotter ('**Del Boy**'), and his younger brother, Rodney, who live together in a high-rise council flat in Peckham. The third occupant of the flat was originally Derek and Rodney's grandfather but he was later replaced by an elderly uncle ('**Uncle Albert**'). Other characters include a louche used car salesman ('**Boycie**'), his wife Marlene, a road sweeper called Trigger and Cassandra, who is Rodney's girlfriend and subsequently his wife.
3. OFAH won the British Academy Television Award for best comedy series three times - in 1986, 1989 and 1997. It was awarded the National Television Award in 1997 for most popular comedy series and the Royal Television Society Award in 1997. John Sullivan won the Writers' Guild of Great Britain top comedy writer award in 1991 and the best situation comedy writer award in 1997 for OFAH. There have been two spin-off sitcoms broadcast by the BBC: one is a sequel to OFAH, called The Green Green Grass (2005-2009). This features Boycie and Marlene. The other is Rock and Chips (2010-2011), which is a prequel to OFAH. Rodney and Del Boy also appeared in the opening ceremony of the London Olympics in 2012 replaying a scene from OFAH in which they dress as Batman and Robin. The fact that they appeared in the ceremony, some nine years after the last OFAH special Christmas episode was broadcast, is an indication of its impact and national resonance with the public.
4. The Claimant ('**Shazam**') is a company owned and controlled by John Sullivan's family. Shazam was formed in 2003 to exploit the intellectual property rights held by John Sullivan in connection with OFAH (as well as other shows written by him, such as 'Citizen Smith').
5. In February 2019, Shazam launched a musical based on the characters from OFAH at the Theatre Royal Haymarket ('**the Musical**'). The Musical is written by John Sullivan's son, Jim Sullivan, and Paul Whitehouse.

OFDE

6. In May 2018, the Third Defendant (Ms Pollard-Mansergh) and the Fourth Defendant (Mr Mansergh) decided to develop an interactive dining show using the characters from OFAH. The show was produced and marketed under the name "Only Fools The (cushty) Dining Experience" ('**OFDE**'). The actors in the OFDE Show used the appearance, mannerisms, voices and catchphrases of Del Boy, Rodney, Uncle Albert, Cassandra, Boycie, and Marlene as they appeared in the broadcast version OFAH. The backstories of those characters and their relationship to each other as that had developed by Series 6 of OFAH was carried over into OFDE. The characters were presented, however, in a new context of an interactive pub quiz, which had not appeared in OFAH itself.
7. Whilst the audience is being served a three-course meal, the actors in the OFDE Show perform scenes based on a script produced collaboratively by a number of people over the course of a few weeks. ^[1] The script was compiled by the Fifth Defendant. It gave flexibility for the actors to interact spontaneously with the diners and to improvise. OFDE was usually performed in hotel function rooms in front of an audience of no more than 120.
8. The commercial vehicle for developing the OFDE Show initially was the Second Defendant ('**ITI**'). However, the rights to OFDE were subsequently transferred to the First Defendant.

FTDE

9. OFDE was not ITI's first venture in the area of TV-show themed dining shows. ITI had for many years offered a similar interactive dining experience based on the characters from the BBC comedy Fawlty Towers. This was called the Faulty Towers Dining Experience ('**FTDE**').
10. The aim of both FTDE and OFDE was the same. It was to make the audience feel that they are in the presence of the characters they knew and loved from the respective television shows. The idea was for the

audience to feel immersed in "a similar imaginary universe" to that created by the TV show in each case. A marketing email for the OFDE Show said this:

"Only Fools The (cushty) Dining Experience is an immersive theatre show created in loving tribute to the BBC's Only Fools & Horses TV Series. The ITI show does not use script or music from the TV series"

[text deleted]

B. THE ISSUES FOR TRIAL

24. In accordance with standard practice in IPEC, a list of issues for trial was settled at the CMC. The nine issues for trial were as follows:

Copyright

1. Whether the following are literary works for the purposes of copyright law:

1.1. The body of scripts for the Sitcom taken together including whether they collectively establish as an independent work the characters, stories and imaginary "world" of Only Fools and Horses.

1.2. The Character "Del Boy".

2. Whether the following are dramatic works for the purposes of copyright law:

2.1. Each script used in the Sitcom.

2.2. The body of scripts for the Sitcom taken together including whether they collectively establish as an independent work the characters, stories and imaginary "world" of Only Fools and Horses.

2.3. The Character "Del Boy".

3. The extent of the commonalities in content between the aforesaid alleged works and the September Script. This Issue shall be determined by reference to the features identified in the Claimant's Amended Schedule only.

4. Whether, and the extent to which, the aforesaid commonalities were the result of copying, directly or indirectly, from the aforesaid alleged works. This Issue shall be determined by reference to the features identified in the Claimant's Amended Schedule only.

5. Whether those commonalities which were the result of copying amount either individually or collectively to substantial parts of the alleged works (which for some features includes a requirement to consider whether those features were original to John Sullivan), such that the copying of the September Script and/or performance of the Show to that script infringe any copyright in those alleged works (unless the defence in Issue 6 below applies). This Issue shall be determined by reference to the features identified in the Claimant's Amended Schedule only.

6. Whether any of the Defendants are entitled to defences under s30A CDPA in relation to any of the acts alleged to infringe, in particular:

6.1. Were the said acts for the purpose of parody?

6.2. Were the said acts for the purpose of pastiche?

6.3. Did the said acts amount to fair dealing with the Claimant's works?

6.4. Do the said acts conflict with normal exploitation of the Claimant's works?

6.5. Do the said acts unreasonably prejudice the legitimate interests of the Claimant?

Passing Off

7. Whether prior to the first of the acts complained of the Claimant owned goodwill associated in the mind of the relevant public with the Name/Indicia, including as sub-issues:

7.1. The nature and extent of the business of the Claimant and its predecessor under the Name/Indicia.

7.2. The extent to which the Name/Indicia have been distinctive of the Claimant's business in the mind of the relevant public.

7.3. Whether the ownership by the BBC of BBC Marks precludes the Claimant from owning any such goodwill or indicates that it does not own such goodwill.

7.4. If the Claimant does own any such goodwill, the date(s) from which it owned that goodwill.

8. Whether or not any of the Defendants:

8.1. have misrepresented that the Show is connected in the course of trade with the Claimant's business.

8.2. intended to make such any such misrepresentations.

9. Whether any misrepresentations found pursuant to paragraph 8 has caused or is likely to cause the Claimant damage.

[text deleted]

D. THE STATUTORY FRAMEWORK

62. The Copyright Designs and Patents Act 1988 ("**CDPA**") contains a list of types of work which may be protected by copyright. Section 1 states:

"1. Copyright and copyright works.

(1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work—

(a) original literary, dramatic, musical or artistic works,

(b) sound recordings, films or broadcasts, and

(c) the typographical arrangement of published editions.

(2) In this Part "copyright work" means a work of any of those descriptions in which copyright subsists.

(3) Copyright does not subsist in a work unless the requirements of this Part with respect to qualification for copyright protection are met (see section 153 and the provisions referred to there)."

63. Under section 3(1) of CDPA a work cannot be both a literary work and a dramatic work. This follows from the words underlined below:

3 Literary, dramatic and musical works.

(1) In this Part—

"literary work" means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes—

(a) a table or compilation other than a database

- (b) a computer program;
- (c) preparatory design material for a computer program, and
- (d) a database

"dramatic work" includes a work of dance or mime..."

[text deleted]

F. INFRINGEMENT

123. Having held that the Scripts are dramatic works and the character of Del Boy is a literary work both of which works are protected by the CDPA 1988, the next issue is whether copyright in either of these works has been infringed.

124. The Claimant's rights in either or both of these works will have been infringed if they have been copied by the Defendants. The sole alleged infringing work for the purpose of this trial is the September Script for OFDE

The legal principles

125. The following four basic principles are relevant to the question of infringement:

a. Copying is defined as "reproducing the work in any material form": s.17(2) of CDPA. However, to amount to infringement the copying may be of the work as a whole or a "substantial part" of it: s.16(3) of CDPA.

b. Whether a substantial part of a work has been copied requires a qualitative rather than a quantitative assessment: Sheeran v Chokri [2022] EWHC 827 (Ch) at [21] applying Designers Guild Ltd v Russell Williams [2000] 1 WLR 2416 at p.2422 at F-H:

"Although the term "substantial part" might suggest a quantitative test, or at least the ability to identify some discrete part which, on quantitative or qualitative grounds, can be regarded as substantial, it is clear upon the authorities that neither is the correct test. Ladbroke (Football) Ltd. v. William Hill (Football) Ltd. [1964] 1 W.L.R. 273 establishes that substantiality depends upon quality rather than quantity (Lord Reid at p. 276, Lord Evershed at p. 283, Lord Hodson at p. 288, Lord Pearce at p. 293). And there are numerous authorities which show that the "part" which is regarded as substantial can be a feature or combination of features of the work, abstracted from it rather than forming a discrete part. That is what the judge found to have been copied in this case. Or to take another example, the original elements in the plot of a play or novel may be a substantial part, so that copyright may be infringed by a work which does not reproduce a single sentence of the original. If one asks what is being protected in such a case, it is difficult to give any answer except that it is an idea expressed in the copyright work."

c. Infringement requires there to have been actual copying. This means the alleged infringer not only had access to the original work, but actually saw or heard it. It is however well recognized that neither the access nor copying needs to be direct but may be indirect: S. 16(3)(b) CPDA, *Copinger 7-22 – 7-24*.^[14]

d. The essential test is whether the part of the original which is alleged to have been copied contains elements which are the expression of the intellectual creation of the author of the work or not. Sheeran v Chokri [2022] EWHC 827 (Ch) at [21] applying Newspaper Licensing Agency Ltd v Meltwater Holding BV [2011] EWCA Civ 890, at [24]-[28], Mitchell v BBC [2011] EWPC 42, per HHJ Birss QC at [28]-[29] and Infopaq International A/S v Danske Dagblades Forening [2009] ECDR 16.

126. I remind myself that the standard two step test for copyright infringement in English law as described in the speech of Lord Millett in Designers Guild Ltd v Russell Williams [2000] 1 WLR 2416

"An action for infringement of artistic copyright ... is not concerned with the appearance of the defendant's work but with its derivation. The copyright owner does not complain that the defendant's work resembles his.

His complaint is that the defendant has copied all or a substantial part of the copyright work. The reproduction may be exact or it may introduce deliberate variations—involving altered copying or colourable imitation as it is sometimes called. Even where the copying is exact the defendant may incorporate the copied features into a larger work much and perhaps most of which is original or derived from other sources. But while the copied features must be a substantial part of the copyright work, they need not form a substantial part of the defendant's work: see *Warwick Film Productions Ltd. v. Eisinger* [1969] 1 Ch. 508. Thus the overall appearance of the defendant's work may be very different from the copyright work. But it does not follow that the defendant's work does not infringe the plaintiff's copyright.

The first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work....

Even at this stage, therefore, the inquiry is directed to the similarities rather than the differences. This is not to say that the differences are unimportant. They may indicate an independent source and so rebut any inference of copying. But differences in the overall appearance of the two works due to the presence of features of the defendant's work about which no complaint is made are not material. ...

Once the judge has found that the defendants' design incorporates features taken from the copyright work, the question is whether what has been taken constitutes all or a substantial part of the copyright work. This is a matter of impression, for whether the part taken is substantial must be determined by its quality rather than its quantity. It depends upon its importance to the copyright work. It does not depend upon its importance to the defendants' work, as I have already pointed out. The pirated part is considered on its own (see *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.* [1964] 1 W.L.R. 273, 293, per Lord Pearce) and its importance to the copyright work assessed. There is no need to look at the infringing work for this purpose."

The character of Del Boy

127. Having held that the character of Del Boy is itself a protected literary work, the evidence of infringement by the Defendants is overwhelming and obvious.

128. The evidence of Ms Pollard-Mansergh and Ms Gillham was clear:

a. The character of Del Boy, his own back story, his relationship with the other characters in OFDE i.e. Rodney, Uncle Albert, DCI Slater, Boycie and Trigger, his use of mangled French, and the catchphrases, such as "Lovely Jubbly" and "This time next year we could be millionaires", "a few olives short of a pizza", his being involved in dodgy schemes as set out in the September Script were all copied from the broadcast versions of OFAH and imported into the September Script by the four mechanisms described in paragraph 47 above.

b. One of the aims of OFDE in general and therefore the September Script in performance was for the audience to feel that they were in the presence of a Del Boy character presented in a form which was familiar to them from OFAH and to be able to interact with him.

c. The brief which led from the first brain dump to the September Script was to create a "pitch-perfect" live version of Del Boy (and the other characters). That aim is reflected in the September Script by the vocabulary and phrasing used by the Del Boy character.

129. In short, the commonality between Del Boy of the September Script and the Del Boy in the Scripts is almost total. The copying was far more than the substantial copying required for a finding of infringement.

130. There is no evidence that the actors and Ms Gillham directly used the Scripts themselves to create the Del Boy of the September Script but there is clear evidence that they watched clips from OFAH and watched entire episodes of OFAH when developing the earlier iterations of the September Script. Finally, as noted at least some of the actors were superfans of OFAH with deep knowledge of the Scripts. The copying of Del Boy's character from the OFAH is, in my judgement, a clear case of indirect copying via the broadcast of the OFAH episodes.

The Scripts

131. I will assume for the purposes of the factual analysis below that I am wrong that Del Boy as a character is a work separately protected under copyright law.

132. By reference to the Schedule of Infringements (which cross refers to the witness evidence and pleadings) I find that the following features are original features of the Scripts which have been copied and used in the September Script (using the same numbering as in the Final Schedule):

a. Item 1 (Feature 7) - The "satellite" out of range joke. This joke has two elements: Del's mispronunciation of the word satellite and his belief that his mobile phone is not working because that depends on a satellite being in range. This joke appeared in series 6 (Little Problems) of OFAH. There Del is trying to make a call using his mobile phone, which does not work, and he says "I know what's happened, the statelite has moved out of position" before saying "hang about" as another one will be along in a minute. Both elements appear in the September Script in only very slightly modified form. The core elements of the joke are exactly the same. The Defendants introduced no evidence of independent creation.

b. Item 2 (Feature 20) - Rodney modelling outlandish gear at Del's request. It is one of the repeated themes in the Scripts that Del Boy persuades a reluctant Rodney to get into or model outlandish or unusual clothing such as underwear provided by Del. Such themes are an important part of the dynamic of their relationship. One of the complaints made by Rodney is that Del Boy in Episode 1 of Series 1 made him wear shorts to school even as a 15 year old. This theme appears in the September Script in the form of Rodney wearing flippers, snorkel and life jacket at Del's behest, in order to assist in selling deep sea diver's watches.

c. Item 3 (Feature 26) - The catchphrase "Oh Shut up you tart!" The Defendants admit that was created by John Sullivan and that it was derived from OFAH. The catchphrase is part of Del Boy's character. It is a manifestation of Del's self confidence and his way of telling someone to stop being a moaner/whiner. It appears many times in the Scripts usually aimed at Rodney. The September Script uses it in exactly the same way.

d. Item 5 (Feature 34) - The use of Lovely Jubbly. This is a highly distinctive phrase closely associated with Del Boy. It first appeared in Series 6 (Yuppy Love) and appears many times thereafter. I have already accepted that it was coined in this form by Mr Sullivan. The Defendants admit taking it from OFAH and incorporating it in the September Script.

e. Item 8 (Feature 44) - Del Boy's use of (mangled) French. This is a running joke in the OFAH Scripts. It is not just that the words are misused. It reflects a part of Del Boy's character that he is aspirational and wants to *sound* impressive and sophisticated (but then gets it wrong). While it is true that the use made of "piece de resistance" in the September Script is not mangled in the context in which it appears. Nevertheless, what is copied is Del Boy's need to show off by using French. Later in the September Script French appears again and this time it is mangled: "Apres moi c'est da louge"

f. Item 9 (Feature 56) - Del's eternal optimism. This is a key character trait and is appears in many episodes. It is reflected in two specific phrases associated with Del Boy: "He who dares, wins" and "This time next year, we will be millionaires". The September Script copies the second phrase almost exactly (replacing 'will' with 'could') and the action reflects the first. Although the Defendants plead independent creation in the course of improvisation, I reject this. No proper evidence was adduced and it is in any event inherently implausible.

g. Item 10 (Feature 57) – "splitting straight down the middle, 60/40". This is a joke which appears in the first episode of OFAH. It is admitted by the Defendants to be an original creation of John Sullivan and that it was taken from OFAH.

h. Item 14 (Feature 85) Rodney's use of "I don't believe you": Rodney uses this phrase in OFAH to express not only incredulity but also exasperation when put in a humiliating situation by Del Boy. I accept that it is a catchphrase of Rodney which represents a key aspect of his character and his relationship with Del Boy. It is used in exactly the same way in the September Script. The denial of originality in the words by the Defendants misses the point. It is a catchphrase associated with a particular character which is copied from a copyrighted work.

i. Item 15 – feature 89 – joke of Trigger calling Rodney 'Dave' That Trigger calls Rodney "Dave", despite Rodney repeatedly telling him he is called Rodney not Dave is a long-running joke in OFAH. It appears in the

very first episode. I accept that the joke is a central feature of the relationship between Rodney and Trigger and is known to all Only Fools fans. The joke appears in identical form in the September Script. The Defendants admit that the joke was created by John Sullivan and that it was taken from OFAH. The Defendants deny that the joke is original in the sense required to create a protectable copyright work. This is, however, beside the point. It is a joke copied from a copyright work.

j. Feature 16 - "crème de la menthe" (Feature 11). This is another instance of Feature 8. It is a malapropism of Del Boy's which appears three times in OFAH when what he means is "crème de la crème". It is used in exactly the same way in the September Script: "You are the [chosen] ones, the crème de menthe". The Defendants allege independent creation but produce no evidence to support this. It is inherently unlikely in any event.

133. Although the parties invested a great deal of time and energy in the Annexes and the Infringements Schedule, it is not necessary for me to make detailed findings on each and every item. In addition to the ten features discussed above I am satisfied that items 17 (Rodney being held back), 18 (Del Boy's use of Chateaux Neuf de Pape as an exclamation of horror or surprise) 19 (Del's use of his and Rodney's memory to emotionally blackmail Rodney) , 21 ("Olives short of a pizza"), 22 (Rodney's use of the catchphrase "He Who Dares"), 23 ("Cushty") are all features which form part of the original creation of John Sullivan and which have been copied from OFAH. The same applies to the five particular features relied upon in relation to Del Boy's character. Even if he is not protectable as a copyright work, those features of his character were, in my judgment, plainly copied from OFAH into the September Script.

134. I am more than satisfied that these features taken from the Scripts represent a substantial part of the copyright work. I have addressed the issue of infringement in accordance with the order made by HHJ Hacon ("This Issue shall be determined by reference to these Features only"). However, it seems to me that with the benefit of hindsight the schedules were something of a detail overkill. The evidence of Ms Gillham and Ms Pollard-Mansergh described above demonstrates that a conscious decision was taken to copy the names, mannerisms, catchphrases and full back stories of five of the main characters of OFAH who then all appear in one of the familiar settings of OFAH, namely the Nag's Head in Peckham, South London. In these circumstances, it seems to me to be plain and obvious that (a) a substantial part of the Scripts was copied into the September Script and (b) that what was copied represented the expression of the intellectual creation of John Sullivan as the originator of those characters, their catchphrases and back-stories.

135. The answer to Issues 3 and 4 is therefore that there are a great number of commonalities between the September Script and the Scripts and this was the result of extensive indirect copying from the Scripts via the medium of the broadcast episodes of OFAH with which the creators of the September Script were very familiar.

136. The answer to Issue 5 is that what was taken was a substantial part of the Scripts and infringed the copyright in those Scripts regardless of whether Del Boy as a character was separately protected or not.

G. FAIR DEALING UNDER SECTION 30A CDPA

137. Section 30A of the CDPA provides

(1) Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work.

138. This provision was inserted into English domestic law on 1 October 2014 by Regulation 5(1) of Copyright and Rights in Performances (Quotation and Parody) Regulations 2014/2356.

139. Prior to the introduction of section 30A, English law provided that in certain circumstances works of "burlesque" parody may not be held to be an infringement of copyright. The test was whether the alleged infringer had bestowed sufficient mental labour upon what he had taken to produce an original result: Glyn v Weston Feature Film [1916] 1 Ch 261 and Carlton v Mortimer (1917-23) MacGillivray's Copyright Cases 194 (Avory J); Joy Music v Sunday Pictorial newspapers (1920) [1960] 2 QB 60. However, in a series of cases in the 1980s a stricter test for infringement was adopted and this exception for parody in English law was all but extinguished: Schweppes v Wellington [1984] FSR 210, 212; Bently, 'Parody and Copyright in the Common Law World' in *Copyright and Freedom of Expression* (ALAI, 2008) p.355.

The submissions

140. Mr St Quintin made no attempt to revive the earlier English domestic law referred to above. He relied exclusively on section 30A of the CDPA.

141. The Defendants' pleaded case was that the September Script of OFDE represented fair dealing for the purposes of parody, alternatively for the purposes of pastiche. However, in closing submissions, Mr St Quintin placed more emphasis on the OFDE being a pastiche of OFAH. He invited me to adopt the broad interpretation of the pastiche exception advocated by Emily Hudson in her article 'The pastiche exception in copyright law: a case of mashed-up drafting' IPQ 2017, 4, 346-368.

142. Mr Hill submitted, in summary, as follows:

- a. It is necessary for the court to focus on the use of relevant copyright works in the Show (or substantial parts of them) and decide whether these conditions are met in respect of that use. This does not require the entirety of OFDE to be a parody or pastiche, except to the extent that the relevant works are used throughout the Show (as is the case with the Characters).
- b. The uses made of John Sullivan's works were not for the purposes of parody. They are not distinguishable from John Sullivan's works and that was the Defendants' intent. They did not want people coming away thinking they were getting something different. The aim was to recreate his work in a dining context.
- c. The use made by the Defendants did lead to a humorous product but that was because the subject matter taken was itself humorous. Imitation is not parody.
- d. Pastiche is limited to copying style (but not subject matter) or the amalgamating of a number of different works from different authors.
- e. Hudson's approach essentially treats pastiche as meaning nothing more than imitation – i.e. copying. That would be in essence a general fair use defence, which is neither permissible under the 3 step test nor was intended by using the word 'pastiche' in the context of 'parody' and 'caricature' – three comparable types of limited use that might benefit from the optional exception are listed.
- f. If wrong on the above points, the use made by the Defendants did not constitute fair dealing and did not satisfy the three step test.

The Information Society Directive

143. Section 30A has its origins in an EU Directive: Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society ('**the Info Soc Directive**').

144. Article 5(3)(k) of the Info Soc Directive provides:

"Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(k) use for the purpose of caricature, parody or pastiche;"

145. Article 5(5) of the Info Soc Directive provides:

"The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."

The three step test

146. Article 5(5) corresponds to what is usually referred to as "The three step test". This first appeared in Art.9(2) of The International Convention for the Protection of Literary and Artistic works signed at Berne on 9 September 1886 (as amended in 1979) ('**the Berne Convention**'). Article 9 (2) is an article which allows state parties to permit reproduction of protected works. It has to be read in the context of the Article 9 (1) which establishes the basic rights of authors. Art 9 as a whole reads:

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such [i.e. literary and artistic] works in certain special cases, provided such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

147. The three step test also appears in Article 13 of The Agreement on Trade-related Aspects of Intellectual Property Rights ("**TRIPS**") which forms Annex 1C to the Agreement establishing the World Trade Organisation signed in Morocco on 15 April 1994 and Article 10(2) of The World Intellectual Property Organisation Copyright Treaty agreed in Geneva on 20 December 1996 ('**WIPO**').

148. The UK and all the Member States of the European Union are parties to the Berne Convention, TRIPS and WIPO.

149. I was referred by Mr Hill to the following comments of Arnold J. about the three step test in England and Wales Board Limited v Tixdaq Limited [2016] EWHC 575 (Ch) at [90] – [92]:

[90]. The first step is that the exception must be confined to "certain special cases". It is not necessary to elaborate upon this requirement, since I understand it to be common ground that reporting current events is a certain special case.

[91]. The second step is that the application of the exception must not "conflict with a normal exploitation of the work or other subject-matter". It is clear that this refers to exploitation of the work by the copyright owner, whether directly or through licensees. In my view it requires consideration of potential future ways in which the copyright owner may extract value from the work as well as the ways in which the copyright owner currently does so. On the other hand, it also embraces normative considerations i.e. the extent to which the copyright owner should be able to control exploitation of the kind in question having regard to countervailing interests such as freedom of speech.

[92] The third step is that the application of the exception must not "unreasonably prejudice the legitimate interests of the rightholder". Although this is often treated as a separate and additional requirement to the second step, it has also been forcefully argued that it qualifies the second step. In other words, it indicates that it is not sufficient for an exception not to apply that there is some conflict with the copyright owner's legitimate interests, including the copyright owner's normal exploitation of the work. Rather, the exception can apply unless those interests are unreasonably prejudiced. This requires consideration of proportionality, and a balance to be struck between the copyright owners' legitimate interests and the countervailing interests served by the exception. That approach appears to be consistent with the jurisprudence of the CJEU discussed above, and therefore I shall adopt it.

The reference to "jurisprudence" in paragraph 92 is a reference back to paragraph 73 in the Judgement. There Arnold J refers to Painer v Standard VerlagsGmbH [2011] ECR I-1253 at [134] and Deckmyn v Vandersteen C-201/13 at [27] as authority for the proposition that Article 5(3)(c) of the Info Soc Directive must be applied "to strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive and, on the other, the freedom of expression of the user of a protected work who is relying on the exception".

150. In the present case neither counsel sought to persuade me that Arnold J's description of the three steps test was anything other than accurate. I accept that it is. Like him I was not referred to the WTO Panel Report in the case of WT/DS160/R of 15 June 2000: United States—s.110(5) of the Copyright Act. Mr St Quintin did, however, refer me to the summary of the decision contained in *Copinger* at 23-139. In doing so he placed emphasis on the words underlined below:

The Application of the three-step test by a WTO Panel

23-139 Of particular interest in connection with limitations under the TRIPs Agreement, is the application of the "three-step test" of the Berne Convention by a World Trade Organisation Panel in its report on a complaint brought against the USA by the EU under the TRIPs dispute prevention and settlement procedure. This report would appear to be the first judicial interpretation of the three-step test. The panel found that the term "special cases" in the first condition requires that a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach. However, a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned. Thus, the first condition does not imply passing a judgment on the legitimacy of the exceptions in dispute (as had been argued by the EU). As regards the second condition, that an exception should not conflict with the normal exploitation of a work, the panel considered that a conflict arises when the exception or limitation enters into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e. the copyright) and thereby deprives them of significant or tangible commercial gain. The panel finally gave its opinion on the third condition of the three-step test, that the exception or limitation must not unreasonably prejudice the legitimate interests of the right holder, finding that there is unreasonable prejudice where an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright holder.

151. This passage is consistent with the summary of the three-stage test provided by Arnold J. in England and Wales Board Limited v Tixdaq Limited [2016] EWHC 575 (Ch).

Fair dealing

152. As noted by Arnold J in England and Wales Cricket Board Limited v Tixdaq Limited [2016] EWHC 575 (Ch) at [83] the question of what is meant by "fair dealing" was (albeit in a different context) considered by the Court of Appeal in Ashdown v Telegraph Group Ltd [2001] EWCA Civ 1142, [2002] Ch 149. At [70]. The following passage from Laddie, Prescott & Vitoria, *The Modern Law of Copyright and Designs* (3rd edition, 2000) was approved by Lord Phillips:

"It is impossible to lay down any hard-and-fast definition of what is fair dealing, for it is a matter of fact, degree and impression. However, by far the most important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor's exploitation of the copyright work, a substitute for the probable purchase of authorised copies, and the like. If it is, the fair dealing defence will almost certainly fail. If it is not and there is a moderate taking and there are no special adverse factors, the defence is likely to succeed, especially if the defendant's additional purpose is to right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on. The second most important factor is whether the work has already been published or otherwise exposed to the public. If it has not, and especially if the material has been obtained by a breach of confidence or other mean or underhand dealing, the courts will be reluctant to say this is fair. However, this is by no means conclusive, for sometimes it is necessary for the purposes of legitimate public controversy to make use of 'leaked' information. The third most important factor is the amount and importance of the work that has been taken. For, although it is permissible to take a substantial part of the work (if not, there could be no question of infringement in the first place), in some circumstances the taking of an excessive amount, or the taking of even a small amount if on a regular basis, would negative fair dealing."

153. Mr Hill referred me to the following passage from *Copinger* on the relationship between section 30A and the three step test:

"Probably, in order to come within an exception, the act in question must not only satisfy the terms of the exception but must also conform to the three-step test laid down in Art.5(5) of the Directive."

154. This passage is based on the decision of the CJEU in Stichting Brein v Wullems C-527/15 in which the CJEU held that the temporary reproduction in that case did not fall within the temporary copying exception in Article 5(1) of the Info Soc Directive because the three step test was not met. Article 5(5) was in other words applied directly to the facts of the case.

155. However, as noted by Arnold J. in England and Wales Cricket Board Limited v Tixdaq Limited [2016] EWHC 575 (Ch) at [72], there are other cases suggesting that the three step test is directed exclusively to

Member States rather than national courts. It is not necessary for me to decide this point because it was agreed by counsel that (a) it was appropriate to apply the three step test and that (b) the factors overlapped to a very large extent with those relevant to whether or not the reproduction in question amounts to fair dealing or not within the meaning of section 30A.

"For the purpose of"

156. Section 30A requires that in order to a permitted use the fair dealing must be "for the purpose of" parody, pastiche or caricature. It was not suggested that this phrase in section 30A has any different meaning to the same words that in section 30(2) CPDA ("for the purpose of reporting current events").

157. In England and Wales Cricket Board Limited v Tixdaq Limited [2016] EWHC 575 (Ch) Arnold J noted the observations of the Court of Appeal in Pro Sieben media AG v Carlton UK Television Ltd [1999] 1 WLR 605 at 614

"In Sweet v. Parsley [1970] AC 132 the House of Lords emphasised the importance of construing a composite phrase rather than a single word. It seems to me that in the composite phrases 'for the purposes of criticism or review' and 'for the purpose of reporting current events' the mental element on the part of the user is of little more importance than in such everyday composite expressions as 'for the purpose of argument' or 'for the purpose of comparison.' The words 'in the context of' or 'as part of an exercise in' could be substituted for 'for the purpose of' without any significant alteration of meaning.

That is not to say that the intentions and motives of the user of another's copyright material are not highly relevant for the purposes of the defences available under section 30(1) and section 30(2). But they are most highly relevant on the issue of fair dealing, so far as it can be treated as a discrete issue from the statutory purpose (arguably the better course is to take the first 24 words of section 30(1), and the first 16 words of section 30(2), as a single composite whole and to resist any attempt at further dissection). It is not necessary for the court to put itself in the shoes of the infringer of the copyright in order to decide whether the offending piece was published 'for the purposes of criticism or review.' This court should not in my view give any encouragement to the notion that all that is required is for the user to have the sincere belief, however misguided, that he or she is criticising a work or reporting current affairs. To do so would provide an undesirable incentive for journalists, for whom facts should be sacred, to give implausible evidence as to their intentions."

158. Arnold J added that the question of whether the use of copyright material is "for the purpose of" reporting current events is to be judged objectively. The same in my judgment applies in the context of section 30A. Nevertheless, in this context it is in my judgment legitimate to have regard to the motives of the user: England and Wales Cricket Board Limited v Tixdaq Limited [2016] EWHC 575 (Ch) at [85].

IPO Guidance

159. Shortly after section 30A came into force, the Intellectual Property Office published some guidance (UKIPO 2014) 6 in which they said the following question and answer guidance:

What's changing?

Many works of caricature, parody or pastiche – songs, films, artworks and so on - especially in this age of digital creation and re-mixing, involve some level of copying from another work. The law is changing to allow people to use limited amounts of another's material without the owner's permission. For example: a comedian may use a few lines from a film or song for a parody sketch; a cartoonist may reference a well known artwork or illustration for a caricature; an artist may use small fragments from a range of films to compose a larger pastiche artwork. It is important to understand, however, that this change in the law only permits use for the purposes of caricature, parody, or pastiche to the extent that it is "fair dealing." Fair dealing allows you only to make use of a limited, moderate amount of someone else's work. This legal term is further explained later in this guide.

What is meant by "for the purpose of caricature, parody or pastiche"?

The words "caricature, parody or pastiche" have their usual meaning in everyday language, but also take

account of the context and purpose of the copyright exceptions. In broad terms: parody imitates a work for humorous or satirical effect. It evokes an existing work while being noticeably different from it. Pastiche is musical or other composition made up of selections from various sources or one that imitates the style of another artist or period. A caricature portrays its subject in a simplified or exaggerated way, which may be insulting or complimentary and may serve a political purpose or be solely for entertainment.

Does the parody have to be making fun of the original work or its author?

Whilst parody does involve an expression of humour or mockery, it does not have to comment on the original work or its author. It can be used to comment on any theme or target.

Parody

160. Parody is a well-known literary genre. Familiar examples may be found in *The Oxford Book of Parodies* (2010) and *The Faber Book of Parodies* (1984). The editor of the former, John Gross, says this in the Introduction:

"A parody is an imitation which exaggerates the characteristics of a work or style for comic effect. Such is the broad definition on which most dictionaries or reference books agree".

The modern-day parodist, Craig Brown, who has written a parodic diary in *Private Eye* for many years has referred to parody in literature as a pas-deux in that "the parodist must inhabit the language and speech-rhythms of the parodied while subverting them for his own ends": *The Lost Diaries* (2010).

161. The Shorter Oxford English Dictionary defines parody as:

"A n. 1. prose, verse or (occas.) artistic composition in which the characteristic themes and style of a particular work, author, etc., are exaggerated or applied to an inappropriate subject, esp. for the purposes of ridicule... 2. Fig. A poor or feeble imitation, a travesty M19.

B. v 1. V.t. Compose a parody of; be a parody of M18. B v.i. Parody a composition rare L19 2. V.t. fig. imitate in a poor or feeble manner, travesty"

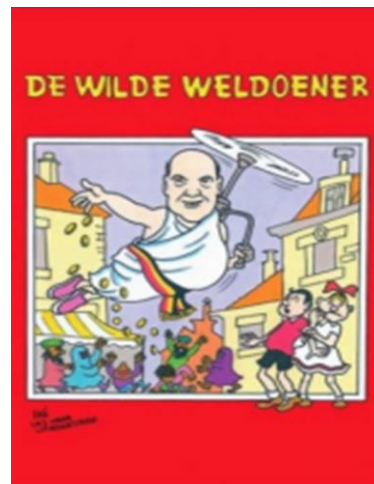
Deckmyn

162. Parody as a legal concept in the context of Article 5(3)(k) of the Info Soc Directive has been considered by the CJEU in Deckmyn v Vandersteen C-201/13 [\[2014\] Bus LR 1368](#). The case concerned the use made by a Mr Deckmyn of a drawing which closely resembled the title cover of a comic book from 1961. Mr Deckmyn was a member of a Belgian nationalist anti-immigration party. Mr Vandersteen's estate held the copyright in the image and objected to the use of the image for political purposes.

163. The title cover of the original comic book shows one of the main characters wearing a white tunic and throwing coins to people who are trying to pick them up under the title "The Wild Benefactor":



164. In the allegedly infringing work (the cover of a calendar), the flying main character was replaced by the Mayor of the City of Ghent and inserted into the background people wearing veils picking up the coins:



165. The Belgian court of first instance ordered Mr Deckmyn to cease using the drawing. On appeal, Mr Deckmyn argued that the political cartoon fell within the parody exemption provided under Belgian law. The copyright holders argued that the parody exemption did not apply because it failed to meet certain criteria, including that it:

- a. Failed to fulfil a critical purpose;
- b. Lacked originality;
- c. Failed to display humorous traits;
- d. Failed to try to ridicule the original work;
- e. It borrowed a greater number of formal elements from the original work than was strictly necessary in order to produce the parody;
- f. The drawing conveyed a discriminatory message, since the characters who, in the original work, pick up the scattered coins, were replaced in the drawing at issue by people wearing veils and people of colour.

166. The Court of Appeal in Brussels referred the following questions to the CJEU:

"1. Is the concept of 'parody' an autonomous concept of EU law?"

"2. If so, must a parody satisfy the following conditions or conform to the following characteristics: —display an original character of its own (originality); —display that character in such a manner that the parody cannot reasonably be ascribed to the author of the original work; —seek to be humorous or to mock, regardless of whether any criticism thereby expressed applies to the original work or to something or someone else;— mention the source of the parodied work?

"3. Must a work satisfy any other conditions or conform to other characteristics in order to be capable of being labelled as a parody?"

167. The CJEU held in answer to those questions:

1. The concept of "parody" appearing in that provision is an autonomous concept of EU law.
2. The essential characteristics of parody, are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery.
3. The concept of "parody", within the meaning of that provision, is not subject to any of the following conditions mentioned by the referring court:
 - a. that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work;
 - b. that it could reasonably be attributed to a person other than the author of the original work itself;
 - c. that it should relate to the original work itself or mention the source of the parodied work.
4. When applying the exception for parody, within the meaning of article 5(3)(k) of Directive 2001/29, a court must strike a fair balance between, on the one hand, the interests and rights of persons referred to in articles 2 and 3 of that Directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of article 5(3)(k)
5. It is for the national court to determine, in the light of all the circumstances of the case in the main proceedings, whether the application of the exception for parody, within the meaning of article 5(3)(k) of Directive 2001/29, on the assumption that the drawing at issue fulfils the essential requirements of parody, preserves that fair balance.

168. There is no record of what happened to the case when it returned to the referring court.

Two types of parody

169. The Advocate General in his opinion at [61] distinguished between two types of parody, namely:

- (i) Parody directed at or concerned with the original work (*'parody of'*)
- (ii) Parody or target parody where the original work parodied is merely the instrument of an intention aimed at a third-party individual or object (*'parody with'*).

The second type of parody is sometimes called 'target parody'.

170. The same distinction as referred to by the Advocate General is contained in the UK IPO Guidance referred to above and it is clear from the judgment of the Grand Chamber that both types of parody are encompassed within Article 5(3)(k) of the Info Soc Directive.

171. The reason why both types of parody are given protected status is that they involve freedom of expression in a context where the copyright holder may well be highly unlikely to grant a licence. Parodies of and target parodies may be a form of artistic expression but target parodies may additionally involve considerations of freedom of political expression. The alleged parody in Deckmyn was a target parody. Mr

Deckmyn was not passing comment on or making fun of the main character from the Suske en Wiske comic or the comic series more generally. The altered image was a mere vehicle for a political message.

172. The essential elements of parody as a legal concept identified by the CJEU, are that the work must:

(i) evoke an existing work

(ii) be noticeably different from that existing work

(iii) constitute an expression of humour or mockery

173. It has been pointed out that this definition is potentially very wide especially when applied to alleged copies of humorous works:

"Some activities covered by the Deckmyn definition could not, in any generally accepted sense, be regarded as parodies. Consider, for example, the adaptation of a work which simply "borrows" humour from the underlying work - an adapted image of a comic cartoon character or an unlicensed sequel to a funny novel, for example. On the face of it, in both situations, the conditions of the Deckmyn definition would be satisfied. However, neither could reasonably be described as parody."

(Griffiths, "Fair Dealing after Deckmyn" – the United Kingdom's defence for caricature, parody or pastiche" in Richardson and Rickeson, *Research Handbook on Intellectual Property in Media and Entertainment*, (Edward Elgar, 2017))

174. I agree. The author continues:

"The Advocate General convincingly explained that parodies do not have to "target" an underlying copyright work and that contemporary cultural practice encompasses parodies which adapt works in order to comment on social practices and behaviour beyond the boundaries of the underlying work (so-called "weapon parodies"). However, a parody must target something.^[15] It must be a "weapon" of some sort. The two hypothetical examples described above are not parodies because they are not directed at anything at all."

175. I agree. Another way of putting that the parody must have a target is to say that there must be some critical distance between the new work and the original work:

"Although parody and imitation are close, what distinguishes them is that parody focuses on criticizing or mocking the original whereas imitation merely pays tribute to the original work, thereby lacking the critical distance which is so important to in a work of parody"^[16]

176. I therefore accept the submission by Mr Hill that it is an essential part of parody within the meaning of the Info Soc Directive and section 30A of the CDPA that:

"it does express some kind of opinion by means of its imitation, but noticeable difference, from the work parodied"

The opinion might be about something outside of the work such as a political figure or policy of a public authority (as in the Deckmyn case itself) or it might be an opinion about the parodied work itself. But either way it is this way that the work of parody "constitutes" an expression of mockery or humour in the way demanded by the Judgment of the CJEU.

177. The need for a parody to express an opinion in order to fall within the exception is particularly important in the case of parodies of comedies. It is relatively unusual for parodies to take comic works as a subject. It is common in literary and dramatic parody for serious works to be mocked and made fun of : see e.g. Craig Brown's parody of a description of an imagined trip to the sea side by WG Sebald^[17] and Benny Hill's parody of Edward Albee's 'Whose Afraid of Virginia Woolf'.^[18] The parody by Mel Smith and Griff Rhys Jones of the Two Ronnies ('*The Two Ninnies*'^[19]) is a rare exception to the general rule that comedies are not usually the subject of parody.^[20] The Two Ninnies sketch is both a funny impersonation and is also at the same critical

of the comic technique used by Ronnie Barker and Ronnie Corbet. In that sense it 'targets' the comedy of the Two Ronnies. It is both a parody of and parody with.

178. Without this critical target element every reproduction or imitation of a comic work (as long as it was noticeably different from the original) would constitute a parody. That cannot be what the CJEU intended.

179. Mr Hill's submission is in my judgment supported by the observation of the Advocate General in Pelham v Hutter C-476/17):

"As I have already stated, EU copyright law takes account of various rights and interests which could conflict with the exclusive rights of authors and other rightholders, in particular the freedom of the arts. Exceptions to the exclusive rights such as the quotation, and caricature, parody and pastiche exceptions facilitate dialogue and artistic confrontation through references to pre-existing works"

180. Works of parody can only facilitate dialogue or give rise to artistic confrontation if they are in some sense themselves an expression of opinion expressed as humour or mockery. I accept Mr Hill's submission that mere imitation (of a work of comedy) is not enough to constitute parody.

Pastiche

181. Pastiche is defined in the Shorter Oxford English Dictionary as:

A n. A medley of various things: spec (a) a picture or a musical composition made up of pieces derived from or imitating various sources (b) a literary or other work of art composed in the style of a well-known author, artist etc. L19. B. v.t. & i. Copy or imitate the style of an artist or author"

182. In his opinion the AG in Pelham v Hutter said (in a footnote, n.31):

"As for the concept of pastiche, it consists in the imitation of the style of a work or an author without necessarily taking any elements of that work. However, the present case concerns the reverse situation whereby a phonogram is taken to create a work in a completely different style."

183. In the article relied upon by Mr St Quintin, Emily Hudson notes that the term "pastiche" is used less frequently in the English language than both parody and caricature. She notes that some musicologists draw a distinction between pastiche and pasticcio, with the former referring to works that deliberately imitate the style of another, and pasticcio to operas and other performances drawing from the works of different composers. She refers to Richard Dyer who has argued that the primary definition of pastiche is "a kind of imitation that you are meant to know is an imitation".

184. She comments that there appears to be a consensus that pastiche and parody can be contrasted owing to intention and impact. For instance, it has been said that while pastiche "borrows closely, openly, appreciatively, and often playfully from the styles of previous works, frequently combining elements of different styles", the imitation present in parody is one "in a spirit of mockery or ridicule". That is consistent with the approach of the CJEU in Deckmyn set out above.

185. She notes the suggested definition offered by the IPO for pastiche in the context of section 3A of CDPA was the use of "small fragments from a range of films to compose a larger pastiche artwork". Hudson concludes that: "the ordinary meanings of pastiche suggest that it exhibits features that are distinct from, and operate well outside of, the genres of parody and caricature.". I agree.

186. She concludes that it is appropriate to start with the ordinary meaning of pastiche, which as discussed in the second section covers imitation of the style of pre-existing works, the incorporation of parts of earlier works into new works, and the production of medleys. She continues:

"Returning to s.30A, the copyright definition of pastiche should reflect the term's essential meaning, which covers two key activities: imitation of the style of pre-existing works, and the utilisation or assemblage of pre-existing works in new works."

187. I agree. This approach seems to me to be consistent with the approach of the CJEU to parody in Deckmyn which involved starting with the meaning of the term in ordinary language and identifying its essential ingredients, the comments of the AG in Pelham v Hutter cited above and the Guidance published by the IPO in its Guidance.

188. It follows that the two essential ingredients for pastiche within the meaning of s30A are, in my judgment, that:

- a. The use imitates the style of another work; or
- b. It is an assemblage (medley) of a number of pre-existing works.
- c. In both cases, as with parody, the product must be noticeably different from the original work.

189. If this definition is adopted, pastiche in s.30A could, according to Hudson, potentially apply to a broad spectrum of 'mash-ups', fan fiction, music sampling, collage, appropriation art, medleys, and many other forms of homage and compilation. This may be so. Each case will have to be assessed on its own merits. However, it is important to bear in mind that s.30A must be read in light of the first of the three-step tests. If pastiche is too widely interpreted, to cover any imitation or reproduction of subject matter it ceases to be a "special case" of protected expression. It would encompass virtually any form of borrowing, imitation or reproduction. This was plainly not the intention of the European or UK legislature which created an exception for three limited specific types of use.

190. If pastiche is interpreted too broadly so that it in effect encompasses all forms of appropriation and imitation, it would also mean that s.30A would become a general fair use provision which is not what either the Info Soc Directive or section 30A intends. I therefore accept Mr Hill's submission that the pastiche exception must be confined to use which involves the copying of the style of a work (or the creation of amalgamation of works in the form of medley).

191. There may of course be cases where the allegedly infringing work may contain elements of both parody and pastiche or even parody, pastiche and caricature. That is not the case here so the issue does not arise but it seems to me that section 30A is flexible enough to accommodate such a case in any event. I don't see any difficulty in reading the test as being whether there has been 'fair dealing for the purposes of parody [and/or] pastiche [and/or] caricature [or any combination or mixture of these three]'

192. I should add that although the list of issues for trial divides section 30A into two elements, namely 'whether the acts of infringement are for the purpose of parody or pastiche' and 'do the acts amount to fair dealing with the Claimant's works', it seems to me that s.30A actually contains only one question which is whether the acts complained of amount to fair dealing for the purposes of parody or caricature or pastiche'.

193. I also accept Mr Hill's submission that the court's focus ought to be on the use which is made of the relevant copyright works in OFDE Show / the September Script. The court is not required to assess whether the OFDE is itself a work of parody or pastiche.

H. APPLICATION TO THE FACTS OF THIS CASE

No use for the purpose of parody

194. In my judgment, the use made of the characters, their backstories, jokes and catchphrases is not for the purpose of parody within the meaning of section 30A for the following reasons:

- a. The September Script does not evoke OFAH in order to express humour about OFAH or anything else. In so far as the Script is humorous, the humour is already contained in the borrowed material.
- b. The September Script does not evoke OFAH in order to mock it or critically engage with either OFAH or situation comedy or anything else.
- c. OFDE involves the wholesale transposition of the characters, language, jokes and backstories from OFAH

into the setting of an imaginary pub quiz. It is closer in form to reproduction by adaptation than parody.

d. Although some of the characters may have appeared in OFDE in a slightly exaggerated fashion, this is not evident from the September Script and was not intended. The overall aim of the September Script was rather to represent the characters taken from OFAH in a pitch perfect familiar fashion.

e. Whilst the form of the September Script is noticeably different from the OFAH Script in that it is set in a live and interactive dining experience rather than being intended to be performed before a passive live audience, it does not seek to target OFAH or use OFAH either to express humour about it or mock it (or anything else).

f. None of the marketing material or planning of the show or reviews of OFDE refers to any use of material from OFAH for the purpose of parody.

g. The overwhelming audience feedback was that it felt like being in another live episode of the OFAH. In that respect the September Script is not noticeably different from OFAH. It is a reproduction by adaptation to a live dining setting:

i. As the show's website states "it's a hoot ... like being in the telly".

ii. "Great night out... It was like being sat in the middle of an episode"

iii. "From start to finish it felt like we were in an episode of 'Only Fools'.

No use for the purpose of pastiche

195. In my judgement, the use made of the characters, their backstories, jokes and catchphrases is not for the purpose of pastiche within the meaning of section 30A for the following reasons:

a. The September Script does not use elements from the Scripts to imitate the style of OFAH. Nor are the elements taken arranged in any sort of medley or assemblage. Rather it takes the characters, with their full back story and catch phrases and simply (re)presents them in a live dining format.

b. The use made of Del Boy and the other characters, their language, jokes and backstories from OFAH in the setting of an imaginary pub quiz involves a wholesale borrowing of content. It is closer to reproduction by adaptation than pastiche.

c. None of the marketing material or internal planning material refers to the OFDE Show as being intended as being a pastiche of OFAH.

d. None of the reviews of the OFDE Show refer to it as being perceived or understood to be a pastiche.

e. The September Script uses copyright material from OFAH to create an interactive adaptation of OFAH with the aim of giving the audience the feeling that they are meeting the characters from OFAH. The loose script built around the borrowed characters and backstories is a mere vehicle for facilitating this feeling of coming into contact with the characters from OFAH rather than being an attempt to use the style of OFAH. In that respect the September Script is not noticeably different from OFAH.

No fair dealing

196. Assuming that I am wrong and the September Script does involve the use of copyright material for the purposes of pastiche or parody, in my judgment, that use does not qualify as fair dealing and fails steps 2 and 3 of the three step test for the following reasons:

a. The taking from the Scripts is very extensive both in terms of the quantity of material and its quality:

i. As to the extent of the taking, all the characters used in the September Script are lifted wholesale without any attempt to rework or rename them.

ii. This taking includes the characters' full back stories, appearance, wants desires, frustrations, social context. It took the key moments, the key catchphrases, and most recognizable parts of OFAH and the characters were closely reproduced in what was intended to be pitch perfect manner. The effect is that the audience feels they have just lived an episode.

iii. As the Break a Leggers' video review put it: "It didn't try to add anything particularly new or inventive but why would you when you've got great source material with strong characters, with memorable lines and catchphrases, why would you feel the need"

b. The use made of the Scripts is not a type of expression which attracts particular protection or engages fundamental rights. There is no expression of political view or any attempt to engage in an artistic dialogue or aesthetic criticism of OFAH specifically or through that show about comedy or television or popular culture generally.

c. The aim of putting on the show was simply to entertain the audience by bringing them into contact with the copied characters.

d. OFDE plainly competes with Shazam's normal exploitation of OFAH:

i. Whilst the most common exploitation of the works in issue is via television broadcast, that is not its only form of exploitation. Through its licensing agreement with the BBC, Shazam had a long established and on-going commercial interest in exploiting OFAH. It had been involved in a prequel and a sequel to OFAH and received license fees for a wide range of OFAH themed promotional items.

ii. Shazam had also invested large sums in a musical adaptation of OFAH. OFDE represented an adaption of OFAH in an interactive dining show.

iii. ITI's aim was to extract value from the use of the OFAH characters in the form of a commercial enterprise of a live dining live show. I reject the submission that unless the OFDE can be shown to interfere with the sale of books containing the Scripts, there is no commercial interference with Shazam's normal exploitation of OFAH. Shazam's normal exploitation of the Works took many forms. It is irrelevant in this context that Shazam has not considered itself commissioning or presenting a dining show of the OFAH.

iv. OFDE was launched and marketed at the same time as the fully authorized OFAH Musical was going through the same process. There was a significant risk that some people interested in seeing a live OFAH themed performance might go to see the OFDE rather than go to the Musical. It is not necessary for Shazam to show actual diversion of trade because of the existence of OFDE. A risk of diversion is sufficient to give rise to a potential conflict with Shazam's normal exploitation of the Works and Shazam's economic interest in the Works.

e. I accept Mr Hill's submission that OFDE amounted in substance to the creation of a new episode of OFAH adapted for a dining performance. It is obvious that what amounts to the writing of a new episode of an established and commercially successful work using the same principal characters, back story, catchphrases and social and temporal setting without permission unreasonably prejudices the legitimate interests of Shazam.

f. Shazam had a legitimate interest in controlling how the OFAH characters were portrayed and presented and commercially exploited. The conflict with Shazam's legitimate commercial interests in these circumstances was stark.

g. The presentation of the characters, catchphrases, backstories from OFAH (unchanged) in a live setting for the purpose of entertainment is a form of exploitation which a copyright holder would legitimately expect to be able to control (e.g. by licence).

I. PASSING OFF

197. The parties' submissions on passing off were short and the time devoted to it at trial was limited. I will accordingly state my conclusions briefly.

The legal principles

198. There was no dispute between the parties as to the applicable law. It may be summarized as follows:

a. Passing off requires proof of the so-called classical trinity of (i) goodwill, (ii) misrepresentation leading to deception or a likelihood of deception and (iii) damage: see Reckitt & Colman Products Ltd v Borden Inc (No.3) [1990] 1 WLR 491.

b. The burden in relation to all three elements is on the Claimant.

c. The date at which these elements must be proven is the date upon which the acts alleged to amount to passing off commenced: see Lord Neuberger PSC at [16] of Starbucks (HK) v British Sky Broadcasting Group [2015] UKSC 31.

d. In relation to deception:

i. The court must assess whether "a substantial number" of the Claimants' customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per Interflora Inc v Marks and Spencer Plc [2012] EWCA Civ 1501, [2013] FSR 21).

ii. In Harrods Ltd v Harrodian School Ltd [1996] RPC 697 at p.706, Millett LJ said:

"Deception is the gist of the tort of passing off, but it is not necessary for a plaintiff to establish that the defendant consciously intended to deceive the public if that is the probable result of his conduct. Nevertheless, the question why the defendant chose to adopt a particular name or get up is always highly relevant. It is "a question which falls to be asked and answered": see Sodastream Ltd. v. Thorn Cascade Co. Ltd. [1982] R.P.C. 459 at page 466 per Kerr L.J. If it is shown that the defendant deliberately sought to take the benefit of the plaintiff's goodwill for himself, the court will not "be astute to say that he cannot succeed in doing that which he is straining every nerve to do": see Slazenger & Sons v. Feltham & Co. (1889) 6 R.P.C. 531 at page 538 per Lindley L.J."

e. The same approach applies in cases involving goodwill based in whole or in part on character merchandising, as long as the specific type of misrepresentation that is relevant to those cases is borne in mind: see Fenty v Arcadia [2015] EWCA Civ 3 at [39], following Laddie J in [46] of Irvine v Talksport [2002] EWHC 367 (Ch).

f. Proof of actual damage is not required.

199. To these basic propositions, Mr Hill adds the following gloss to proposition (d) above: Where a valuable commercial creative property has been created, it can certainly be the case that a substantial portion of the public will believe that a work using key features of that property is put out by the owner of the property or someone authorised by them: see, e.g. IPC Magazines v Black and White Music [1983] FSR 348 at 350.

[text deleted]

J. CONCLUSION

210. It follows that the Claimant's claims for copyright infringement and passing off succeed. The table below summarises the conclusions I have reached in relation to each of the issues tried in question and answer form:

Issue No.	Issue	Answer	Para

<u>Copyright</u>			
1.1	Is the body of scripts for the Sitcom taken together a literary works for the purposes of copyright law?	No.	72
1.2	Is the character of "Del Boy" a literary work for the purposes of copyright law?	Yes	122
2.1	Is each script used in OFAH a dramatic work for the purposes of copyright law?	Yes	67
2.2	Is the Character "Del Boy" a dramatic work for the purposes of copyright law	No	121
2.2	Is the body of scripts for the Sitcom taken together a dramatic work?	No	71
3	What is the extent of the commonalities in content between the alleged works and the September Script?	There are significant commonalties	135
4	Were the commonalities identified in answer to Issue 3 the result of copying, directly or indirectly, from the alleged works and, if so, to what extent.	Yes	133
5	Were those commonalities which were the result of copying amount either individually or collectively to substantial parts of the alleged works, such that the copying of the September Script and/or performance of the Show to that script infringe any copyright in those alleged works (unless the defence under s.30A CPDA applies)?	Yes	136
6.1	If copyright was infringed, were the acts of infringement for the purpose of parody?	No	194
6.2	If copyright was infringed, were the acts of infringement for the purpose of pastiche?	No	195
6.3	Did any of the acts of infringement amount to fair dealing with the Claimant's works?	No	196
6.4	Do the acts of infringement conflict with normal exploitation of the Claimant's works?	Yes	196
<u>Passing Off</u>			
7	Did the Claimant own goodwill in relation to (i) the name Only Fools and Horses or (ii) the leading characters, in particular, Del Boy?	Yes (both)	200
8	Have any of the Defendants misrepresented that the Show is connected in the course of trade with the Claimant's business?	Yes	206-208
9	Was there damage caused or a likelihood of damage being	Yes	209

Note 1 A full list of the individuals said to have collaborated was provided by Brandsmiths in a letter dated 14 June 2021.

Note 2 Published as ‘The Bible of Peckham – Volumes 1-3’ by BBC books (1999).

Note 3 The footnote cites Francis Day and Hunter Ltd v Twentieth Century Fox Corp Ltd [\[1940\] AC 112](#) at 123. The general rule “does not mean that in particular cases a title may not be on so extensive a scale, and so important in character, as to be the proper subject of protection against being copied” (citing Dick v Yates (1881) L.R. 18 Ch D. 76) and Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 W.L.R. 273 (at 286, per Lord Hodson, saying that Dick v Yates *and* “do not support the proposition that, as a matter of law, copyright cannot subsist in titles. No doubt they will not as a rule be protected, since alone they would not be regarded as a sufficiently substantial part of the book or other copyright document to justify the preventing of copying by others”

Note 4 In particular, Infopaq International, C-5/08, [EU:C:2009:465](#), paragraphs 37 and 39, and Levola Hengelo, C-310/17, [EU:C:2018:899](#), paragraphs 33 and 35 to 37.

Note 5 Painer, C-145/10, [EU:C:2011:798](#), paragraphs 88, 89 and 94 and Renckhoff, C-161/17, paragraph 14. h

Note 6 Clark, Only Fools and Horses, The Official Inside Story (2011) p. 15.

Note 7 Clark, Only Fools and Horses, The Official Inside Story (2011) p. 15.

Note 8 Part of the back story was that Rodney and Del’s father had deserted them shortly after their mother passed away when Rodney was six, leaving Del to bring him up.

Note 9 Clark, Only Fools and Horses, The Official Inside Story (2011) p. 15.

Note 10 Clark, Only Fools and Horses, The Official Inside Story (2011) p. 15

Note 11 A fictional character in a comic series.

Note 12 “It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly”

Note 13 p.13.

Note 14 “Although there must be a causal connection between the claimant’s and the defendant’s work for there to be any infringement, this connection need not be direct. ... Even though copying may take place indirectly, it is still necessary to prove an unbroken chain between the claimant’s and the defendant’s work. It must therefore be shown that the intermediate copy is itself either a direct or an indirect copy of the copyright work”

Note 15 The editor of *The Oxford Book of Parodies* says “A parody is no longer worthy of the name, however, if it loses sight of its target”. Introduction p. xiii

Note 16 Jacques, *The Parody Exception in Copyright Law* (Oxford, 2019) p.11

Note 17 “High above me in the air, the seagull continued upon its vacuous and erratic journey through a sky still glowering in fury at the ceaseless intrusion of the crazed sun”.

Note 18 <https://www.youtube.com/watch?v=iVb5EBSNKTw>

Note 19 https://www.youtube.com/watch?v=6oVG4_k7Hbc

Note 20 Another example is the comedian John Thompson who, as Bernard Righton, critically parodies the comedian Bernard Manning: <https://www.youtube.com/watch?v=BxFqv1QDI3Q>

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Introduction

”To write a discourse history of the terms ‘pasticcio’ and ‘pastiche’ is nothing short of adventurous.”¹

In October 2014, new copyright exceptions came into force in the UK, including [s.30A of the Copyright, Designs and Patents Act 1988](#) covering fair dealing for the purposes of caricature, parody or pastiche. These reforms were the culmination of a lengthy campaign for the introduction of new exceptions into the [CDPA](#), including in relation to parody.² The UK drafters of [s.30A](#) took the language of “caricature, parody or pastiche” from [art.5\(3\)\(k\)](#) of the Information Society Directive,³ placing that text in the context of the UK’s existing fair dealing machinery. Significantly, while much attention has been directed to the meaning of parody and justifications for a parody exception,⁴ there has been far less analysis of its legislative bunkmate, pastiche. This raises the question of what additional work, if any, is done by the inclusion of this word in [s.30A](#): is “pastiche” merely a synonym for “parody” or does it refer to imitation of a different type?

This article will argue that despite variation in the use of the word “pastiche” in different artistic fields, there is consensus that it refers to laudatory and non-critical imitation, such as creating a new work in the style of another artist or genre, and making a new work from a compilation or assembly of pre-existing works. Pastiche therefore includes “anti-twist” uses, i.e. those where there is no attempt to ridicule, lampoon or satirise the copied work, or comment critically on that work or other themes. This can be contrasted with the “expectation-defying alterations”⁵ of parody and the exaggeration of caricature.⁶ This raises serious doubts about assertions that the three terms are “too similar for it to be possible to distinguish between them”.⁷

That said, any analysis of the meaning of pastiche must be undertaken in light of principles of statutory interpretation and of judicial interpretative practices, which demonstrate that *copyright* understandings of statutory language may depart from ordinary meanings.⁸ This article will pay particular attention to the judgment of the Court of Justice in [Deckmyn v Vandersteen](#).⁹ That judgment included a number of observations regarding the legal interpretations of the term “parody” under [art.5\(3\)\(k\)](#), including that parody is an autonomous European concept and that courts must undertake a human rights balancing or proportionality exercise when applying the parody exception. Logic dictates that these factors would apply equally to the other elements of [art.5\(3\)\(k\)](#), making it necessary to consider whether, and how, they might impact on the ambit of the pastiche defence.

The key message of this article is that the introduction of [s.30A into the CDPA](#) is far more significant than has been appreciated thus far,¹⁰ as the term “pastiche” can clearly extend to mash-ups, fan fiction, music sampling, appropriation art and other forms of homage and compilation. To illustrate, the defendant’s artworks in the US case of [Carou v Prince](#),¹¹ understood as examples of transformative use by the Second Circuit, could reasonably be classified as instances of pastiche in the UK. Whether they would also constitute a *fair* dealing is another matter—and here we will need to consider normative questions regarding the circumstances in which pastiche ought to be permitted under a free exception. This point is significant as it indicates why we can be sanguine about giving pastiche a robust, stand-alone definition: in the UK, much intellectual heavy lifting can be done by the fairness factors; and indeed elsewhere in Europe, such considerations can inform the human rights balancing exercise required by the Court of Justice when applying [art.5\(3\)\(k\)](#).

This article commences by providing in the second section an overview of the artistic meanings of pastiche, emphasising its relevance to anti-twist uses. In the third section the analysis turns to pastiche as a copyright concept, focusing in particular on the extent (if at all) that the term’s legal definition departs from ordinary usage. This includes consideration of the history of pastiche in French and European law, and the interpretative lessons that can be drawn from [Deckmyn](#). The fourth section draws this analysis together by urging a liberal understanding of pastiche in copyright law. It resists any suggestion that caricature, parody and pastiche are functionally equivalent, arguing that while there may be overlaps in their coverage, the technical meanings of pastiche take it far outside the realms of parody and caricature. It argues further that pastiche should not be narrowed by arguments said to derive from [Deckmyn](#); on the contrary, there are strong normative arguments in favour of liberal exceptions,

and aspects of *Deckmyn* (notably its emphasis on freedom of speech) are consistent with a broad definition of pastiche in copyright law.

What is pastiche?

In order to develop the propositions in this article, it is necessary to start with an examination of pastiche as a non-legal concept. Compared with parody and caricature, the term “pastiche” is used less frequently in the English language. For instance, the *Oxford English Dictionary* places parody and caricature in Frequency Band 5, while pastiche is in the less well-utilised Band 4.¹² Similarly, a Google Books Ngram search of pastiche, parody and caricature¹³ suggests that it was not until the 1920s that use of the word “pastiche” began to trend upwards from a baseline of negligible (and often zero) use. In contrast, the words “parody” and “caricature” enjoyed far greater usage from 1700 to 2008, with caricature used more frequently than parody from 1812 to 1965, and parody overtaking caricature from that point. Looking at the 2008 dataset, parody was used over five times more often than pastiche, and around 1.5 times more often than caricature. This may help explain the impression (obviously anecdotal) that pastiche is less accessible to potential users as a fair dealing purpose because of lack of familiarity with its non-legal meaning. Against such a background, it may be easy to assume that, because it appears alongside parody and caricature, pastiche must be synonymous with or a close variant of these acts.

An indication that pastiche describes quite different forms of endeavour comes from the definition in the *OED*. The entry for “pastiche” as a noun reads:

1. ”a. A novel, poem, painting, etc., incorporating several different styles, or made up of parts drawn from a variety of sources. b. A musical composition incorporating different styles; a medley.
2. a. A work, esp. of literature, created in the style of someone or something else; a work that humorously exaggerates or parodies a particular style. b. The technique of incorporating distinctive elements of other works or styles in a literary composition, design, etc.”

The definitions in paragraph 1 are cross-referenced to elements of the entry for “pasticcio”, a term of Italian origin covering similar ground in relation to mixing and imitation, and used regularly in discussions of pastiche:

1. ”a. Music. An opera or other work consisting of a medley of pieces from different compositions or by different composers. b. A work of art or architecture imitating an antique or older style; esp. one incorporating elements taken or copied from antique or classical works; this style in art or architecture
....¹⁴

The definitions in the *OED* accord with descriptions in specialist texts, although the former do not capture the nuance that comes from a detailed examination of the history and meaning of pastiche (and pasticcio) in the visual arts, literature and music. It is not possible to attempt such a project here, but some key ideas about pastiche as a technical term can be noted. It is clear that pastiche has a dual identity, referring to both a “combination of aesthetic elements” and “a kind of aesthetic imitation”,¹⁵ giving the term a “slippery quality”.¹⁶ Its use in the artistic context can be traced back to 16th-century Italy, and in particular the “pasticcio” painting: “eclectically blended” works that combined themes and motifs from Renaissance art sources.¹⁷ The resulting works exhibited a “sort of generic High Renaissance style”, although they were also viewed dimly because of their composition and, in many cases, fraudulent presentation as authentic works.¹⁸ It seems that the concept of pasticcio emerged in France some time in the 17th century under the name “pastiche”, although the historical narrative is incomplete.¹⁹ The genre then continued to evolve, for instance through greater recognition of the ingenuity and lineage of artistic imitation, and through the term’s use for literary composition.²⁰

In musical realms, it has been said that the pasticcio operas of the 18th century also represented “a new positive value” of the genre of pastiche.²¹ These productions typically involved the performance of a series of popular arias from different composers, often held together with a tenuous plot. The pasticcio format was attractive for a number of reasons. For the travelling opera group with a limited catalogue of works, remixing permitted novel productions. The pasticcio offered an opportunity for repeat listening in an age without sound recordings, and shared parallels with the “suitcase” aria: the phenomenon of star singers inserting their own favourite songs into any production. It has also been observed that for composers, writing music was often “like crafting a piece of handmade furniture, far-removed from the Romantic notion of creating an original masterpiece”.²² Their purpose, it is said, was often “functional”: to create something “in circulation for a few weeks or months, before being relegated to the archives in favour of something more current”.²³ This meant there was not the same sort of moral or commercial concern with copying; as one opera blogger jokingly notes, “[p]art laxity with copyright, part free

advertising, then 18th century folk had different ideas about intellectual property.”²⁴ Another explains:

”Pastiche’ carries negative connotations now, but didn’t in baroque times when recycling was part of what went into theatre. Recordings didn’t exist then, so composers were expected to re-use popular melodies so people could enjoy them again. That’s also partly why baroque operas adapt similar ideas over and over. Audiences delighted in new ways of hearing old. How many of Vivaldi’s operas were all ‘new’ or even all Vivaldi? And how many adaptations of Ariosto and Tasso? The baroque aesthetic blended characters from ancient antiquity and medieval myth in joyous riot. Even Mozart had no qualms about recycling a good tune. So snobbery about this kind of pastiche is misguided.“²⁵

As indicated in this quotation, the pasticcio opera was not confined to small-fry or amateur productions, and a number of leading composers embraced the format.²⁶ During the 19th century, pasticcio fell out of fashion for being gauche and lacking the musical integrity and genius of the original.²⁷ Despite this, pasticcio has remained a part of operatic composition, and there are contemporary examples.²⁸

Against this backdrop, musicologists draw a distinction between pastiche and pasticcio, with the former referring to works that deliberately imitate the style of another, and pasticcio to operas and other performances drawing from the works of different composers.²⁹ It is clear, however, that different iterations of anti-twist imitation—e.g. blending different musical influences or styles, and sampling from existing works—remain extremely common in modern musical composition,³⁰ although the latter is more significant legally because it is far more likely to involve the reproduction of a protected element of a copyright work.

Developing a definition of pastiche is challenging because of the variation in the meaning of the term in different creative circles, and its continued evolution over time. As Richard Dyer observes, “the word pastiche is in practice extremely elastic”, which can result in “generally fruitless discussion about whether such and such really is pastiche”.³¹ Dyer’s thesis—which focuses on pastiche as aesthetic imitation rather than pastiche (or in his language, pasticcio) as a combination of existing elements—adopts a preliminary definition of pastiche as “a kind of imitation that you are meant to know is an imitation”.³² As Dyer notes, this generates questions about creator intention, audience knowledge and the indications and markers of pastiche.³³ Dyer seeks to challenge the pejorative connotations that surround pastiche, arguing that

”pastiche can now just mean, and I wish it did just mean, evident recombination and imitation of prior works, but the negative associations persist, mainly now in terms of triviality and pointlessness”.³⁴

Ingeborg Hoesterey also counters the “vaguely traditional, predominantly negative”³⁵ interpretation given to pastiche, pressing a postmodern vision of the genre as “about cultural memory and the merging of horizons past and present”—practices that “borrow ostentatiously from the archive of Western culture”, and that seek to “[foster] critical thinking”.³⁶ She argues that having

”for centuries [been] on the fringe of aesthetic canons ... [m]etamorphoses of [pastiche] can be found today in architecture, painting, sculpture/assemblage, in film and literature, in commercial art, in popular music, and in performance modes range from neo-operatic to MTV idioms”.³⁷

Depending on one’s preferred definition, pastiche therefore encompasses or overlaps with other aesthetic categories such as appropriation art, assemblage and collage, capriccio, cento, hip hop, montage and patchwork.³⁸ In contrast, there seems to be greater consensus that pastiche and parody can be contrasted owing to intention and impact. For instance, it has been said that while pastiche “borrows closely, openly, appreciatively, and often playfully from the styles of previous works, frequently combining elements of different styles”, the imitation present in parody is one “in a spirit of mockery or ridicule”.³⁹ Again, though, the degree of divergence—and overlap—depends on one’s preferred definitions. Hoesterey, for example, describes parody as involving “satirical, critical, or polemical intention”—“[c]haracteristic features of the work are retained but are imitated with contrastive intention, whereas in pastiche this relationship is one of similarity”.⁴⁰ That said, she also notes that other descriptions of parody which focus on “transposition” and staging a “confrontation” with a “canonical text”, and which may be closer to her postmodern view of pastiche.⁴¹

Returning to [s.30A of the CDPA](#), there is no statutory definition of caricature, parody and pastiche. Guidance issued by the Intellectual Property Office in 2014 stated that all three terms “have their usual meaning in everyday

language”, taking account “of the context and purpose of ... copyright exceptions”.⁴² The IPO stated that:

”In broad terms: parody imitates a work for humorous or satirical effect. It evokes an existing work while being noticeably different from it. Pastiche is musical or other composition made up of selections from various sources or one that imitates the style of another artist or period. A caricature portrays its subject in a simplified or exaggerated way, which may be insulting or complimentary and may serve a political purpose or be solely for entertainment.”⁴³

The IPO included an illustration for each sub-type; for pastiche, this was an artist using “small fragments from a range of films to compose a larger pastiche artwork”.⁴⁴

The wording in the 2014 guidance differed from that used by the IPO in its 2007 report *Taking Forward the Gowers Review*, although the definitions in that report rehearsed similar themes regarding pastiche: “picture or musical composition from or imitating various sources” and “literary or other work composed in the style of a well-known author, etc.”.⁴⁵ Interestingly, there were indications that, in 2007, the IPO did not consider pastiche to have any meaningful stand-alone effect. The IPO emphasised the similarities between caricature, parody and pastiche, stating that

”these terms are all defined in slightly different ways but all can include an element of imitation, and may incorporate, to a greater or lesser extent, elements of the original work”.⁴⁶

It also stated that, given the “close relationship between caricature, parody and pastiche”, it would use the word parody “as shorthand for all three” in its consultation.⁴⁷

While the statements regarding imitation and incorporation are clearly correct, any suggestion that the difference between the terms is “slight” would seem to imply an unduly narrow understanding of pastiche as a genre. However, this conflation of caricature, parody and pastiche—or at least, the lack of any meaningful weight given to the three concepts as separate ideas—would seem typical of the field.⁴⁸ For instance, despite recommending an exception based on art.5(3)(k), the *Gowers Review* used the word “pastiche” only three times in its 142-page final report, being in the text of the proposed reform.⁴⁹ The discussion leading up to this recommendation focused on transformative use in US fair use law, with some reference to parody. Although the report was supportive of an exception of similar operation being permissible in Europe, it also noted criticisms that, in the hip hop scene, a licensing culture had arisen in relation to sampling due to limits in the understanding of transformative use.⁵⁰ The report stated:

”Hip hop is not the first genre to ‘sample’ music: composers from Beethoven to Mozart to Bartok to Charles Ives have regularly recycled themes, motifs, and segments of prior works. Under the current copyright regime, these creators would need to clear permission and negotiate licences to avoid infringement suits. The barriers that new musicians have to overcome are extremely high, and the homogenisation of hip hop music is, critics argue, a direct response to the costs of clearing rights.”⁵¹

This discussion of transformative use concluded with two recommendations, one for the UK Government to introduce a parody exception styled after art.5(3)(k), and the other for the Government to press for reform of the [Information Society Directive](#) “to allow for an exception for creative, transformative or derivative works, within the parameters of the Berne Three-Step Test”.⁵² In presenting these recommendations, it would seem that the *Gowers Review* did not consider the argument that the pastiche limb of its proposed new exception would cover musical sampling and indeed many other uses that might be considered transformative in US fair use law. As will be argued later in this article, it can even be argued that pastiche enjoys advantages over transformative use, in particular owing to its recognition of artistic borrowing that does not seek to convey a new aesthetic or meaning.

In sum, the ordinary meanings of pastiche suggest that it exhibits features that are distinct from, and operate well outside of, the genres of parody and caricature. In evaluating what this means for [s.30A](#), the third section considers how the legal environment impacts on the interpretation of pastiche as a term in the [CDPA](#).

Legal framework

Relevance of exceptions

Prior to 2014 there was no exception in the CDPA expressly covering caricature, parody or pastiche despite imitative genres having a lineage that can be traced back long before the advent of the copyright system. The relevance of copyright to these acts depends, first, on whether the relevant imitation pertains to protected features of a copyright work—if not, for instance because the defendant’s work copies mere ideas, styles or techniques, then copyright will not be implicated.⁵³ If protected elements have been copied, a second question is whether those elements constitute a substantial part of the earlier work. While it was suggested in some English cases that a parody might be non-infringing where the defendant had made changes and contributions that resulted in an original work,⁵⁴ by the 1980s this reasoning had been rejected on the basis that it misunderstood the substantial part test, which focuses on the copied elements vis-à-vis the plaintiff’s work and not the original contributions of the defendant.⁵⁵ Assuming that a prima facie case of infringement is made out, a third key question is whether an exception is applicable. For many years, the most obvious possibility was fair dealing for the purpose of criticism or review.⁵⁶ However, with limitations in the language and judicial interpretations of that provision, there was a question over its ability to provide a comprehensive answer to the challenges posed by parody and other imitative uses.⁵⁷ Since October 2014 this position has changed with the introduction, in s.30A of the CDPA, of a fair dealing exception directed to caricature, parody or pastiche. As noted above, there is no guidance in the CDPA in relation to the meaning of these terms, which were taken from art.5(3)(k) of the Information Society Directive, itself also silent regarding their coverage. Looking to the Directive’s *travaux préparatoires*, we see that art.5(3)(k) was requested by the French delegation.⁵⁸ Its first iteration appeared in draft text dated 28 March 2000, with the language seemingly modelled on an existing French exception.⁵⁹ Little else is disclosed by the legislative history, suffice for earlier versions of the proposed Directive containing a Recital referring to the continued application of national exceptions covering “other cases of minor importance” such as “certain forms of humorous use”.⁶⁰ With the French delegation pressing for a specific exception,⁶¹ this text did not find its way into the recitals as implemented. Thus, with no direct guidance in the Directive itself, and minimal explanation in the *travaux*, the legislative framework of the Directive does little to elucidate the reach of art.5(3)(k).

The French approach

Given its origins in French law, one line of inquiry might be to consider how pastiche is understood in the copyright jurisprudence in that country. The French protection for pastiche is found in art.L122-5 of the Intellectual Property Code, which provides that “once a work has been disclosed, the author may not prohibit ... parody, pastiche and caricature, observing the rules of the genre”.⁶² It has been suggested that in France these acts are governed by the same rules but apply to different types of work, with parodies relating to musical works, video and film; caricature to visual or figurative works; and pastiche to literary works.⁶³ This accords with the (legal) view, mentioned earlier, that caricature, parody and pastiche are essentially interchangeable.⁶⁴ For instance, Cabay and Lambrecht suggest that “scholars now agree that those three terms must be considered as synonyms, or at least that [any] formal difference between them should bear no legal consequences”.⁶⁵

Looking to the French case law, it would seem that while there have been some attempts to distinguish between parody and pastiche,⁶⁶ the definitions given to pastiche have been unclear, inconsistent and ultimately irrelevant because courts have identified common considerations that tend to be present in a successful defence under art.L122-5,⁶⁷ for instance that the defendant’s work is intended to make people laugh, involves a substantial modification of the earlier work (so that the two works cannot be confused) and does not cause harm to the first author (e.g. by alienating the public from the first work).⁶⁸ The *Dezandre* decision of 1990 illustrates this point. The publisher of the newspaper *Libération* brought proceedings in relation to a record sleeve depicting a newspaper front page said to copy elements from *Libération*’s front page.⁶⁹ There were a number of limbs to the complaint; the copyright aspect related to the alleged reproduction of *Libération*’s layout. Defences of parody and pastiche both failed. The Court of Appeals in Paris described pastiche as imitating “a particular manner” and parody as imitating “a serious work by caricaturing it”,⁷⁰ which is somewhat consistent with the distinctions between parody and pastiche discussed in the second section. However, the court also suggested that for both defences, it was necessary for the defendant to aim to cause laughter; here, while there were shocking “coarse expressions” on the sleeve, they had “no comic virtue whatever”.⁷¹ By analysing parody and pastiche using common considerations—including the presence of comic intent—the distinction between the two aesthetic forms may have been rendered largely irrelevant.

The Deckmyn v Vandersteen case

While the French authorities provide a sense of the interpretative approaches in that country, they must be read subject to the judgment of the Court of Justice in *Deckmyn v Vandersteen*.⁷² The facts of *Deckmyn* are well known, and involved a member of a far-right political party distributing calendars containing an image that resembled a drawing from the comic strip *Suske en Wiske*. The purpose of the defendant's work was to criticise the spending priorities of the mayor of Ghent, who was shown distributing money to a group of people, some of whom had brown skin and others of whom wore veils. In a copyright action brought by the creator's heirs and other right holders in Belgium, the defendants argued that the calendar fell within that country's parody defence.⁷³ The Court of Appeal of Brussels stayed proceedings pending a referral to the Court of Justice regarding the meaning of parody in art.5(3)(k) of the Information Society Directive.

Although *Deckmyn* focused on parody, its reasoning is significant for pastiche for a number of reasons. First, it teaches us that we cannot simply transplant French understandings of pastiche across Europe. This is because the Grand Chamber held that parody is an "autonomous European concept"—i.e. one that must be interpreted uniformly across EU Member States⁷⁴—and provided guidance (discussed next) regarding the meaning of that term. If this is correct, then logic demands that pastiche follow suit given its shared legislative history and doctrinal context. At most, the French jurisprudence reflects a possible approach to construing pastiche.

Secondly, *Deckmyn* suggests that the plain meaning of statutory language is relevant to, but not solely constitutive of, its legal definition. The Grand Chamber noted that parody, which is not defined in the *Information Society Directive*, should be construed by considering its "usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part".⁷⁵ This approach, which for the reasons given above must apply to pastiche, might be described as a purposive semantic assessment: one looks not only at the plain language of a provision but also at its goals and surrounding infrastructure. Using this methodology, the Grand Chamber said that there are two essential characteristics of parody: that it evokes, but is noticeably different from, an existing work; and that it involves humour or mockery.⁷⁶ For the Grand Chamber, this definition accorded with the relevant legal context, namely that exceptions be interpreted strictly but in a way that enables their effectiveness⁷⁷; and reflected the objective of art.5(3)(k) in supporting free speech and the public interest.⁷⁸ Similarly, A.G. Villalón, whose interpretative efforts were aided by dictionary definitions of parody in the Spanish, French, German, Dutch and English languages,⁷⁹ saw his task as developing a *copyright* understanding of parody. As he noted at one point, in talking about the "decidedly troubled field" created by parody, he was referring "not ... to the field of art theory, into which it is clearly not for me to enter, but rather the field of copyright".⁸⁰

However, the Grand Chamber went further, stating that in applying art.5(3)(k), a "fair balance" must be maintained between the rights and interests of right holders and the freedom of expression of users.⁸¹ The idea of fair balance is mentioned explicitly in *Recital 31 of the Information Society Directive*,⁸² and has been cited in other copyright case law in the Court of Justice.⁸³ The Grand Chamber stated that in determining how to preserve such a balance, "all the circumstances of the case must be taken into account",⁸⁴ which in this instance might include any discriminatory message conveyed by the defendants' work.⁸⁵ This latter aspect, which would seem to countenance a compelled speech argument, will be discussed in more detail later. For now it is relevant to note that this fair balance assessment seems to be a very different beast from the purposive semantic analysis, operating more in the nature of a human rights balancing or proportionality exercise.

That *Deckmyn* might have an influence on the French approach is suggested by the recent "Glamour" decision of the Cour de Cassation.⁸⁶ That case concerned photographs by a fashion photographer that had been incorporated into paintings by an artist intending to create "a parodic perspective of the consumerist society".⁸⁷ Although *Deckmyn* was not cited by the Cour de Cassation, the decision of the Paris Court of Appeal—which had held that there was an infringement—was quashed on the basis that the lower court had failed to explain in a "concrete way" how a "fair balance" between the freedom of expression of the alleged infringer and the economic and moral rights of the author had been analysed.⁸⁸ The case was remanded to the Court of Appeal of Versailles for further consideration. Elsewhere, *Deckmyn* has been cited by the German Federal Court of Justice, also in relation to the reproduction of photographs.⁸⁹ In that case, a news website ran a competition in which entrants were asked to manipulate photographs of celebrities to make them look overweight, and an action was brought by the photographer of a photograph so altered. In considering the impact of *Deckmyn*, the Federal Court of Justice held that the definition of parody used in earlier German cases needed to be updated to accord with *Deckmyn*, for instance by omitting the need for the parody to comment on the original work. That said, it has also been observed that, when discussing fair balance, the court revived some of these requirements, for instance in finding that a

defendant's free speech arguments will be stronger if her work comments on the original.⁹⁰ The case was remitted to the Higher Regional Court of Hamburg so that a *Deckmyn*-informed standard could be applied. It therefore remains to be seen how *Deckmyn* will influence the reasoning of domestic judges across Europe, and how such judges will undertake the proportionality exercise countenanced by the Court of Justice.

Deckmyn and parody

Numerous questions arise in relation to the reasoning in *Deckmyn*. One is the relationship between the Grand Chamber's two interpretative canons: purposive semantic assessment and human rights balancing. Take the statement that parody requires the presence of "humour or mockery", a proposition that, in the UK at least, might not capture the field.⁹¹ With the emphasis on fundamental freedoms later in the Grand Chamber's judgment, should free speech ideas also affect the definition of parody (and, logically, pastiche), for instance through defendant-preferring interpretations? Another is how to deal with statutes that use industry language or terms of art: should the understandings of experts or creative constituencies (and not just the dictionary) inform the statute's interpretation? As seen above, A.G. Villalón was keen to avoid art theory when examining parody in *Deckmyn*,⁹² but can art.5(3)(k) be properly understood without any such analysis? Still another question is how to undertake the proportionality exercise contemplated by the General Chamber, a matter on which little guidance was rendered.

In answering these questions, we might start with a logically antecedent matter: are we taking an existing artistic or literary concept and inserting it into copyright law, or are we developing a legal concept that may depart—perhaps radically—from non-legal understandings?⁹³ To illustrate, "originality" is a term with a special meaning in copyright law, referring in essence to whether a person used the right type of effort in creating—i.e. originating—a work.⁹⁴ "Authorship" is closely related to originality, but is perhaps a more troublesome concept to the extent that different creator groups have different conceptions of an authorial contribution, such ideas not necessarily being coterminous with the relevant legal tests.⁹⁵ Some inconsistency between legal and non-legal understandings may nevertheless need to be tolerated, given that authorship reflects normative, doctrinal and pragmatic decisions about who should receive copyright law's bounty. There may therefore be good reasons to resist private ordering of authorship, for instance to do with manipulating rules regarding first ownership and duration, and defining people out of authorship and hence protections such as moral rights.⁹⁶

Returning to parody, one example of the "legal concept" approach is the *Michelin* decision of the Federal Court of Canada.⁹⁷ This case related to the reproduction of the image of "Bibendum", the marshmallow-like corporate logo of Michelin, on campaign materials produced by a trade union.⁹⁸ One argument of the union was that their use fell within fair dealing. Given that there was no explicit reference to parody in the Canadian statute at the time, the relevant purpose was said to be criticism.⁹⁹ This defence failed for a number of reasons, including that criticism did not extend to parody: to give "such a large meaning" to criticism would be to create "a new exception to the copyright infringement, a step that only Parliament would have the jurisdiction to do".¹⁰⁰ Teitelbaum J stated:

"I do accept that parody in a generic sense can be a form of criticism; however, it is not 'criticism' for the purposes of the Copyright Act as an exception under the fair dealing heading."¹⁰¹

This decision therefore countenanced a division between "criticism" as a fair dealing purpose and the ordinary meanings of the word,¹⁰² the latter of which would seem to include acts of evaluation and judgment that inhere in many parodies. In drawing this distinction, Teitelbaum J was swayed by the absence of Canadian or Commonwealth case law in which parody had amounted to criticism,¹⁰³ and the view that exceptions should be interpreted strictly.¹⁰⁴ While this article would challenge the reasoning that led the judge to this particular conclusion, *Michelin* demonstrates that interpretations of fair dealing purposes cannot be judged solely by reference to non-legal meanings. If a case with similar facts were heard in Canada today, it is possible that the opposite outcome would be reached, given the legislative expansion of Canadian fair dealing to include parody and satire, and the forward-leaning understanding of exceptions preferred in *CCH v Law Society of Upper Canada* and later cases.¹⁰⁵

In Europe, the conclusion in *Deckmyn* that parody is an autonomous European concept is consistent with a separate copyright understanding of the term, as it suggests a definition that transcends national boundaries and cultural norms. In a similar vein, Graeme Austin states that

”this part of the CJEU’s holding gives support to the claim that, in the copyright context, legislative terminology might sometimes be less important than the fundamental principles that the statutory language is attempting to capture ... By characterising ‘parody’ as an autonomous European concept, the CJEU seems to be reaching beyond whatever textual variations might appear in domestic law iterations of the defence and insisting that the scope of the defence be construed in the light of copyright’s deeper systemic commitments”.¹⁰⁶

The human rights balancing exercise bolsters this viewpoint, as it suggests the existence of universal factors that may influence the reach of art.5(3)(k). That said—and as noted above—a key issue about *Deckmyn* is the lack of guidance regarding the relationship between the definition of parody and the need for proportionality. If parody is a vehicle for free speech, then should we interpret the Grand Chamber’s conditions for parody in ways that prefer the defendant? The discussion of fair balance by the Advocate General contained some suggestion that this concept was relevant to the classification of a work as a parody:

”Taking into account the ‘presence’ that fundamental rights must be acknowledged to have in the legal system as a whole, I believe that, in principle and strictly from the perspective of the concept of parody, a particular image cannot be excluded from that concept solely because the author of the original work does not agree with the message or because the latter may deserve to be rejected by a large section of public opinion. However, distortions of the original work which, in form or substance, convey a message radically opposed to society’s most deeply held beliefs, on which the European public space is constructed and exists, should not be accepted as a parody and the authors of the work with whose assistance the parody is created are authorised to assert as much.”¹⁰⁷

In contrast, the Grand Chamber’s judgment seemed to treat fair balance differently, going to “the *application*, in a particular case, of the exception for parody”.¹⁰⁸ It therefore countenanced a two-stage approach in which the defendant’s work was initially classified as a parody (or not) by reference to the “essential requirements” of parody, and then a determination made as to whether, “in the light of all the circumstances of the case”, a fair balance between different stakeholders would be preserved if the defence was enlivened.¹⁰⁹ The Grand Chamber did not discuss what, if any, further conditions were provided by the three-step test language in art.5(5).¹¹⁰ This may reflect the questions posed by the referring court, which were directed towards the definition of parody.¹¹¹ That said, it seems odd to mention proportionality without explaining how this relates to the three-step test. The question therefore remains whether a parody that satisfies the Grand Chamber’s two-stage test may fail on the basis that the requirements of art.5(5) have not also been met.

The judgment in *Deckmyn* has received mixed reviews in the commentary. It has been praised for taking harmonisation seriously, for instance through its treatment of parody as an autonomous European concept, and its statement that a fair balance must be struck between the interests of right holders and users—a concept that has been referred to in other cases, and which could, it is said, serve as a unifying test to give greater consistency and clarity to the exceptions in art.5.¹¹² The definition of parody has also been welcomed for its liberal tenor,¹¹³ although concern has been expressed that “the court’s requirement for a parody to be humorous, without any further explanation of what humour entails, may be too restrictive”.¹¹⁴ While there is something in the observation that humour is subjective and culturally specific, one must bear in mind that the Grand Chamber spoke of parody involving an expression of humour *or mockery*, which would seem consistent with the proposition that unfunny parodies can fall within the exception.¹¹⁵

Perhaps the most compelling criticism—and one that could, as discussed in the fourth section, be significant for pastiche—relates to the Grand Chamber’s statement that in assessing fair balance, attention must be given to any discriminatory message conveyed by the defendant’s work.¹¹⁶ The right holders’ contention was that the defendant’s drawing had Islamophobic overtones and that some recipients believed the calendar to have been produced or endorsed by *Suske en Wiske*.¹¹⁷ The Grand Chamber agreed that, if there was a discriminatory message, right holders have “in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message”.¹¹⁸ At this point it is worth interpolating that a commitment to free speech must countenance not only the interests of the speaker but of third parties who do not wish to serve as a vehicle for or be (mis)understood as sharing the speaker’s message.¹¹⁹ As such, any confusion about association may need to be weighed against the speech interests of the defendant, a concern that is best thought of in free speech terms as being an objection to “compelled speech”.¹²⁰ It might also be said that the Grand Chamber, by citing the *Race Equality Directive* and art.21(1) of the Charter of Fundamental Rights,¹²¹ gave this compelled speech argument an objective footing, helping to prevent it from operating as a free-floating and self-serving answer to any assertion

of a parody defence.

The difficulty is that the Grand Chamber's reasoning on this aspect was brief, under-particularised, and side-stepped questions regarding the use of art.21—which covers discrimination on “any ground” including “political or any other opinion”—as a tool for censorship.¹²² The Grand Chamber did not engage with the characteristics of a “discriminatory message” or the circumstances in which a claimant's work will be “associated ... with such a message”, both questions being left to the national court. One issue is whether the copyright system is the appropriate forum to ventilate complaints about the substantive content of a work. At least in the UK, copyright law is not usually concerned with such qualitative assessments: for instance, the immorality exclusion remains contentious in its policy basis and effect, and is applied infrequently¹²³; and as stated by Robert Walker LJ in relation to fair dealing:

“If the fair dealing is for the purpose of criticism that criticism may be strongly expressed and unbalanced without forfeiting the fair dealing defence: an author's remedy for malicious and unjustified criticism lies (if it lies anywhere) in the law of defamation, not copyright.”¹²⁴

Following *Deckmyn*, it has been observed that there are laws directed specifically to racist and hate speech,¹²⁵ and that the (unharmonised) moral rights regime permits authors to object to unsavoury associations.¹²⁶ However, *Deckmyn* is problematic not only for plugging a gap that may or may not exist, but because “copyright law ought not to apply a more exacting standard than public or criminal law in this context”.¹²⁷ Despite the statement of the Grand Chamber that “[i]t is not disputed that parody is an appropriate way to express an opinion”,¹²⁸ statements in *Deckmyn* could be relied upon to narrow the messages that can be conveyed through the medium of parody. To illustrate, the impugned drawing in *Deckmyn* may have had racist motivations but its message pertained to the pending priorities of an elected official. Whatever we may think of the merits of these views, there are questions about whether their circulation should be limited, a debate not touched upon by the Grand Chamber.¹²⁹ One might also note, in this regard, that political speech is usually given the highest level of protection in Strasbourg jurisprudence, including for ideas that “offend, shock or disturb”.¹³⁰

On the question of whether the claimant's work was “associated” with any discriminatory message, one possibility is that this relates to confusion, i.e. that members of the public believe that the author or right holders made or endorsed the defendant's work.¹³¹ The presence of confusion might indicate that the defendant was not actually successful in creating a parody, e.g. that the work lacked any humour or mockery, or that this aspect was too subtle. That said, the Grand Chamber said that it was not a condition that the work “could reasonably be attributed to a person other than the author of the original work itself”.¹³² This could reflect concerns about circular and self-reinforcing licensing arguments, i.e. that the more legal rights are thrown around content, the more the public will come to expect that re-use has been authorised. Again, none of these difficult questions were discussed by the Grand Chamber. If the Grand Chamber was suggesting that an “association” arises from the mere evocation of the claimant's work, this would effect a significant (and arguably unprincipled) enlargement of compelled speech reasoning, and could operate to expand copyright into matters normally the province of (unharmonised) moral rights.

To conclude, there are a number of interpretative lessons that can be derived from *Deckmyn*, notably that parody is a copyright concept influenced not just by the ordinary meaning of the term but by the goals of art.5(3)(k) and its status as an autonomous European concept. There is also evidence of the Court of Justice continuing its retreat from earlier, unqualified, statements that exceptions must be interpreted strictly, for instance through its statement that its conception of parody was “not called into question” by this principle,¹³³ its observation that the interpretation of parody must “enable the effectiveness of the exception”,¹³⁴ and its emphasis on the freedom of expression of the user.¹³⁵ We must be careful not to over-state the pro-user reasoning in this case, as the judgment lacks the unambiguous vision of a case like *CCH*,¹³⁶ and did not involve a wholesale renunciation of the proposition that exceptions must be interpreted strictly.¹³⁷ The role of compelled speech reasoning remains to be seen, and there are those who doubt whether the emphasis on freedom of expression will translate into any significant change in the operation of exceptions.¹³⁸ However, *Deckmyn* does not suggest a narrow role for parody or that we should give the term a limited definition. As discussed in the next section, if we apply similar thinking to pastiche, it is possible and indeed desirable to construe the exception broadly to cover a range of imitative uses.

The legal concept of pastiche

Definition

In construing pastiche as a copyright concept, the first task—and the focus of this subsection—is to develop a definition that responds to the interpretative cues discussed in the foregoing analysis. It is also necessary to explore the relevance of the fair dealing infrastructure used in the pastiche exception in the UK. Having undertaken this analysis, this article will turn in the next subsection to provide illustrations about how a pastiche exception might operate in practice.

An initial point is that neither a purposive semantic interpretation nor a human rights balancing exercise requires, or even suggests, that pastiche should be subverted from its ordinary usage and be understood as a synonym for parody or otherwise subject to the same conditions as this genre. This can be contrasted with the position said to exist in France,¹³⁹ the oral submissions of Belgium in *Deckmyn*,¹⁴⁰ and the analysis of *Deckmyn* by Sabine Jacques, who states that the Grand Chamber’s judgment “implicitly indicates that ‘parody’, ‘pastiche’ and ‘caricature’ are overlapping, rather than impervious terms. While it is possible to highlight characteristics of each genre,¹⁴¹ it may be impossible to delineate each term completely. Ultimately, parody must be understood as a ‘multivalent’ term which operates at different levels and comprises many genres, such as satire, pastiche and caricature”.

Jacques does not provide any citation to the judgment to explain why this perspective is “implicit” in its words, and there is ambiguity around what, precisely, she is asserting in the quotation above. There was no discussion of pastiche or caricature by the Grand Chamber, with these terms only appearing in the judgment in extracts from the relevant EU and Belgian provisions.¹⁴² This contrasts with the brief discussion by the Advocate General, but even here there was no sustained analysis of the distinction between each term, such a comparison being of “[no] particular relevance [for] present purposes”.¹⁴³ The Advocate General’s Opinion is clearly consistent with there being overlap between caricature, parody and pastiche, but if anything points towards each term being on the same rung of the hierarchy and doing independent work.¹⁴⁴ Similarly, while it can be argued that the Grand Chamber construed parody broadly to cover target and weapon parody,¹⁴⁵ acts that may be classified as “satire” in other jurisdictions,¹⁴⁶ it is quite a leap to say that pastiche is a sub-branch of parody. This is not only because of the absence of any such definitive statement in *Deckmyn*, but because of the risks of overlooking the separate history and operation of pastiche, and subjecting it to the conditions of parody, including the need for humour or mockery.

The contention preferred in this article is that, in accordance with *Deckmyn*, we start with the ordinary meaning of pastiche, which as discussed in the second section covers imitation of the style of pre-existing works, the incorporation of parts of earlier works into new works, and the production of medleys. In ascertaining the copyright meaning of pastiche, we must also consider the “purpose of the rules of which [art.5(3)(k)] is part”,¹⁴⁷ including that our interpretation “enable the effectiveness of the exception”.¹⁴⁸ This purposive semantic assessment points against unduly narrow definitions, as seen by the Grand Chamber’s interpretation of parody by reference to two essential features—evoking but being noticeably different from the parodied work, and being an expression of humour or mockery—and its rejection of other possible requirements, for instance that the parody relate to the original work.¹⁴⁹

Applying this approach to pastiche, it is not problematic that experts in art theory may adopt nuanced and competing definitions of pastiche; while these perspectives are useful to build a picture of pastiche, we are ultimately developing a copyright term rather than seeking to mediate a specialist debate. To illustrate, Dyer describes pastiche as “unconcealed”, “textually signalled” (i.e. there are markers within or alongside the work to indicate the imitation) and “evaluatively open” (i.e. the work does not imply any evaluation of the referent).¹⁵⁰ He uses this schema to draw a distinction between pastiche and other practices; for instance, he contrasts pastiche with homage and parody on the basis that the latter are “evaluatively predetermined”, either implying a positive evaluation (homage) or a negative one (parody). Leaving aside the fact that this is but one expert opinion, imbuing pastiche with too many characteristics may not only depart from its “essential characteristics” arising from everyday language,¹⁵¹ but import into copyright law various imponderable aesthetic matters that judges are usually keen to avoid,¹⁵² and effect a narrowing of pastiche that is contrary to the rights of users and the public interest.¹⁵³

In this regard, the call in this article for a broad definition of pastiche comes not only from statements in *Deckmyn* but from underlying normative perspectives on the role of exceptions in copyright law. First, it reflects the proposition that much balance is achieved in copyright law through exceptions, and that exceptions should be given a robust interpretation.¹⁵⁴ Secondly, it responds to lessons from the legal rule-making literature in relation to the drafting of exceptions,¹⁵⁵ including the inefficiency and impossibility of government drafting a series of

detailed rules to deal with every possible contingency.¹⁵⁶ For instance, the use of fine-textured labels risks generating uncertain, inconsistent and unprincipled results if applied to art.5(3)(k), especially given that this provision speaks of only three practices (caricature, parody and pastiche) while aesthetic theory recognises many closely related variants and overlapping categories.¹⁵⁷ In addition, one of the attractions of a broad-acting pastiche defence is that it obviates the need for government to draft specific exceptions to deal with each possible sub-category, e.g. mash-ups, music sampling, appropriation art, and so forth.¹⁵⁸ This connects to a third benefit of giving pastiche a broad interpretation: that in the UK, [art.5 of the Information Society Directive](#) places limits on the ability of government to draft new exceptions.¹⁵⁹ Finally, the approach preferred in this article aligns with that adopted in cases like *CCH v Law Society of Upper Canada*, where fair dealing purposes were given a “large and liberal”¹⁶⁰ interpretation and the intellectual heavy lifting done mainly through fairness factors. This point will be addressed in further detail soon.

Returning to [s.30A](#), the copyright definition of pastiche should reflect the term’s essential meaning, which covers two key activities: imitation of the style of pre-existing works, and the utilisation or assemblage of pre-existing works in new works. It is not necessary for this definition to be narrowed to reflect distinctions drawn by musicologists and others between pastiche and pasticcio—the word “pastiche” as a copyright concept should cover all dimensions. Nor is it necessary for pastiche to involve some sort of humour, critical commentary or element of surprise, such requirements being inapt for an anti-twist genre—in contrast with caricature and parody, pastiche includes uses that are neutral towards, or celebrate, the referent. Acknowledgement of the imitated work should not be required for a work to be a pastiche, although this may be relevant to whether there has been a *fair dealing*, for instance for fakes that are presented as authentic works.¹⁶¹ Similarly, while some specialist definitions of pastiche refer to “*evident recombination*”,¹⁶² we should be reluctant to import this requirement into the copyright definition, because of the potential for it to necessitate inquiry into subjective and contested matters regarding creator intention, audience knowledge, and the like.

Applying this approach, pastiche in [s.30A](#) could apply to mash-ups, fan fiction, music sampling, collage, appropriation art, medleys, and many other forms of homage and compilation. This approach takes seriously the speech interests of the defendant, and embodies the proposition that imitation is an important and legitimate part of artistic creation. Lest this definition seem too broad, it must be remembered, first, that many instances of pastiche will not implicate copyright (being in the *style* of a work or author, rather than reproducing protectable expression), and secondly, that this act of classification is not the end of the story. Under *Deckmyn*, a proportionately exercise will also be necessary, and there may be additional work by virtue of the three-step test language of art.5(5). In the UK, it is likely that, in the absence of statutory reform, courts will integrate these requirements through the fairness component of fair dealing.¹⁶³ This would make sense, and as discussed above is the logical place for narrowing to take place. In short, there is no need to read down the definition of “pastiche” when we can use fairness to ensure to provide limits to the application of the exception.

In the next subsection, this article will use two US cases to illustrate its approach to pastiche, and some of the potential dangers of the compelled speech arguments in *Deckmyn*. Before turning to these illustrations, it must be acknowledged that the foregoing analysis is based on the current relationship between the UK and EU. Given the June 2016 referendum result, there may be a change in the status of EU law in the UK in the future. However, even if there is a “hard” Brexit in which European directives and case law cease to have binding effect, the interpretation of pastiche called for in this article can stand on its own two feet, given its normative grounding and its utilisation of fairness factors to create a nuanced application of the exception. A broad approach to pastiche does not, therefore, depend on European infrastructure.

Illustration

Two examples—both taken from the fair use jurisprudence of the US—will be used to help explain the conception of pastiche called for in this article.

The first example is the Second Circuit decision in *Cariou v Prince*. The plaintiff, Patrick Cariou, was a professional photographer who had taken photographs of the Rastafarian population in Jamaica and published them in a book titled *Yes, Rasta*. These photographs were used by the defendant, the well-known appropriation artist Richard Prince, in paintings forming part of his “Canal Zone” series. These works utilised Cariou’s photographs (along with others) with various techniques applied, e.g. cropping, collage, tinting and over-painting. Both sides applied for summary judgment, with the defendants arguing that the paintings fell within fair use. At

first instance the plaintiff's motion was granted in relation to copyright infringement, fair use and liability.¹⁶⁴ Judge Batts held that none of the fair use factors favoured the defendants, observing that any transformation was minimal and did not involve comment, that there was a large commercial element to exhibition and sale of Prince's works, and that there was evidence of actual market harm.

On appeal, the findings on fair use were reversed for 25 of the works and remanded in relation to the remaining five.¹⁶⁵ The Court of Appeals held that it was wrong for the District Court to read into fair use a requirement that the defendant comment on or critically refer back to the original works; all that was required was that the new work "alter the original with 'new expression, meaning, or message'".¹⁶⁶ The court was prepared to hold that most of the works were transformative: when viewed side by side they manifested an entirely different aesthetic ("hectic and provocative" rather than "serene and deliberately composed") and added something new.¹⁶⁷ They were of any entirely different scale, and used collage and other techniques to change the underlying images. This conclusion was reinforced by Prince's intention: to create something "completely different ... a kind of fantastic, absolutely hip, up to date, contemporary take on the music scene."¹⁶⁸ A decision of the remaining five artworks was never handed down as the case settled.¹⁶⁹

It is beyond the scope of this article to engage in a lengthy critique of this case, which has received a mixed reception in the US.¹⁷⁰ Relevant for this article is the proposition that Prince's artworks, if they were the subject of similar litigation in the UK, could reasonably be classified as instances of pastiche under s.30A, given the artistic techniques employed. Because parodic or critical overtone is not required, it would not be fatal that Prince himself denied that he was "commenting on any aspects of culture", his goal simply being to "try to change [the original image] into something that's completely different", being "great art that makes people feel good".¹⁷¹ The analysis would instead focus on whether the works were *fair* dealings. Here a number of the traditional factors might be relevant, including the extent of copying, what new material or context has been added by the defendant, and whether the defendant's purpose could have been achieved with a less intrusive amount of copying.¹⁷² One could also envisage a parallel complaint under the integrity right,¹⁷³ for instance owing to the level of nudity in Prince's works, and—potentially—the re-use of images for purposes well outside the use for which subject consents were originally obtained by Cariou.

Comparing UK and US law, it might be argued that a pastiche exception helps avoid some of the difficulties in assessing whether a work is transformative for the purposes of the fair use doctrine.¹⁷⁴ For instance, Amy Adler, who lauds the role of copying in contemporary creative enterprise and self-describes as "unapologetically Team Richard Prince",¹⁷⁵ has said that the transformativeness inquiry in cases such as *Cariou v Prince* is predicated on assumptions that are antithetical to modern art (e.g. that there is a stable meaning or message in a work), focuses on whether a work is new when much art rejects newness as a goal, and uses inconsistent approaches to deciding aesthetic matters. Adler raises the possibility of using market impact as the primary tool to judge fair use in cases involving the visual arts, on the basis that the value of art derives not just from the expression but the artist's imprimatur, meaning that new works can involve a high degree of copying without any market substitution taking place.¹⁷⁶ In the UK, the presence of pastiche may avoid some of these problems because this practice does not require a new message or meaning. This may permit judges applying s.30A to focus instead on fairness, which could conceivably include some of the market substitution points raised by Adler, given that competition between the works is an accepted component of fair dealing analysis.¹⁷⁷

The second example to illustrate this article's conception of pastiche is *Salinger v Colting*, another decision of the Second Circuit. The case related to a novel written by the defendant, Fredrik Colting, under the pseudonym John David California, and titled *60 Years Later: Coming Through the Rye*. The novel explored the relationship between J.D. Salinger and Holden Caulfield, the protagonist of *The Catcher in the Rye*. It utilised two narrators: 76-year-old "Mr C", who has experiences and recounts stories similar to those of Holden Caulfield in *Catcher*; and his 90-year-old author, who interrupts the story at numerous points and who wishes to write Mr C out of existence. The two characters meet and reconcile at the end of the novel.

In an application for a preliminary injunction restraining publication of the novel, the defendants sought to argue that *60 Years* was a parody that commented on *Catcher* and Salinger.¹⁷⁸ However, Judge Batts (also the district judge in *Cariou v Prince*) rejected this argument, describing the defendants' contentions as "post-hoc rationalizations employed through vague generalizations about the alleged naivete of the original, rather than reasonably perceivable parody".¹⁷⁹ In her view, themes and ideas in *Catcher* were repeated in *60 Years*, and there was nothing parodic about the new context, e.g. the age of the characters and the changes to the world in the

intervening years. Judge Batts observed that

”*60 Years*’ plain purpose is not to expose Holden Caulfield’s disconnectedness, absurdity, and ridiculousness, but rather to satisfy Holden’s fans’ passion for Holden Caulfield’s disconnectedness, absurdity, and ridiculousness, which *Catcher* has elevated into the realm of protectable creative expression”.¹⁸⁰

These findings were fortified by descriptions of the novel as a sequel to *Catcher*, for instance on the original jacket of the book and in other public statements.¹⁸¹ With the conclusions regarding the minimally transformative nature of *60 Years* bolstered by other findings in relation to commerciality, the nature of the plaintiff’s work and the extent of copying, Judge Batts concluded that any fair use defence was unlikely to succeed, a point with which the appeal judges agreed.¹⁸² Critiquing this conclusion, Kate O’Neill argues that *60 Years* is a “metafiction” (i.e. “a fiction about a fiction”),¹⁸³ and that by construing it as a sequel, Judge Batts gave inadequate weight to the significance of the dual narrative structure. For instance, it could be argued that this structure was inherently transformative owing to its effect on the reader’s perceptions of the original work, illuminating the frustration Salinger might have felt about his own fame and notoriety, the popularity of Holden Caulfield, and the continued calls (almost all of which were rejected) for sequels and dramatisations.¹⁸⁴

O’Neill makes a credible case that Judge Batts mischaracterised the defendant’s novel, with the result that the parody arguments never get off the ground. However, even if Judge Batts’ analysis was correct, one could imagine a convincing argument in the UK that the defendant’s novel was a pastiche, and indeed *60 Years* has been described that way in the literature.¹⁸⁵ Such an approach would reduce the significance of the classification of fan fiction in the UK, because different forms—e.g. a sequel that retains the events and vision of the underlying work versus a critical work that changes the focus and experience of the reader—could fall within a fair dealing purpose. It would also help remove the need for defendants to retrofit tortured and self-serving arguments about critical commentary as part of their fair dealing argumentation. Indeed, one of the refreshing aspects of *Cariou v Prince* was the defendant’s refusal to invoke some concocted highfalutin explanation of his works. If, in a UK context, we just accept those works are instances of pastiche, we can turn to the more important question: are they *fair* dealings?

There is one final point to make about *Salinger v Colting*, which relates to compelled speech. In the course of discussing the standard for an injunction, the Court of Appeals for the Second Circuit observed that the “‘loss of First Amendment freedoms’, and hence infringement of the right not to speak, ‘for even minimal periods of time, unquestionably constitutes irreparable injury’”.¹⁸⁶ Questions arise regarding the source of such a right: does it come from Colting seeking to, say, present *60 Years* as authored or endorsed by Salinger, or merely from Salinger’s refusal to license derivative works? O’Neill argues that the Court of Appeals “invoked this language to deflect attention from a factitious and circular argument that Colting’s work deprived Salinger of a valuable licensing right”, helping bolster “a weak link in his claim for infringement”.¹⁸⁷ She also highlights the dangers of these ideas for fair use reasoning:

”This rhetoric is very powerful ... and I hope that future courts will resist using it to support close judgments in hard cases. Unchecked, the rhetoric implies that Salinger’s copyright claim involves fundamental personal freedoms guaranteed to him by the [Bill of Rights](#) and not just a privilege limited by time and fair use. ... With a few short words, the court managed to translate Salinger’s undoubted commercial right to license – and to refuse to license – into a private, constitutional privilege to censor derivative works during the copyright term, unchecked by the doctrine of fair use. I think copyright defendants need to challenge this rhetoric head on because, taken at face value, it eviscerates fair use.”¹⁸⁸

Recall that one criticism of *Deckmyn*, above, related to its under-particularised analysis of a discriminatory message, which raised the risk of compelled speech arguments effecting a significant carve-out from the scope of art.5(3)(k).¹⁸⁹ If our concern is confusion—i.e. that the public believes that the original author is speaking or has agreed to the speech—then parody may have an in-built protection because the comedic or satirical flavour will help indicate that the speaker is not the original author. Given that pastiche does not require any comment or twist, there is a risk that compelled speech may cut even more deeply if we do not think carefully about the harms we are seeking to prevent. As noted earlier, if our concern relates to the fraudulent presentation of the defendant’s works as having been created by the claimant, there are causes of action to deal with this, and the defendant’s bad faith could be relevant to fairness. If, on the other hand, members of the public are merely unsure or mistaken about the work’s authorship, there are questions as to whether this should be afforded any weight as a compelled

speech argument in a fair dealing analysis.

One answer to the above may be that the compelled speech tenor of *Deckmyn* pertained to discriminatory messages, and that many instances of pastiche are neutral or laudatory, and do not involve content that might be inflammatory. The merits of this view will depend on its accuracy as an empirical claim and on the contours of the compelled speech argument, including whether it continues to be linked to art.21(1) of the Charter or develops as a free-standing speech argument that can be applied to other unpalatable content. As already noted, the Canal Zone series of Richard Prince contained a great deal of nudity, raising the question of whether obscenity could ground a compelled speech argument; and in *Salinger*, it is not clear that problematic content was even necessary for a “right not to speak” to be enlivened. In sum, we need to be careful about compelled speech, and its potential to effect a significant watering down of art.5(3)(k).

Conclusion

This article has argued that the introduction of s.30A into the CDPA is far more significant than has been appreciated thus far owing to the inclusion of pastiche as one of the three fair dealing purposes, thereby giving the UK a defence covering mash-ups, fan fiction, music sampling, collage, appropriation art and other forms of homage and compilation. It has argued that as a matter of doctrine and policy, pastiche should be read broadly to include a range of uses, including the imitation of the style of pre-existing works, the incorporation of elements or features of those works, and the production of compilations and medleys. To the extent this results in an overshoot in permitted conduct, this can be dealt with through the fair dealing machinery, which can effect the proportionality exercise countenanced in *Deckmyn* and deal with any additional requirements arising from art.5(5). Such an approach may even offer advantages over the concept of transformative use in US law by short-circuiting the need for analysis of the critical commentary, message or newness of a work, and instead allowing judges to place the intellectual heavy lifting where it best belongs: in the assessment of fairness.

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Footnotes

- 1 *Ingeborg Hoesterey, Pastiche: Cultural Memory in Art, Film and Literature (Bloomington: Indiana University Press, 2001), p.1.*
- 2 e.g. *Gowers Review of Intellectual Property (HM Treasury, 2006), Recommendation 12; Ian Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth (May 2011), p.51.* For a discussion of this process, see *Sir Robin Jacob, “Parody and IP claims: a defence? – a right to parody?” in Rochelle Cooper Drexfuss and Jane C. Ginsburg (eds), Intellectual Property at the Edge: The Contested Contours of IP (Cambridge: Cambridge University Press, 2014).*
- 3 [Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society.](#)
- 4 e.g. Richard Posner, “When is Parody Fair Use?” (1992) 21 J. Legal Stud. 67; Robert P. Merges, “Are You Making Fun of Me?: Notes on Market Failure and the Parody Defense in Copyright” (1993) 21 AIPLA Q.J. 305; Sherri L. Burr, “Artistic Parody: A Theoretical Construct” (1996) 14 Cardozo Arts & Ent. L.J. 65; Michael Spence, “Intellectual Property and the Problem of Parody” (1998) 114 L.Q.R. 594; David J. Brennan, “Copyright and Parody in Australia: Some Thoughts on Suntrust Bank v Houghton Mifflin Company” (2002) 13 A.I.P.J. 161; Ronan Deazley, “Copyright and Parody: Taking Backward the Gowers Review?” (2010) 73 M.L.R. 785; *Jonathan Griffiths, “Fair Dealing after Deckmyn – the United Kingdom’s Defence for Caricature, Parody or Pastiche’ in Megan Richardson and Sam Ricketson (eds), Research Handbook on Intellectual Property in Media and Entertainment (Cheltenham: Edward Elgar, 2017).*
- 5 Brennan, “Copyright and Parody in Australia” (2002) 13 A.I.P.J. 161, 166.
- 6 For an analysis of the meaning of caricature, albeit not in the copyright context, see *Attorney-General v Trustees of the Art Gallery of NSW (1944) 62 W.N. (NSW) 212* (eligibility of a painting that exaggerated and distorted the features of the sitter to win the Archibald Prize for portraiture).
- 7 Description of the oral argument of Belgium by A.G. Villalón in *Deckmyn v Vandersteen (C-201/13) EU:C:2014:458* at [42]; see also the French approach to caricature, parody and pastiche described below in fnn.62–69 and surrounding text. As noted by *Griffiths, “Fair Dealing after Deckmyn” in Research*

- Handbook on Intellectual Property in Media and Entertainment* (2017), the Advocate General’s own statements on this question (at [46] of his Opinion) are unclear, and could be understood to suggest that the three categories are distinct but overlap or, alternatively, that the three concepts “cannot usefully be disaggregated”. This matter was not dealt with by the Grand Chamber.
- 8 See Graeme W. Austin, “EU and US Perspectives on Fair Dealing for the Purpose of Parody or Satire” (2016) 39 U.N.S.W.L.J. 684, esp. 684–685.
- 9 *Deckmyn v Vandersteen* (C-201/13) EU:C:2014:2132; [2014] E.C.D.R. 21 (Grand Chamber).
- 10 For instance, in her analysis of the status of remixes and sampling after the 2014 copyright reforms, Sabine Jacques uses the word “pastiche” only once, instead focusing her fair dealing analysis on the quotation and parody, with the latter said to require humour (which she says could be defined broadly to include unexpected, playful or rule-breaking combinations): Sabine Jacques, “Mash-ups and mixes: what impact have the recent copyright reforms had on the legality of sampling?” (2016) 27 Ent. L.R. 3, 5–7.
- 11 *Cariou v Prince* 784 F. Supp. 2d 337 (S.D.N.Y. 2011); 714 F. 3d 694 (2d Cir. 2013).
- 12 See *Oxford English Dictionary* (OUP online version, 2016). The Bands are based on frequency of usage, based primarily on Google Books Ngrams data, and run from Band 1 (least common) to Band 8 (most common). Words in Band 5 (used “between 1 and 10 times per million words in typical modern English usage”) are therefore more frequent than Band 4 (used “between 0.1 and 1.0 times”), although neither are everyday words and are associated with “educated discourse” (Band 5) and “much greater specificity” (Band 4). See <http://public.oed.com/how-to-use-the-oed/key-to-frequency/> [Accessed 21 September 2017].
- 13 The Google Books Ngram Viewer, available at <https://books.google.com/ngrams> [Accessed 21 September 2017], allows searches across the books digitised by Google as part of the Google Books Project. In this instance, the relevant search was for the words “pastiche”, “caricature” and “parody” (case insensitive) from 1700 to 2008 from the corpus of English books. Care must be taken in the interpretation of this data, for instance owing to large numbers of scientific texts that can skew results, mistakes in OCR versions, and so forth. However, the Ngram search is used here for a more limited claim about the respective frequency of parody, caricature and pastiche.
- 14 The *OED* places “pasticcio” in Frequency Band 3 for words that “occur between 0.01 and 0.1 times per million words in typical modern English usage”. Such words are “not commonly found in general text types” but “are not overly opaque or obscure”.
- 15 Richard Dyer, *Pastiche* (London/New York: Routledge, 2007), p.1.
- 16 Hoesterey, *Pastiche* (2001), p.9.
- 17 The term “pasticcio” is also Italian for pie, and this mixing of artistic elements was akin to the combination of ingredients in such a dish: Dyer, *Pastiche* (2007), pp.8–9.
- 18 Hoesterey, *Pastiche* (2001), pp.1–4.
- 19 Hoesterey, *Pastiche* (2001), pp.4–5.
- 20 Hoesterey, *Pastiche* (2001), pp.5–7. To illustrate, John Fowles’s novel *The French Lieutenant’s Woman* has been described as a “well-known modern example” of the genre, being “partly a pastiche of the great Victorian novelists”: Chris Baldick, *Oxford Dictionary of Literary Terms* (OUP online version, 2015).
- 21 Hoesterey, *Pastiche* (2001), p.8.
- 22 Julian Perkins, “Musical Pies: An Introduction to the Pasticcio” (April 2015), <http://julianperkins.com/julians-jottings/programme-notes/musical-pies.html> [Accessed 21 September 2017].
- 23 Perkins, “Musical Pies” (April 2015), <http://julianperkins.com/julians-jottings/programme-notes/musical-pies.html> [Accessed 21 September 2017].
- 24 “Half baked thoughts on pasticcio (should opera be *gasp* tasty?)” (15 March 2015), opera, innit?, <https://dehgial.wordpress.com/2015/03/15/pasticcio-baroque-opera/> [Accessed 21 September 2017].
- 25 “The Enchanted Island at the Met – deeper than expected” (23 January 2012), *Classical Iconoclast*, <http://classical-iconoclast.blogspot.co.uk/2012/01/enchanted-island-at-met-deeper-than.html> [Accessed 21 September 2017].
- 26 Handel stands out in this regard: for a comprehensive history, see Donald Burrows, *The Master Musicians: Handel*, 2nd edn (Oxford: Oxford University Press, 2012).
- 27 This is illustrated by the entry for “pasticcio” in the 1880 edition of *Grove’s*, which said that despite its prominence in the 18th century and its utilisation by master composers, the style “never inspired any real respect, even in its brightest days”. Like the pastiche in the world of painting, it appears one issue was the fraudulent manner in which some pasticcios were presented, including the lack of proper attribution of the music to the relevant composer. The aesthetic merit of the production was also questioned, given the perceived lack of unity between the individual selections. See George Grove (ed.), *A Dictionary of Music and Musicians*, Vol II (London; Macmillan, 1880), pp.668–670.
- 28 e.g. *The Enchanted Island*, written by Jeremy Sams and premiering at the Metropolitan Opera, New York, on 31 December 2011. For a description of the creative process, see Jeremy Sams, “The Enchanted Island: the isle is full of mash-ups” (10 January 2012), *The Guardian*, <https://www.theguardian.com/music/2012/jan/10/enchanted-island-met-opera-baroque> [Accessed 21 September 2017].

- 29 Alison Latham, *Oxford Companion to Music* (OUP online version, 2011); Tim Rutherford-Johnson, Michael Kennedy and Joyce Bourne Kennedy (eds), *Oxford Dictionary of Music* (OUP online version, 2016) (although pastiche “has a meaning as ‘medley’, it is invariably applied musically in the sense outlined above [i.e. composition in the style of another]”).
- 30 Hoesterey, *Pastiche* (2001), p.113. For instance, *Joseph and the Amazing Technicolor Dreamcoat*, written by Tim Rice and Andrew Lloyd Webber, is a well-known pastiche musical, with influences including country and western, calypso and Elvis Presley.
- 31 Dyer, *Pastiche* (2007), p.9.
- 32 Dyer, *Pastiche* (2007), p 1.
- 33 Dyer, *Pastiche* (2007), pp.2–4.
- 34 Dyer, *Pastiche* (2007), p.9. For instance, the definition of pastiche (pasticcio) in Ian Chilvers, *Oxford Dictionary of Art and Artists* (OUP online, 2016) refers to: “A work of art that imitates the style of another work, artist, or period; more specifically, in the visual arts, a picture or other work that (*often with fraudulent intent*) imitates the style of a particular artist by borrowing and rearranging motifs from his authentic works” (emphasis added).
- 35 Hoesterey, *Pastiche* (2001), p.ix.
- 36 Hoesterey, *Pastiche* (2001), pp.xi–xii; see also Annette Kuhn and Guy Westwell, *Oxford Dictionary of Film Studies* (OUP online version, 2015), suggesting that while pastiche “is sometimes used pejoratively, implying lack of originality”, when “regarded as a feature of postmodernism it tends to shed such negative overtones”. For a negative stance, see Fredric Jameson, *Postmodernism, or, the Current Logic of Late Capitalism* (Durham, NC: Duke University Press, 1991), esp. pp.17–25, suggesting that pastiche has come to replace parody, but “without any of parody’s ulterior motives, amputated of the satiric impulse, devoid of laughter”.
- 37 Hoesterey, *Pastiche* (2001), p.xi.
- 38 Hoesterey, *Pastiche* (2001), pp.10–15; Dyer, *Pastiche* (2007), pp.11–16.
- 39 Kuhn and Westwell, *Oxford Dictionary of Film Studies* (OUP online version, 2015).
- 40 Hoesterey, *Pastiche* (2001), p.14.
- 41 Hoesterey, *Pastiche* (2001), p.14.
- 42 Intellectual Property Office, *Exceptions to Copyright: Guidance for Creators and Copyright Owners* (IPO, 2014), p.6.
- 43 Intellectual Property Office, *Exceptions to Copyright* (2014), p.6
- 44 Intellectual Property Office, *Exceptions to Copyright* (2014), p.5.
- 45 Intellectual Property Office, *Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions* (IPO, 2007), para.188.
- 46 Intellectual Property Office, *Taking Forward the Gowers Review of Intellectual Property* (2007), para.189.
- 47 Intellectual Property Office, *Taking Forward the Gowers Review of Intellectual Property* (2007), para.190.
- 48 e.g. *Hargreaves Review* (May 2011) (containing multiple references to parody, but only including the word pastiche on a single occasion); Deazley, “Copyright and Parody” (2010) 73 M.L.R. 785 (focusing on justifications for a parody exception, and stating at 786 that “parody is multivalent; it speaks to and embraces a range of different cultural practices such as allusion, burlesque, caricature, irony, mimesis, pastiche, persiflage, satire, skit, spoof, travesty, and so on”).
- 49 *Gowers Review* (2006), pp.6, 68.
- 50 *Gowers Review* (2006), p.67.
- 51 *Gowers Review* (2006), p.67, at para.4.86.
- 52 *Gowers Review* (2006), p.68, Recommendation 11.
- 53 e.g. *Baigent v Random House Group Ltd* [2007] EWCA Civ 247; [2008] E.M.L.R. 7 at [145]–[146] (discussing the idea–expression dichotomy); Brennan, “Copyright and Parody in Australia” (2002) 13 A.I.P.J. 161, 162 (discussing fan fiction and similar literary forms). There are challenges in applying this concept, particularly in a world where copyright can be infringed without there being any direct copying of the text or expression of the claimant’s work: *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 W.L.R. 2416 HL at 2422–2423 (per Lord Hoffmann).
- 54 See especially *Glyn v Weston Feature Film Co* [1916] 1 Ch. 261 Ch D; *Joy Music v Sunday Pictorial Newspaper* [1960] 2 Q.B. 60 QBD. In *Glyn*, Younger J suggested (in obiter) that a burlesque would not infringe copyright where the defendant “has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result”. This approach was applied in *Joy Music* to the creation of altered lyrics to the song “Rock-a-Billy”, where the only common element came through the words “Rock-a-Philip, Rock-a-Philip, Rock-a-Philip, rock” in the chorus of the defendant’s work. It was held that this was not an infringement as the author had produced “a new original work derived from “Rock-a-Billy””.
- 55 See, e.g. *Schweppes Ltd v Wellingtons Ltd* [1984] F.S.R. 210 Ch D; *Williamson Music Ltd v Pearson Partnership Ltd* [1987] F.S.R. 97 Ch D; *Allen v Redshaw* (Patents County Court, 15 May 2013).
- 56 CDPA s.30(1); see also *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2001] FCA 108 at [17] (Conti J discussing possibility that parody and satire can fall within the Australian fair dealing defence covering

- criticism and review).
- 57 One limitation is the requirement in the CDPA that the criticism or review must be of “that or another work or of a performance of a work”, a requirement that first appeared in s.6(2) of the Copyright Act 1956. Although there is authority that the relevant review or criticism can relate to the underlying thoughts, ideas and philosophy of a work (e.g. *Hubbard v Vosper* [1972] 2 Q.B. 84 CA (Civ Div); *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] F.S.R. 610 CA (Civ Div)), there have also been instances where this language has operated to take a criticism outside the defence (e.g. *Ashdown v Telegraph Group Ltd* [2002] Ch. 149 CA (Civ Div)). In the 1980s case *Williamson Music v Pearson Partnership* [1987] F.S.R. 97, Judge Paul Baker QC noted at 103 the potential relevance of a fair dealing defence to parody, but stated that it was inapplicable on these facts because there was no element of literary criticism or review in the defendant’s work, a television advertisement for a bus company that included a jingle said to parody the Rodgers and Hammerstein song “There is Nothin’ Like a Dame”.
- 58 Summary of Proceedings from the Working Group on Intellectual Property (Copyright) dated 29–30 March 1999, doc 7299/99 PI 18 CULTURE 21 CODEC 176, 2 (“several Member States” have requested additional option exceptions be added to draft art.5(3), including “caricature, parody and pastiche”); Summary of Proceedings from the Working Group on Intellectual Property (Copyright) dated 16–17 December 1999, doc 5377/00 PI 5 CULTURE 3 CODEC 36 at para.46 (“The [French] delegation requested an additional exception covering parody, pastiche and caricature”).
- 59 Amended proposal dated 28 March 2000, doc 6652/00, PI 14 CULTURE 11 CODEC 154.
- 60 Amended proposal dated 30 September 1999, doc 11435/00, PI 49 CULTURE 63 CODEC 520, Recital 24ter.
- 61 Amended proposal dated 30 September 1999, doc 11435/00, PI 49 CULTURE 63 CODEC 520, fn.16 (“The [French] delegation requested a specific exception on parody, pastiche and caricature in the main body of the Directive instead of a reference to humorous use in this Recital”).
- 62 Code de la propriété intellectuelle art.L122-5: “Lorsque l’oeuvre a été divulguée, l’auteur ne peut interdire: ... 4° La parodie, le pastiche et la caricature, compte tenu des lois du genre ...”.
- 63 See, e.g. *Henri Desbois, Le droit d’auteur en France, 3rd edn (Paris: Dalloz, 1978), para.254; Dinusha Mendis and Martin Kretschmer, The Treatment of Parodies under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles (Intellectual Property Office 2013), p.18; Laetitia Lagarde and Carolyn Ang, “Parody in the UK and France: defined by humour?” (24 March 2016), Practical Law, [https://uk.practicallaw.thomsonreuters.com/9-625-2313?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/9-625-2313?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) [Accessed 21 September 2017].*
- 64 See above fn.7.
- 65 Julien Cabay and Maxime Lambrecht, “Remix prohibited: how rigid EU copyright laws inhibit creativity” (2015) 10 J. Int. Prop. Law & Practice 359, 371. See also *Michel Vivant and Jean-Michel Bruguière, Droit d’auteur et droits voisins, 3rd edn (Paris: Dalloz, 2015), p.648* (in favour of the view that the three terms are interchangeable).
- 66 See, e.g. Cour de Cassation, 12 January 1988, RIDA July 1988 p.98; Versailles Court of Appeal, 17 March 1994, RIDA April 1995 p.350.
- 67 I would like to acknowledge the input of Maxence Rivoire, who reviewed and helped translate numerous French language materials, in developing this point.
- 68 See, e.g. *SA Les Editions Salabert v Le Luron (Cour d’Appel, Paris, 15 October 1985) [1987] E.C.C. 48* at [3]; *SA Jacobs Suchard France v Antenne 2 (Cour d’Appel, Paris, 27 November 1990) [1992] E.C.C. 344* at [1]; *Mendis and Kretschmer, The Treatment of Parodies under Copyright Law in Seven Jurisdictions (2013), pp.18–19.*
- 69 *Jacques Dezandre v SA Musidisc and Societe Nouvelle de Presse et de Communication (Cour d’Appel, Paris, 25 October 1990) [1992] E.C.C. 495.*
- 70 *Dezandre v SA Musidisc [1992] E.C.C. 495* at [4].
- 71 *Dezandre v SA Musidisc [1992] E.C.C. 495* at [4].
- 72 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21*; for a comprehensive analysis of this case, see *Griffiths, “Fair Dealing after Deckmyn” in Research Handbook on Intellectual Property in Media and Entertainment (2017).*
- 73 Law on Copyright and Related Rights art.22(1) (applying to caricature, parody or pastiche that observes fair practice).
- 74 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21* at [14]–[17], citing *Padawan SL v Sociedad General de Autores y Editores de España (C-467/08) EU:C:2010:620; [2011] E.C.D.R. 1* at [32].
- 75 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21* at [19], citing *Diakité v Commissaire General aux Refugies et aux Apatrides (C-285/12) EU:C:2014:39; [2014] 1 W.L.R. 2477* at [27] (discussing the meaning of “internal armed conflict” for the purposes of the Qualification Directive).
- 76 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21* at [20], citing A.G. Villalón, Opinion *EU:C:2014:458* at [48]. For a discussion of these limbs and their application, see *Griffiths, “Fair Dealing after Deckmyn” in Research Handbook on Intellectual Property in Media and Entertainment (2017).*

77 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21* at [22]–[24], citing *ACI Adam BV v Stichting de Thuiskopie (C-435/12) EU:C:2014:254; [2014] E.C.D.R. 13* at [23]’ and *Football Association Premier League Ltd v QC Leisure (C-403/08) EU:C:2011:631; [2012] E.C.D.R. 8* at [163].

78 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21* at [25].

79 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21*, A.G. Villalón, Opinion *EU:C:2014:458* at [47].

80 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21*, A.G. Villalón, Opinion *EU:C:2014:458* at [52].

81 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21* at [26]–[27].

82 Recital 31 states: “A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded”

83 e.g. *Padawan SL v Sociedad General de Autores y Editores de Espana (SGAE) (C-467/08) EU:C:2010:620; [2011] E.C.D.R. 1* at [38]–[50]; *Painer v Standard Verlags GmbH (C-145/10) EU:C:2011:798; [2012] E.C.D.R. 6* at [132]–[136].

84 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21* at [28].

85 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21* at [31].

86 *X v Y (Cour de Cassation, chambre civile 1, 15 May 2015) [2016] E.C.D.R. 4*; see also *Lagarde and Ang, “Parody in the UK and France” (24 March 2016), Practical Law, [https://uk.practicallaw.thomsonreuters.com/9-625-2313?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/9-625-2313?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) [Accessed 21 September 2017].*

87 *X v Y [2016] E.C.D.R. 4* at [19] (reproducing the plea of counsel for the artist).

88 *X v Y [2016] E.C.D.R. 4* at [7]–[8].

89 Noted in Henrike Maier, “German Federal Court of Justice rules on parody and free use” (2017) 12 J.I.P. Law & Practice 16 (discussing Bundesgerichtshof judgment of 28 July 2016). In Germany, parody is protected via the free use in art.24 of the German Copyright Act rather than a specific exception.

90 Maier, “German Federal Court of Justice rules on parody and free use” (2017) 12 J.I.P. Law & Practice 16, 17.

91 English definitions often refer to satirising the relevant target, which may include but go beyond the use of humour or mockery: See, e.g. *OED (OUP online version, 2016)* (“n.2 A literary composition modelled on and imitating another work, esp. a composition in which the characteristic style and themes of a particular author or genre are satirized by being applied to inappropriate or unlikely subjects, or are otherwise exaggerated for comic effect. In later use extended to similar imitations in other artistic fields, as music, painting, film, etc.”).

92 See above fn.78 and surrounding text.

93 Graeme Austin describes a similar idea when he says that “determining the ordinary and natural meanings” of the words of copyright legislation is “only the beginning of the analysis” as “courts often seem to be reaching ‘through’ the statutory text and engaging with deeper questions of copyright policy”: Austin, “EU and US Perspectives on Fair Dealing for the Purpose of Parody or Satire” (2016) 39 U.N.S.W.L.J. 684, 684–685.

94 See generally *Lionel Bently and Brad Sherman, Intellectual Property Law, 4th edn (Oxford: Oxford University Press, 2014)*, pp.93–95.

95 e.g. Daniela Simone, “Recalibrating the Joint Authorship Test: Insights from Scientific Collaborations” (2013) 26 I.P.J. 111.

96 e.g. *Beggars Banquet v Carlton [1993] E.M.L.R. 349 Ch D* (company not able to rely on a term of a contract that they were the authors of footage); cf. *Heptulla v Orient Longman [1989] F.S.R. 598 High Court (India)* (subjective intentions and conduct of the parties relevant to the conclusion that there was joint authorship of the relevant literary work).

97 *Compagnie Générale des Établissements Michelin-Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) [1997] 2 F.C. 306 (Federal Court of Canada)*.

98 For instance, one leaflet included a cartoon depicting “a broadly smiling ‘Bibendum’, arms crossed, with his foot raised, seemingly ready to crush underfoot an unsuspecting Michelin worker”: *Michelin v CAW-Canada [1997] 2 F.C. 306* at 354.

99 *Michelin v CAW-Canada [1997] 2 F.C. 306* at 377–378, citing Copyright Act (RSC 1985, c. C-42) s. 27(2)(a.1).

100 *Michelin v CAW-Canada [1997] 2 F.C. 306* at 381.

101 *Michelin v CAW-Canada [1997] 2 F.C. 306* at 381.

102 See *OED (OUP online version, 2016)* (“1. The action of criticizing, or passing judgement upon the qualities or merits of anything; esp. the passing of unfavourable judgement; fault-finding, censure.”).

103 *Michelin v CAW-Canada [1997] 2 F.C. 306* at 379.

104 *Michelin v CAW-Canada [1997] 2 F.C. 306* at 379. This was the prevailing view in Canada at the time: e.g. *Normand Tamaro, The 1997 Annotated Copyright Act (Scarborough, Ont.: Carswell, 1996)*, p.330.

105 Copyright Act (RSC 1985, c. C-42) s.29; *CCH v Law Society of Upper Canada, 2004 S.C.C. 13; Society of*

- Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 S.C.C. 36; see also *Laura J. Murray and Samuel E. Trosow, Canadian Copyright: A Citizen's Guide* (Toronto: *Between the Lines*, 2007), p.78. In *United Airlines Inc v Cooperstock* 2017 F.C. 616, Phelan J cited these decisions when considering whether fair dealing in s.29 applied to the website UNTIED.com. This website presented negative information and complaints about the airline United, and was designed in such a way that it resembled United's actual website. In addition to claims grounded in trade mark law, United argued that the UNTIED website infringed copyright in United's website and various logos. In concluding that fair dealing did not apply, Phelan J accepted that the defendant's use was for an allowable purpose—parody—as it evoked existing works while showing differences from those works, and was an expression of mockery: at [109]–[120], including endorsement of the definition of parody in *Deckmyn*. However, the defendant failed because his dealing was not fair: his motive was to embarrass and punish United; his website reproduced closely the home page of United's website; and the confusion brought about by that similarity could lead users of the defendant's website to believe they were interacting with United: at [121]–[141].
- 106 Austin, “EU and US Perspectives on Fair Dealing for the Purpose of Parody or Satire” (2016) 39 U.N.S.W.L.J. 684, 698–699.
- 107 *Deckmyn* EU:C:2014:2132; [2014] E.C.D.R. 21, A.G. Villalón, Opinion EU:C:2014:458 at [85].
- 108 *Deckmyn* EU:C:2014:2132; [2014] E.C.D.R. 21 at [27].
- 109 *Deckmyn* EU:C:2014:2132; [2014] E.C.D.R. 21 at [32]–[35].
- 110 This connects to broader questions about the addressee for art.5(5), and in particular whether its limbs are to be considered by domestic judges applying exceptions *even if* those limbs have not been transposed directly into the local statute. In Europe, there is authority from the Court of Justice that art.5(5) is targeted at domestic judges, although the position is not clear-cut: see Richard Arnold and Eleanora Rosati, “Are national courts the addressee of the InfoSoc three-step test?” (2015) 10 J.I.P. Law & Practice 741. In the UK, almost all fair dealing cases have proceeded without any consideration of art.5(5). For instance, in *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch); [2011] E.C.D.R. 10 at [130], Proudman J quoted from art.5(5) but did not indicate how its limbs were relevant to fair dealing. In contrast, Arnold J engaged with the effect of art.5(5) in *England and Wales Cricket Board Ltd v Tixdaq Ltd* [2016] EWHC 575 (Ch); [2016] Bus. L.R. 641 at [72], [88]–[92], although the discussion was impacted by concessions of counsel (namely that the three-step test must be applied by national courts) and their treatment of art.5(5) as dovetailing with the factors usually considered in relation to fair dealing.
- 111 This point was made by the Advocate General, who stated that consideration of whether the limbs of art.5(5) were satisfied was outside the reference and a matter to be determined by the national court: *Deckmyn* EU:C:2014:2132; [2014] E.C.D.R. 21, A.G. Villalón, Opinion EU:C:2014:458 at [29].
- 112 e.g. Jonathan Griffiths, Christophe Geiger, Martin Senftleben, Raquel Xalabarder and Lionel Bently, “The European Copyright Society’s ‘Opinion on the judgment of the CJEU in Case C-201/13 Deckmyn’” (2015) 37 E.I.P.R. 127, 128; Sabine Jacques, “Are national courts required to have an (exceptional) European sense of humour?” (2015) 37 E.I.P.R. 134, 135.
- 113 Griffiths et al., “The European Copyright Society’s ‘Opinion on the judgment of the CJEU in Case C-201/13 Deckmyn’” (2015) 37 E.I.P.R. 127, 128.
- 114 Jacques, “Are national courts required to have an (exceptional) European sense of humour?” (2015) 37 E.I.P.R. 134, 137; for similar, see *Lagarde and Ang*, “‘Parody in the UK and France’” (24 March 2016), *Practical Law*, [https://uk.practicallaw.thomsonreuters.com/9-625-2313?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/9-625-2313?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) [Accessed 21 September 2017].
- 115 The same observation has been made by Austin, “EU and US Perspectives on Fair Dealing for the Purpose of Parody or Satire” (2016) 39 U.N.S.W.L.J. 684, 695. In *United Airlines v Cooperstock* 2017 F.C. 616 (facts discussed above at fn.105), Phelan J, adopting the *Deckmyn* reasoning to inform the meaning of parody in the Canadian Copyright Act, said at one point that “parody requires humour”: at [133]. Elsewhere in his decision, however, Phelan J referred to the requirement for humour or mockery (e.g. at [119]), and indeed in holding that the UNTIED website was within an allowable fair dealing purpose, Phelan J concluded that the website “evokes existing works ... while showing some differences ... [and] expresses mockery (and criticism) of the Plaintiff”: at [120].
- 116 *Deckmyn* EU:C:2014:2132; [2014] E.C.D.R. 21 at [29]–[30].
- 117 Described in *Deckmyn* EU:C:2014:2132, [2014] E.C.D.R. 21; A.G. Villalón, Opinion EU:C:2014:458 at [20].
- 118 *Deckmyn* EU:C:2014:2132, [2014] E.C.D.R. 21; A.G. Villalón, Opinion EU:C:2014:458 at [31].
- 119 Compelled speech can take different forms, and there is disagreement over which forms result in harm and should be the subject of regulation: e.g. Steven H. Shiffrin, “What is Wrong with Compelled Speech?” (2014) 29 J.L. & Pol. 499. In the UK, compelled speech arguments were ventilated recently in *Lee v McArthur* [2016] NICA 39 in relation to the refusal by the proprietors of Ashers Bakery to fulfil an order to bake a cake decorated with the slogan “Support Gay Marriage”. The decision of the District Judge, who held that the defendants had engaged in direct discrimination against the applicant, was upheld on appeal.

- In the US, similar arguments regarding the right not to speak were unsuccessful in *Elane Photography, LLC v Willock* 309 P. 3d 53 (NM 2013), which concerned discrimination said to arise from the refusal by a photographer to photograph a same-sex commitment ceremony.
- 120 For a similar argument in relation to trade mark parodies, see Robert Burrell and Dev Gangjee, “Trade marks and freedom of expression – a call for caution” (2010) 41 I.I.C. 544; and see generally Shiffrin “What is Wrong with Compelled Speech?” (2014) 29 J.L. & Pol. 499, esp. 512–516.
- 121 Charter of Fundamental Rights art.21 covers non-discrimination, with para.(1) prohibiting “[a]ny 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”.
- 122 Jacques, “Are national courts required to have an (exceptional) European sense of humour?” (2015) 37 E.I.P.R. 134, 134.
- 123 For an overview, see *Bently and Sherman, Intellectual Property Law* (2014), pp.122–123.
- 124 *Pro Sieben Media v Carlton UK Television* [1999] F.S.R. 610 at 619; for similar comments, see Henry LJ in *Time Warner Entertainments Co v Channel Four Television Plc* [1994] E.M.L.R. 1 CA (Civ Div) at 14.
- 125 Jonathan Griffiths, Christophe Geiger, Martin Senftleben, Raquel Xalabarder and Lionel Bently, “Limitations and exceptions as key elements of the legal framework for copyright in the European Union: opinion of the European Copyright Society on the CJEU ruling in Case C-201/13 Deckmyn” (2015) 46 I.I.C. 93, 99 at para.30.
- 126 Griffith et al., “The European Copyright Society’s ‘Opinion on the judgment of the CJEU in Case C-201/13 Deckmyn’” (2015) 37 E.I.P.R. 127, 128 129–130.
- 127 Griffiths et al., “‘Limitations and exceptions as key elements of the legal framework for copyright in the European Union’” (2015) 46 I.I.C. 93, 99 at para.30.
- 128 *Deckmyn EU:C:2014:2132*; [2014] E.C.D.R. 21 at [25].
- 129 It appears that, at the time of writing, there have been no further developments at the domestic level in relation to *Deckmyn*: *Eleanora Rosati, “Parody and free use in Germany: Federal Court of Justice decides first parody case after Deckmyn”* (6 September 2016), IPKat, <http://ipkitten.blogspot.com.au/2016/09/parody-and-free-use-in-germany-federal.html> [Accessed 21 September 2017].
- 130 e.g. *Lingens v Austria* (1986) 8 E.H.R.R. 103 ECtHR at [42]–[43]; *Ceylan v Turkey* (2000) 30 E.H.R.R. 73 ECtHR at [39]–[47]; *PETA Deutschland v Germany* (2013) 56 E.H.R.R. 25 ECtHR at [46]. For a recent example that has elicited some criticism, see *Annen v Germany* (3690/10) unreported 26 November 2015 (ECtHR), criticised in unattributed, “Anti-abortion activism” [2016] E.H.R.L.R. 211.
- 131 In *Elane Photography v Willock* 309 P. 3d 53 (N.M. 2013), one reason why the photographer’s arguments failed was that reasonable observers would not assume any endorsement of the same-sex commitment ceremony on the part of the photographer, who was paid to provide a service. Shiffrin, “What is Wrong with Compelled Speech?” (2014) 29 J.L. & Pol. 499, 512 contrasts these facts with compelling a person to write speeches or press releases for a political party they do not support, or religions they oppose (he gives the example of Scientology). Shiffrin argues that these scenarios would be distinguishable from *Willock* because they involve public speech at the core of the First Amendment in circumstances more likely to be understood as involving endorsement.
- 132 *Deckmyn EU:C:2014:2132*; [2014] E.C.D.R. 21 at [21]. As discussed above, the definition of parody includes that the defendant’s work evokes, but is noticeably different from, the original work: at [20]. This would seem to require that the two works not be confused, rather than there being no confusion about the authorship of the defendant’s work.
- 133 *Deckmyn EU:C:2014:2132*; [2014] E.C.D.R. 21 at [22].
- 134 *Deckmyn EU:C:2014:2132*; [2014] E.C.D.R. 21 at [23].
- 135 *Deckmyn EU:C:2014:2132*; [2014] E.C.D.R. 21 at [27].
- 136 *CCH v Law Society of Upper Canada* 2004 S.C.C. 13.
- 137 See also Jacques, “Are national courts required to have an (exceptional) European sense of humour?” (2015) 37 E.I.P.R. 134, 135, describing the Grand Chamber’s approach as strict “but not too strict”; cf. Griffiths, “Fair Dealing after Deckmyn” in *Research Handbook on Intellectual Property in Media and Entertainment* (2017), stating that the judgment “paid lip-service to the idea that copyright exceptions should be interpreted narrowly”.
- 138 See Austin, “EU and US Perspectives on Fair Dealing for the Purpose of Parody or Satire” (2016) 39 U.N.S.W.L.J. 684, 696 (*Deckmyn* is “unlikely to mandate an especially broad approach to the EU parody exception. The true position is likely to prove more complex. When the CJEU has previously considered the relationship between freedom of expression and the rights of copyright owners, it has not countenanced any significant dismantling of the latter”).
- 139 Described above in fnn.62–69 and surrounding text.
- 140 Described above in fn.7.
- 141 Jacques, “Are national courts required to have an (exceptional) European sense of humour?” (2015) 37 E.I.P.R. 134, 136. Her statement that “it is possible to highlight characteristics of each genre” cites

- Deazley, “Copyright and Parody” (2010) 73 M.L.R. 785, 786 and other texts on parody.
- 142 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21* at [5], [6].
- 143 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21*, A.G. Villalón, Opinion *EU:C:2014:458* at [46].
- 144 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21*, A.G. Villalón, Opinion *EU:C:2014:458* at [46] The Advocate General observed that it “may be difficult in a specific case to assign a particular work to one concept or another” and that “all those concepts have the same effect of derogating from the copyright of the author of the original work which, in one way or another, is present in the – so to speak – derived work”. The tenor of the Opinion, while brief on this aspect—seems to be that the three purposes in art.5(3)(k) have distinct operation, with the key common feature (i.e. imitation present in the defendant’s work) being at a high level of generality.
- 145 The language of target and weapon parody is used by e.g. Spence, “Intellectual Property and the Problem of Parody” (1998) 114 L.Q.R. 594, 594–595, observing that target parodies comment on the text or its creator, whereas weapon parodies use the text to comment on something else. In *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21* at [21], the Grand Chamber rejected the condition that the defendant’s work “should relate to the original work itself”.
- 146 e.g. Australia and Canada have both extended fair dealing to cover parody and satire: Copyright Act 1968 (Cth) ss.41A, 103AA; Copyright Act (RSC 1985, c. C-42) s.29. In the US, there is authority that fair use can apply not only to parody but to satire: see *Blanch v Koons* 467 F. 3d 244, 254–255 (2d Cir. 2006) (characterising the defendant’s work as a satire).
- 147 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21* at [19].
- 148 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21* at [23].
- 149 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21* at [20]–[21].
- 150 *Dyer, Pastiche* (2007), pp.22–25.
- 151 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21* at [20].
- 152 One might question whether judges are deluding themselves with statements that they are avoiding aesthetic considerations, and indeed certain analytical techniques show clear parallels with different strands of aesthetic theory: See, e.g. Alfred C. Yen, “Copyright Opinions and Aesthetic Theory” (1998) 71 S. Cal. L. Rev. 247. See also Barton Beebe, “Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law” (2017) 117 Colum. L. Rev. 319.
- 153 *Deckmyn EU:C:2014:2132; [2014] E.C.D.R. 21* at [25]–[26], citing *Recitals 3 and 31 of the Information Society Directive*.
- 154 *Robert Burrell, Michael Handler, Emily Hudson and Kimberlee Weatherall, ALRC Inquiry into Copyright and the Digital Economy: Submission in response to Issues Paper No.42 (14 December 2012), esp. pp.3–8*; see also *CCH v Law Society of Upper Canada* 2004 S.C.C. 13 at [48] (describing exceptions as user rights, and calling for a “proper balance” to be maintained between copyright owner and user interests through non-restrictive interpretations).
- 155 Emily Hudson, “Implementing Fair Use in Copyright Law: Lessons from Australia” (2013) 25 I.P.J. 201, esp.218–221.
- 156 See also Justice Laddie, “Copyright: over-strength, over-regulated, over-rated?” (1996) 18 E.I.P.R. 253, 258.
- 157 For instance, Dyer’s schema compares 14 practices: plagiarism, fake, forgery, hoax, copies, version, genre, pastiche, emulation, homage, travesty, burlesque, mock epic and parody: *Dyer, Pastiche* (2007), p.24. As noted above at fn.38 and surrounding text, pastiche can overlap with aesthetic categories such as appropriation art, collage, hip hop, montage, etc.
- 158 Some of these acts might conceivably fall within a quotation exception, if such an exception is interpreted broadly and as applying beyond quotations from literary works. This is the thesis being pursued by Tanya Aplin and Lionel Bently. For a summary of the quotation exception in the *CDPA*, see *Bently and Sherman, Intellectual Property Law* (2014), pp.238–241.
- 159 *Article 5 of the Information Society Directive* contains a list of exceptions that may be introduced by Member States in relation to rights harmonised by that Directive (i.e. reproduction, communication to the public and distribution). This has been read as a closed list that does not permit, for example, broader fair use-style exceptions: *Hargreaves Review* (May 2011), paras 5.6, 5.18 to 5.19.
- 160 *CCH v Law Society of Upper Canada* 2004 S.C.C. 13 at [51]; similar at [54].
- 161 It must also be remembered that if the relevant complaint relates to misrepresentation of authorship, there are other causes of action that can be pressed, such as consumer protection regimes, moral rights and criminal actions for fraud. Indeed, it has been argued that for the visual arts, where consumers place a high value on authenticity such that a copy, however perfect, does not generally substitute for the original, the market will often operate to render a copyright complaint unnecessary: see Amy Adler, “Fair Use and the Future of Art” (2016) 91 NYU L. Rev. 559, 618–625.
- 162 *Dyer, Pastiche* (2007), p.9.
- 163 See especially *England and Wales Cricket Board v Tixdaq* [2016] EWHC 575 (Ch); [2016] Bus. L.R. 641. The degree to which this will allow courts to apply the existing fair dealing case law has been questioned: e.g. *Griffiths, “Fair Dealing after Deckmyn” in Research Handbook on Intellectual Property in Media and*

- Entertainment (2017).
- 164 *Cariou v Prince* 784 F. Supp. 2d 337 (S.D.N.Y. 2011).
- 165 *Cariou v Prince* 714 F. 3d 694 (2d Cir. 2013).
- 166 *Cariou v Prince* 714 F. 3d 694, 706 (2d Cir. 2013), citing *Campbell v Acuff-Rose Music Inc* 510 U.S. 569, 579 (1994).
- 167 *Cariou v Prince* 714 F. 3d 694, 706 (2d Cir. 2013).
- 168 *Cariou v Prince* 714 F. 3d 694, 707 (2d Cir. 2013).
- 169 Brian Boucher, “Landmark Copyright Lawsuit *Cariou v. Prince* is settled” (18 March 2014), *Art in America*, <http://www.artinamericamagazine.com/news-features/news/landmark-copyright-lawsuit-cariou-v-prince-is-settled> [Accessed 21 September 2017].
- 170 e.g. Caroline L. McEneaney, “Transformative Use and Comment on the Original: Threats to Appropriation in Contemporary Visual Art” (2013) 78 Brooklyn L.R. 1521; Jacey Norris, “Art or Artifice: The Second Circuit’s Misapplication of the Fair Use Factors in *Cariou v. Prince* in light of *Kienitz v Sconnie Nation*” (2015) 25 DePaul J. Art Tech. & I.P. Law 429; Daniel J. Brooks, “Rectifying Fair Use After *Cariou v Prince*: Revising the Forgotten Statutory Text and Requiring that Unauthorized Copying Be Justified, Rather than Merely ‘Transformative’” (2016) 15 Chi-Kent J. Intell. Prop. 93; Adler, “Fair Use and the Future of Art” (2016) 91 NYU L. Rev. 559, 618–625. The reasoning was also questioned in *Kienitz v Sconnie Nation LLC* 766 F. 3d 757 (7th Cir. 2014) on a number of bases, including that it served to oust the four fairness factors and to, in effect, extinguish the right to make derivative works under §106(2) of the US Copyright Act of 1976.
- 171 Oral testimony of Richard Prince, reproduced in Christine Haight Farley, “No Comment: Will *Cariou v Prince* Alter Copyright Judges’ Taste in Art” (2015) 5 IP Theory 19, 30–31. To illustrate, on the matter of paintings where guitars were collaged on to portraits of Rastafarian men, Prince explained: “he’s playing the guitar now, it looks like he’s playing the guitar, it looks as if he’s always played the guitar, that’s what my message was”: *Cariou v Prince* 784 F. Supp. 2d 337, 349 (S.D.N.Y. 2011).
- 172 See, e.g. *Hubbard v Vosper* [1972] 2 Q.B. 84 at 94; *Newspaper Licensing Agency Ltd v Marks & Spencer Plc* [1999] E.M.L.R. 369 Ch D at 381–383; *Hyde Park Residence v Yelland* [2001] Ch. 143 CA (Civ Div) at 158–159.
- 173 CDPA s.80.
- 174 For discussion of the role of transformativeness in the US case law, see Barton Beebe, “An Empirical Study of U.S. Copyright Fair Use Options, 1978–2005” (2008) 156 U. Pennsylvania L.R. 549, 603–606, noting that although many cases post-dating *Campbell v Acuff-Rose* 510 U.S. 569, 579 (1994) did not discuss transformativeness, when they did “it exerted nearly dispositive force not simply on the outcome of factor one but on the overall outcome of the fair use test”, leading Beebe to describe this consideration as sufficient although not necessary: at 605.
- 175 Adler, “Fair Use and the Future of Art” (2016) 91 NYU L. Rev. 559, 561.
- 176 Adler, “Fair Use and the Future of Art” (2016) 91 NYU L. Rev. 559, 561.
- 177 e.g. *Pro Sieben Media v Carlton UK Television* [1999] F.S.R. 610 at 619. Emphasis on market displacement can also be seen in the reasoning of the WTO Panel considering the meaning of “conflict with a normal exploitation” in *Report of the Panel, United States-Section 110(5) of the U.S. Copyright Act, WT/DS160/R* (15 June 2000) at paras 6.176 to 6.183.
- 178 *Salinger v Colting* 641 F. Supp. 2d 250, 257 (S.D.N.Y. 2009).
- 179 *Salinger v Colting* 641 F. Supp. 2d 250, 258 (S.D.N.Y. 2009).
- 180 *Salinger v Colting* 641 F. Supp. 2d 250, 260 (S.D.N.Y. 2009), citing *Castle Rock Entertainment Inc v Carol Pub Group Inc* 150 F. 3d 132, 143 (2d Cir. 1998).
- 181 *Salinger v Colting* 641 F. Supp. 2d 250, 262 (S.D.N.Y. 2009).
- 182 *Salinger v Colting* 607 F. 3d 68 (2d Cir. 2010). However, the injunction granted by Judge Batts was vacated and the case remanded on the basis that the standard for granting a preliminary injunction did not accord with that in *eBay Inc v MercExchange LLC* 547 U.S. 388 (2006). The case settled before any new orders were made.
- 183 Kate O’Neill, “The Content of Their Characters: J.D. Salinger, Holden Caulfield, Fredrik Colting” (2012) 59 J. Copyright Society USA 291, 296.
- 184 O’Neill, “The Content of Their Characters” (2012) 59 J. Copyright Society USA 291, 307–316.
- 185 See *Bernard A. Drew, Literary Afterlife: The Posthumous Continuations of 325 Authors’ Fictional Characters* (Jefferson, NC: McFarland & Co, 2010), p.90.
- 186 *Salinger v Colting* 607 F. 3d 68, 81 (2d Cir. 2010), citing *Elrod v Burns* 427 U.S. 347, 373 (1976).
- 187 O’Neill, “The Content of Their Characters” (2012) 59 J. Copyright Society USA 291, 340.
- 188 O’Neill, “The Content of Their Characters:” (2012) 59 J. Copyright Society USA 291, 340.
- 189 See above fnn112 to 128 and surrounding text.

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NB. Full text available at: <https://europeancopyrightsocietydotorg.files.wordpress.com/2020/04/ecs-comment-article-17-cdsm.pdf>

1. Introduction

The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law. Its members are renowned scholars and academics from various countries of the European Union, seeking to promote their views of the overall public interest. The Society is not funded, nor has been instructed, by any particular stakeholders. This ECS Opinion concerns the implementation of Article 17 of the Directive on Copyright in the Digital Single Market (DSM Directive or DSMD)² into national law. Article 17 DSMD is one of the most complex – and most controversial³ – provisions of the new legislative package which EU Member States must transpose into national law by 7 June 2021.⁴ Seeking to contribute to the debate on implementation options, the following Opinion addresses several core aspects of Article 17 DSMD that may play an important role in the national implementation process.

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4. Use Privileges and Complaint and Redress Mechanisms – Article 17(7) and (9) DSMD

Article 17 DSMD concerns not only the new licensing and filtering duties that have been discussed in the preceding section. The provision also concerns certain measures to preserve breathing space for forms of UGC that may be qualified as “transformative” in the light of the creative input which the user added to pre-existing

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² Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, Official Journal of the European Communities 2019 L 130, 92.

³ As to the debate during the legislative process (at the time concerning Article 13 of the proposed new copyright legislation), see Martin R.F. Senftleben/Christina Angelopoulos/Giancarlo F. Frosio/Valentina Moscon/Miguel Peguera/Ole-Andreas Rognstad, “The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform”, *European Intellectual Property Review* 40 (2018), 149; Christina Angelopoulos, “On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market”, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800; Giancarlo F. Frosio, “From Horizontal to Vertical: An Intermediary Liability Earthquake in Europe”, *Oxford Journal of Intellectual Property and Practice* 12 (2017), 565-575; Giancarlo F. Frosio, “Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy”, *Northwestern University Law Review* 112 (2017), 19; R.M. Hilty/V. Moscon V. (eds.), “Modernisation of the EU Copyright Rules – Position Statement of the Max Planck Institute for Innovation and Competition”, Max Planck Institute for Innovation and Competition Research Paper No. 1712, Max Planck Institute for Innovation and Competition: Munich 2017; R.M. Hilty/V. Moscon, “Contributions by the Max Planck Institute for Innovation and Competition in Response to the Questions Raised by the Authorities of Belgium, the Czech Republic, Finland, Hungary, Ireland and the Netherlands to the Council Legal Service Regarding Article 13 and Recital 38 of the Proposal for a Directive on Copyright in the Digital Single Market”, available at: <http://www.ip.mpg.de/>; CREATE et al., “Open letter to Members of the European Parliament and the Council of the European Union”, available at: <http://www.create.ac.uk/policy-responses/eucopyright-reform/>; E. Rosati, “Why a Reform of Hosting Providers’ Safe Harbour is Unnecessary Under EU Copyright Law”, CREATE Working Paper 2016/11 (August 2016), available at: <https://ssrn.com/abstract=2830440>; S. Stalla-Bourdillon/E. Rosati/M.C. Kettemann et al., “Open Letter to the European Commission – On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society”, available at: <https://ssrn.com/abstract=2850483>.

⁴ Article 29(1) DSMD.

third-party content. Article 17(7) DSMD underlines the need to safeguard copyright limitations for creative remix activities, in particular use for the purposes of “quotation, criticism and review,” and “caricature, parody and pastiche.”⁵ As these use privileges enhance freedom of expression and information, they are important counterbalances to the new licensing and filtering obligations (following section 4.1).⁶ Against this background, Member States may consider the opportunity of combining the implementation of the DSM Directive, in particular Article 17(7) DSMD, with the introduction of a broader “pastiche” limitation covering a wider spectrum of UGC (section 4.2). If a broad limitation infrastructure for UGC – based on the open-ended concept of “pastiche” – is combined with the payment of equitable remuneration, Article 17(7) DSMD will also generate new revenue streams that support the general policy objective of the new EU legislation to close the so-called “value gap” (section 4.3). Even though platform providers will still have to distinguish between permissible pastiche and prohibited piracy, the introduction of new use privileges for UGC is a gateway to the development of algorithmic content identification tools that follow a different filtering logic. Instead of focusing on traces of protected third-party content that may render user uploads impermissible, a filtering system looking for quotations, parodies and pastiches focuses on creative user input that may justify the upload (section 4.4). In addition, Article 17(9) DSMD supplements the guarantee of certain use privileges in Article 17(7) DSMD with a complaint and redress mechanism that may also play an important role for creative users in the EU (section 4.5).

4.1 Impact of Freedom of Expression

Article 17(7) DSMD leaves little doubt that the use of algorithmic enforcement measures must not erode areas of freedom that support the creation and dissemination of transformative amateur productions that are uploaded to platforms of OCSSPs:

“The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.

Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:

- (a) *quotation, criticism, review;*
- (b) *use for the purpose of caricature, parody or pastiche.”*

Use of the formulation “shall not result in the prevention” and “shall ensure that users [...] are able” give copyright limitations for “quotation, criticism, review” and “caricature, parody or pastiche” an elevated status. In Article 5(3)(d) and (k) of the Information Society Directive 2001/29/EC (ISD),⁷ these use privileges were only listed as limitation prototypes which EU Member States are free to introduce (or maintain) at the national level. The adoption of a quotation right and an exemption of caricature, parody or pastiche remained optional. Article 17(7) DSMD, however, converts these use privileges into mandatory breathing space for transformative UGC.⁸ This metamorphosis makes copyright limitations in this category particularly robust: they “shall” survive the application of automated filtering tools. In case national legislation does not already provide for the

⁵ Article 17(5) DSMD.

⁶ P.B. Hugenholtz/M.R.F. Senftleben, Fair Use in Europe. In Search of Flexibilities, Amsterdam: Institute for Information Law/VU Centre for Law and Governance 2011, 29-30. For a discussion of new UGC use privileges under the umbrella of EU copyright law, see J.-P. Triaille/S. Dusollier/S. Depreeuw/J.B. Hubin/F. Coppens/A. de Francquen, Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society, Study prepared by De Wolf & Partners in collaboration with the Centre de Recherche Information, Droit et Société (CRIDS), University of Namur, on behalf of the European Commission (DG Markt), Brussels: European Union 2013, 522-527 and 531-534 [Triaille et al.].

⁷ Article 5(3)(d) and (k) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, 10).

⁸ Cf. J. Quintais/G. Frosio/S. van Gompel/P.B. Hugenholtz/M. Husovec/B.J. Jütte/M.R.F. Senftleben, “Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics”, Journal of Intellectual Property, Information Technology and Electronic Commerce Law 10 (2020), 277 (278, para. 11) [Quintais et al.].

exemption of “quotation, criticism, review” and “caricature, parody or pastiche”, the use of “shall” in Article 17(7) imposes a legal obligation on Member States to introduce these use privileges.⁹ The reference to “existing” exceptions or limitations must not be misunderstood in the sense of pre-existing national quotation and parody rules. By contrast, it only reflects the fact that these are longstanding EU limitation prototypes that belong to the “existing” canon of permissible use privileges laid down in Article 5 ISD.¹⁰¹¹² This solution also makes sense from the perspective of harmonization in the internal market. Only if all Member States provide for these use privileges in the context of UGC uploads, can filtering systems be applied across territorial borders and can OCSSPs apply the same system configuration and standard of review throughout the EU. This, in turn, ensures that EU citizens enjoy the same freedom of transformative use and a shared UGC experience regardless of territorial borders.

In implementing Article 17(7) DSMD, Member States can benefit from guidance which the CJEU has already provided with regard to the concepts of “quotation” and “parody.” In Painer, the CJEU underlined the need for an interpretation of the quotation right following from Article 5(3)(d) ISD that enables its effectiveness and safeguards its purpose.³⁸ The Court clarified that Article 5(3)(d) ISD was “intended to strike a fair balance between the right of freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.”³⁹

In its more recent decision in Pelham, the CJEU clarified that an essential characteristic of a quotation was: *“the use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user, since the user of a protected work wishing to rely on the quotation exception must therefore have the intention of entering into ‘dialogue’ with that work...”*¹³

With regard to the parody exemption in Article 5(3)(k) ISD, the CJEU provided guidance in Deckmyn. As in its earlier Painer decision, the Court underlined the need to ensure the effectiveness of the parody exemption¹⁴ as a means to balance copyright protection against freedom of expression.¹⁵

As these decisions demonstrate, the fundamental guarantee of freedom of expression plays a crucial role.¹⁶ Relying on Article 11 of the Charter of Fundamental Rights of the EU (CFR) and Article 10 of the European Convention on Human Rights (ECHR), the CJEU interpreted the quotation right and the parody exemption less strictly than

⁹ Favoring a mandatory nature of exceptions and limitations in the form of user’s rights, in particular when justified by fundamental rights such as freedom of expression, see the previous Opinion of the European Copyright Society: C. Geiger/J. Griffiths/M. Senftleben/L. Bently/R. Xalabarder, ‘Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union, Opinion on the Judgment of the CJEU in Case C-201/13, Deckmyn’, *International Review of Intellectual Property and Competition Law* 46 (2015), 93 (97, para. 22).

¹⁰ *Ibid.*, 279, para. 14-15.

¹¹ CJEU, 1 December 2011, case C-145/10, Painer, para. 132-133.

¹² CJEU, *ibid.*, para. 134.

¹³ CJEU, 29 July 2019, case C-476/17, Pelham, para. 71. As to the background of this decision, see L. Bently/S. Dusollier/C. Geiger et al., “Sound Sampling, a Permitted Use Under EU Copyright Law? Opinion of the European Copyright Society in Relation to the Pending Reference Before the CJEU in Case C-476/17, Pelham GmbH v. Hütter”, *International Review of Intellectual Property and Competition Law* 2019, 467 (486487); for a critique of the dialogue requirement, see Tanya Aplin/Lionel Bently, “Displacing the Dominance of the Three-Step Test: The Role of Global, Mandatory Fair Use”, in: Wee Loon Ng/Haochen Sun/Shyam Balganes (eds.), *Comparative Aspects of Limitations and Exceptions in Copyright Law*, Cambridge: Cambridge University Press 2018 (forthcoming), 6-8, available at: <https://ssrn.com/abstract=3119056>; Lionel Bently/Tanya Aplin, “Whatever Became of Global Mandatory Fair Use? A Case Study in Dysfunctional Pluralism”, in: Susy Frankel (ed.), *Is Intellectual Property Pluralism Functional?*, Cheltenham: Edward Elgar 2019, 8-36.

¹⁴ CJEU, 3 September 2014, case C-201/13, Deckmyn, para. 22-23. For a detailed comment on this ruling, see ECS, *supra* note 36.

¹⁵ CJEU, *ibid.*, para. 25-27.

¹⁶ For a discussion of the status quo reached in balancing copyright protection against freedom of expression, see Christophe Geiger/Elena Izyumenko, “Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way”, *European Intellectual Property Review* 41 (2019), 131 (133-136).

limitations without a comparably strong freedom of speech underpinning.¹⁷ The Court emphasized the need to achieve a “fair balance” between, in particular, “the rights and interests of authors on the one hand, and the rights of users of protected subject-matter on the other.”¹⁸ The Court thus referred to quotations and parodies as user “rights” rather than mere user “interests.” In *Funke Medien and Spiegel Online*, the Court explicitly confirmed the status of user rights by pointing out that, “although Article 5 of Directive 2001/29 is expressly entitled ‘Exceptions and limitations’, it should be noted that those exceptions or limitations do themselves confer rights on the users of works or of other subject matter.”¹⁹

The CJEU’s line of reasoning stemming from quotation and parody cases sheds light on a common denominator of the copyright limitations listed in Article 17(7): these user rights strike a balance between copyright protection and freedom of expression. This rationale is particularly relevant to transformative UGC. As long as UGC is the result of creative efforts that add value to underlying source material,²⁰ user-generated remixes and mash-ups of third party content can be qualified as a specific form of transformative use falling under Article 11 CFR and Article 10 ECHR.²¹

4.2 Cultivation of the Concept of “Pastiche”

Bearing this insight in mind, it can be of particular importance during the implementation process to consider not only the well-established concepts of “quotation” and “parody” but also the less developed concept of “pastiche.” In *Deckmyn and Pelham*, the CJEU established the rule that the meaning of limitation concepts in EU copyright law had to be determined by considering the usual meaning of those concepts in everyday language, while also taking into account the legislative context in which they occur and the purposes of the rules of which they are part.²² The Merriam-Webster English Dictionary defines “pastiche” as “a literary, artistic, musical, or architectural work that imitates the style of previous work.”²³ It also refers to a “musical, literary, or artistic composition made up of selections from different works.”²⁴ Similarly, the Collins English Dictionary describes a “pastiche” as “a work of art that imitates the style of another artist or period” and “a work of art that mixes styles, materials, etc.”²⁵

¹⁷ As to the influence of freedom of speech guarantees on copyright law in the EU, see Christophe Geiger/Elena Izyumenko, “Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression”, *International Review of Intellectual Property and Competition Law* 45 (2014), 316; Christophe Geiger, “Constitutionalising’ Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union”, *International Review of Intellectual Property and Competition Law* 37 (2006), 371; Alain Strowel/F. Tulkens/Dirk Voorhoof (eds.), *Droit d’auteur et liberté d’expression*, Brussels: Editions Larcier 2006; P. Bernt Hugenholtz, “Copyright and Freedom of Expression in Europe”, in: Niva Elkin-Koren/Neil Weinstock Netanel (eds.), *The Commodification of Information*, The Hague/London/Boston: Kluwer 2002, 239.

¹⁸ CJEU, 1 December 2011, case C-145/10, *Painer*, para. 132; CJEU, 3 September 2014, case C-201/13, *Deckmyn*, para. 26; see also CJEU, 29 July 2019, case C-476/17, *Pelham*, para. 32, 37 and 59.

¹⁹ CJEU, 29 July 2019, case C-516/17, *Spiegel Online*, para. 54; CJEU, 29 July 2019, case C-469/17, para. 70; for a more detailed discussion of this point, see C. Geiger/E. Izyumenko, “The Constitutionalization of Intellectual Property Law in the EU and the *Funke Medien*, *Pelham* and *Spiegel Online* Decisions of the CJEU: Progress, but Still Some Way to Go!”, *International Review of Intellectual Property and Competition Law* 51 (2020), 282 (292-298).

²⁰ OECD, 12 April 2007, “Participative Web: User-Created Content”, Doc. DSTI/ICCP/IE(2006)7/Final, available at: <https://www.oecd.org/sti/38393115.pdf>, 8.

²¹ Florian Pötzlberger, *Kreatives Remixing: Musik im Spannungsfeld von Urheberrecht und Kunstfreiheit*, Baden-Baden: Nomos 2018.

²² CJEU, 3 September 2014, case C-201/13, *Deckmyn*, para. 19; CJEU, 29 July 2019, case C-476/17, *Pelham*, para. 70.

²³ Merriam-Webster English Dictionary, available at: <https://www.merriamwebster.com/dictionary/pastiche> .

²⁴ *Ibid.*

²⁵ Collins English Dictionary, available at: <https://www.collinsdictionary.com/dictionary/english/pastiche> . ⁵³ Cf. the detailed analysis conducted by Emily Hudson, “The pastiche exception in copyright law: a case of mashed-up drafting?”, *Intellectual Property Quarterly* 2017, 346 (348-352 and 362-364), which confirms that the elastic, flexible meaning of the term “pastiche” is capable of encompassing “the utilisation or assemblage of pre-existing works in new works” (at 363); in the same sense Florian Pötzlberger, “Pastiche 2.0: Remixing im Lichte des Unionsrechts”, *Gewerblicher Rechtsschutz und Urheberrecht* 2018, 675 (681); see also João P. Quintais, *Copyright in the Age of Online Access – Alternative Compensation Systems in EU Law*, Alphen aan den Rijn: Kluwer Law International 2017, 235 [Quintais], who points out that the concept of “pastiche” can be understood to go beyond a mere imitation of style. In line with the results of the study tabled by Triaille et. al., *supra* note 33, at 534-541; Quintais, *ibid.*, 237, nonetheless expresses a preference for legislative

Evidently, the aspect of mixing pre-existing materials and using portions of different works is of particular importance to UGC. In many cases, the remix of pre-existing works in UGC leads to a new creation that “mixes styles, materials etc.” and, in fact, is “made up of selections from different works.” Hence, the usual meaning of “pastiche” encompasses forms of UGC that mix different source materials and combine selected parts of pre-existing works. Against this background, “pastiche” can be an important reference point for lawmakers seeking to offer additional freedom for creative platform users who express themselves in transformative UGC – additional room that goes beyond the long-standing concepts of “quotation” and “parody.”⁵³

Until now, EU Member States have not made effective use of this option to regulate UGC. Implementing Article 17(7), they could take a fresh look at the concept of “pastiche” and clarify that the exemption of pastiches is intended to offer room for UGC.⁵⁴ In this clarification process, Member States have several options depending on the scope of the UGC exemption which they consider appropriate:

- with regard to UGC that constitutes a “genuine” mix of styles and materials in the sense of an artistic “pastiche” that sufficiently plays with all underlying source materials, a mere clarification may suffice that the exemption of “pastiche” is intended to offer breathing space for UGC. This focus on “genuine” pastiche cases, however, may fail to cover widespread forms of UGC, such as funny animal videos with unmodified, copyrighted music in the background. As the music is not part of a transformative mix with other forms or styles of music, this limited version of a pastiche exemption may require a license and related measures under Article 17(1) and (4) DSMD. The animal video as such, however, testifies the creative efforts of the uploading user. Against this background, the regulation of this creative form of UGC on the basis of Article 17(1) and (4) DSMD may appear too harsh in the light of the described need to reconcile copyright protection with freedom of expression and information – in this case, the freedom of expression of amateur creators;

- alternatively, the concept of “pastiche” could be broadened to encompass not only uncontroversial pastiche scenarios with a “genuine” mix of styles and materials but also “non-genuine” forms of mixing pre-existing content, such as the combination of a self-created animal video with protected third-party music. As, in this scenario with a “non-genuine” form of pastiche, the music is simply added, but not mingled with other materials, it seems worth considering to introduce – with regard to this extension of the scope of the “pastiche” concept – an obligation for OCSSPs to pay equitable remuneration. In this alternative scenario, the remuneration would thus not follow from licensing deals under Article 17(1) and (4) DSMD. Instead, the remuneration would follow from statutory remuneration rules that are administered by CMOs and lead to the distribution of remuneration payments in accordance with applicable repartitioning schemes

[end text]

reform.⁵⁴ As to guidelines for a sufficiently flexible application of the pastiche exemption in the light of the underlying guarantee of free expression, see Hudson, *supra* note 53, at 362-364.

James Parish
Case Comment

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MUSIC sampling - the practice of incorporating a fraction or “sample” of a pre-existing sound recording within a new musical arrangement - began in earnest with the advent of commercially available digital samplers in the late 1970s. Five decades later and sampling has become a mainstay of recorded music worldwide. Professional and amateur music producers scour the sound recordings of yesteryear; searching for interesting rhythms, hooks, riffs, refrains, melodies and motifs that can be recontextualised in new compositions. Yet the legality of sampling has long been a source of uncertainty. Books, articles and whole academic theses have been written on the subject. In particular, it has hitherto been unclear whether sampling of sound recordings requires the permission of the holder of copyright (or, in EU terms “related rights”) in the recording. Some steps to resolving this question were taken by the Court of Justice of the European Union (CJEU) in Case C-476/17, *Pelham v Hütter*, Judgment of 29 July 2019, EU:C:2019:624.

The case concerned the German music producer Pelham, who, without authorisation, sampled approximately two seconds of a rhythm sequence from a 1977 Kraftwerk sound recording. Pelham incorporated this sample, with minimal changes, as a continuous loop into his new musical composition. Kraftwerk alleged infringement. The legal issues involved necessitated a preliminary ruling from the CJEU. The first key question was whether the two second sample comprised a “reproduction ... in part” of Kraftwerk’s sound recording for the purposes of Article 2(c) of InfoSoc Directive (Directive 2001/29/EC (O.J. 2001 L 167 p.10)). If so, the second key question was whether the use of the sample fell within an exception, such as the quotation exception in Article 5(3)(d) of the same Directive.

Article 2(c) permits music producers the exclusive right to authorise “reproduction ... in part” of their sound recordings. The CJEU reasoned that these words must “be determined by considering their usual meaning in everyday language” while taking into account the context and purpose of the Directive (at [28]). And since the Directive requires “a high level of protection”, the term “part” must be given a “literal interpretation” (at [30]). Thus any sample, “even if very short”, is considered “part” of the phonogram (i.e. sound recording) from which it was extracted (at [29]). Yet the CJEU also defined the usual meaning of “reproduction” as only including aural reproductions recognisable “to the ear” (at [31]). Thus the overall concept of “reproduction... in part” only provides exclusivity over the unmodified use of samples.

The CJEU supported this interpretation of Article 2(c) by confirming that sampling “constitutes a form of artistic expression which is covered by freedom of the arts, as protected in Article 13 of the Charter” (at [35]). Insofar as artistic freedom also falls within the scope of freedom of expression (Art. 11 of the Charter and Art. 10(1) of the European Convention for the Protection of Human Rights), then sampling also “affords the opportunity to take part in the public exchange of cultural, political and social information and ideas” (at [34]). In light of these fundamental rights, allowing the term “reproduction” to encompass aural reproductions modified beyond human recognition “would also fail to meet the requirement of a fair balance” (at [37]). The CJEU left the application of this reasoning to the German courts.

The CJEU’s definition of “reproduction ... in part” invites three comments. First, the CJEU has defined “part” in a quantitative sense. Even a one-millisecond sample would be a “part”. This quantitative reading differs from the British concept of “substantial part” under section 16(3) (a) of the Copyright, Designs and Patents Act 1988. The House of Lords defined substantial part as being “determined by its quality rather than its quantity” (*Designers Guild v Williams* [2000] 1 W.L.R. 2426). Thus only “parts” that embody the overall essence of the sound recording would have been traditionally protected in the UK.

Second, the CJEU has created two different “part tests” within the EU related rights framework. A second, distinct “part test” comes via the CJEU’s requirement of “substantial part” under Article 9(1)(b) of the Related Rights Directive (Directive 2006/115/EC (O.J. 2006 L 376 p.28)). Article 9(1)(b) grants producers an exclusive distribution right over their sound recordings, and “copies thereof”. In defining “copies thereof”, the CJEU held that the Related Rights Directive is intended to prevent piracy (at [44]). The term “copies” therefore only covers “counterfeit copies”, which are intended as replacements for “lawful copies” (at [46]). Moreover, the term

“copies” should be understood as articles “which contain sounds taken directly or indirectly from a phonogram [sound recording] and which embody “all or a substantial part’ of the sounds fixed in that phonogram [sound recording]” (at [52]). But samples are not substitutes for a “lawful copies”, being used “for the purposes of creating a new and distinct work” (at [47]). Thus samples cannot constitute “a substantial part” under the Related Rights Directive, despite being a “part” for the purposes of the InfoSoc Directive.

Finally, it is unclear why the CJEU chose recognisability “to the ear” as its determining factor in its new modification test for determining “reproduction”. Human recognisability is certainly welcomed. Protection clearly does not extend to aural reproductions only recognisable by robots and machines. However, many samples are humanly unrecognisable while remaining unmodified. For example, samples lasting a few milliseconds could be considered “too short to be recognised”. Alternatively, samples from recordings of the natural or industrial sound (such as recordings of waves breaking on the coast, or the bustle of traffic) could be considered unrecognisable due to having “an unrecognisable source”. It is unclear why these alternative unrecognisable samples should be protected under Article 2(c), while those samples “modified beyond recognition” are excluded. This curiosity is exacerbated by how the CJEU answered the German court’s second key question; whether the use of a protectable sample can fall within the scope of the quotation exception in Article 5(3)(d) of the InfoSoc Directive?

Article 5(3)(d) of the InfoSoc Directive allows Member States to provide a qualified exception or limitation to protection for “quotations for purposes such as criticism or review”. The CJEU wasted no time identifying sampling as a legitimate form of quotation (at [68]). Yet the CJEU also found it necessary to define “quotation”. Accordingly, “the essential characteristics of a quotation are the use ... of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user”. Put otherwise, the user must “have the intention of entering into “dialogue’ with that work” (at [71]). The CJEU left it for the German courts to decide whether Pelham had entered into a dialogue with Kraftwerk.

These new essential characteristics of quotation also invite comment. First, it is unclear what is meant by “intention of entering into “dialogue””, but presumably the CJEU would not have confirmed that samples can be quoted unless samples can also satisfy the “dialogue” criterion. The Advocate General (AG) has suggested that acts of confrontation, tribute and interaction are permissible forms of “dialogue” (EU:C:2018:1002, at [64]). Whether anything unites this list is uncertain and, prima facie, the AG’s examples fall short of samplers’ full ambit of opportunities “to take part in the public exchange of cultural, political and social information and ideas”. Moreover, in relation to quoting authorial works, the AG’s delimitation of “dialogue” might restrict the EU quotation right beyond the mandatory requirements of international copyright (see Art. 10(1) of the Berne Convention for the Protection of Literary and Artistic Works (as amended 28 September 1979)).

Professor Drassinower has previously offered an alternative, more expansive definition of “dialogue”, which ensures that users’ rights are not unduly restricted. Drassinower argues that the concept of authorship (which underpins copyright) should be understood as an ongoing “dialogue” between past, present and future authors (*What’s Wrong with Copying?* (2015)). Insofar as a sampler is creating a new work of authorship - namely a new musical work itself protected by copyright - the sampler is deemed to have engaged with an intention of entering into “dialogue”. Therefore a national court can immediately proceed to consider whether: (1) the source material had already been lawfully made available to the public; (2) the source of the sampled sound recording is indicated; (3) the use of the sample accords with fair practice; and (4) the sample lasts no longer than is required by the purpose of creating a new recording (Art. 5(3)(d)).

Lastly, an unwelcome quirk in the CJEU’s reasoning casts further doubts on whether one can sample from sound recordings that do not contain authorial works. The CJEU interpreted sampling solely as a means by which one quotes a “protected musical work” (at [68]). But what if sampler reproduces nonauthorial sounds, such as the aforementioned waves and traffic sounds? With no author to speak to, how is the sampler supposed to engage in “dialogue”?

While the CJEU has thus opened up some space for unauthorised sampling of sound recordings containing musical works, its judgment has generated a cacophony of questions that will now need to be resolved.

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As succinctly noted by Susan Bischoff in a **prior post**, the ongoing legal saga surrounding the ‘Metall auf Metall’ case continues to yield legal insights. Presently, a **new reference** from the German Federal Court of Justice (BGH) asks the Court of Justice of the European Union (CJEU) for vital interpretive guidance concerning the parody exception within copyright law. While many anticipate the CJEU’s forthcoming decision in mid-2025, this contribution seeks to advocate that distinguishing between parody, pastiche, and caricature in copyright law may be ineffective.

The parody, pastiche, and caricature exception, enshrined in Article 5(3)(k) of the Information Society Directive (**InfoSoc**), represents an optional provision for EU member states to incorporate into their domestic legislation. This provision, while optional, is rendered mandatory for online use on select major platforms under Article 17(7) of the copyright and related rights in the Digital Single Market Directive (**CDSM**). Lacking specific statutory criteria, it is unsurprising that this vague provision has given rise to disparate national interpretations, thereby imperilling the goal of EU harmonisation.

The initial CJEU decision, **Deckmyn**, aimed at advancing harmonisation within the parody exception, primarily focused on the requirements attached to this exception for its application. Some **critics** argued that this decision failed to definitively establish whether there exists a singular parody exception encompassing related terms such as pastiche and caricature or if Article 5(3)(k) of the InfoSoc Directive prescribes three distinct exceptions. Articulating these three as distinct exceptions has its advantages, as evidenced in Emily Hudson’s 2017 **article**, which posits that delineating pastiche as a separate exception could infuse greater flexibility into the EU copyright system, akin to the concept of transformative use in U.S. law. Additionally, proponents like the **European Copyright Society (ECS)** and, more recently, **Eleonora Rosati** contend that treating parody, pastiche, and caricature as distinct exceptions could better safeguard freedom of expression, enabling uses grounded in fundamental rights while lacking a specific defence against copyright infringement. Several national courts have independently chosen to differentiate between these three genres, exemplified by the German case Landgericht Berlin, 2.11.2021 – **15 O 551/19**.

Nevertheless, the question arises: is it truly advantageous to delineate these three as separate exceptions to strike an equitable balance between copyright protection and freedom of expression? Could the parody exception, conceived as encompassing pastiche, caricature, and related genres, sufficiently provide the required flexibility to safeguard users’ rights within EU copyright law? After all, Article 5(3)(k) of the InfoSoc Directive, coupled with the guidance from **Deckmyn**, appears sufficiently broad to encompass these uses in theory. Furthermore, exhaustively defining these concepts within legal confines may exacerbate the disjunction between their legal interpretation and their evolving meanings within diverse artistic fields. This could potentially render the law opaquer to creators, despite them being the intended beneficiaries of this legislation. Furthermore, such a distinction might exacerbate practical disharmony among member states (France and Belgium being examples of countries that do not distinguish the three genres as separate exceptions) and ossify the law at a time when the meaning of these concepts evolves alongside society and its technological advancements, as posited by cultural theorists. Consequently, there is a risk that the law may lag behind contemporary creative processes, technological shifts, and societal expectations.

Identifying Commonalities among Parody, Pastiche, and Caricature

The nature of parody, pastiche, and caricature has spawned extensive discourse among various art fields over time. Cultural theorists endeavoured to comprehensively define these concepts, but such attempts have encountered limitations. For example, in considering parody, some have sought to tether the genre to a specific art form (**Kiremidjian**) or a specific context (**Bakhtin** traces the origin of parody to Carnival and its challenge to established power structures).

Others have approached parody through the lens of its functions. Scholars like **Jameson** emphasise parody’s comedic aspect, whereas **Hutcheon** focuses on its critical function and the “ironic social critical distance” it establishes between the parody and its source material. Hutcheon’s broad definition encompasses a wide array of hypertextual forms beyond traditional parody. Recognising the shortcomings of these definitions, **Genette** strives to balance the comic and critical functions of parody. While Genette’s definition acknowledges the dual facets of parody, it results in another expansive definition that leaves room for

interpretation regarding the uses covered. **Dentith** concludes that seeking an all-encompassing definition of parody is counterproductive and suggests focusing on a particular aspect. This approach, initially applied to cultural politics by Dentith, can be similarly adopted within copyright law. The objective is to distinguish legitimate uses from illegitimate ones, and this can be accomplished through a proper application of *Deckmyn* in conjunction with the framework of human rights and teachings from the European Court of Human Rights (ECtHR).

It's important to understand the commonalities that bind these concepts and what sets them apart. Fundamentally, all three genres rely on *imitation* of a source. While parody imitates (or mimics) an original work for comedic and/or critical purposes, caricature involves exaggerating idiosyncratic features of the original, and pastiche entails the imitation of another's style as a form of tribute or homage, often by replicating its characteristics, themes, or techniques. Pastiche primarily emphasises the similarities between expressions rather than attempting to transform a creative expression. However, not all parodies are necessarily critical. As Jameson notes, some parodies lack a critical edge, blurring the boundaries between parody and pastiche. Similarly, modern interpretations suggest that pastiche can also incorporate elements of critique.

In summary, parody, pastiche, and caricature all rely on imitation and copying as a means of generating new expressions. While pastiche may involve more extensive copying than parody, and parody may exhibit more pronounced critical elements, these three genres are interconnected. What further aligns them is their *transparent* nature—they do not seek to mislead and unmistakably signal their reference to the original work. Despite their unmistakable connection to the source material, they are considered creative endeavours that lead to new expressions. Drawing inspiration from **Proust**, pastiche represents an ideal form of creative critical activity, or *Auseinandersetzung*, serving as a vehicle for challenging the notion that classical art and culture alone possess validity or authority.

Throughout history, these three concepts have experienced fluctuations in reputation, at times viewed negatively before undergoing a resurgence. The rise of the 'creative genius' during the Enlightenment era cast these genres as impediments to creativity, and in some countries, parody even carried the potential for criminal liability. Similarly, pastiche was regarded disdainfully as inferior variants of the works they mimicked or as fraudulent endeavours. However, the 20th century witnessed a revival of these genres, which became more multifaceted, serving purposes ranging from entertainment and criticism to paying homage, acknowledging the past, and advancing artistic movements. This complexity rendered these concepts open-textured and context-dependent.

In contemporary art, pastiche, such as composite paintings, serves as a means of commenting on culture, systems, ideologies, and more. To engage with such artworks, viewers must *actively decipher* cultural references and layers of meaning, often requiring a degree of cultural and artistic literacy. The same holds true for parody and caricature.

Differentiating Parody from Quotation

Given the crucial role of imitation in linking these concepts, it is pertinent to distinguish between parody (understood here as encompassing pastiche, caricature, satire, and related genres) and quotation. The Italian Supreme Court recently posited that parody, pastiche, and caricature could be regarded as forms of quotation, as both parody and dialogue can arguably engage in a discourse with the original work (a summary can be found [here](#)). While this perspective offers a resourceful approach to addressing the absence of a specific parody exception in Italian legislation, it is a perspective that should be dismissed.

Although both quotation and parody can be perceived as literary or artistic techniques, they diverge in terms of their functions, necessitating different requirements for their realisation. Quotation involves using the original work for reference or accuracy, whereas parody entails imitating and exaggerating elements of a work or subject for comedic or critical effect. Additionally, quotation represents a straightforward acknowledgment of another source, while parody involves creative reinterpretation and some form of transformation of the original. While both concepts are rooted in human rights, they demand distinct legal treatment because they serve distinct functions. Accuracy is paramount in quotation, warranting prohibitions on alteration and requirements for source acknowledgment, which do not translate effectively to parody.

The CJEU's Perspective on Parody, Pastiche, and Caricature

In the *Deckmyn* case, the European Commission suggested the necessity of treating parody, pastiche, and caricature as separate exceptions. However, the **CJEU Advocate General** concurred with the Belgian submission, positing that these three genres are so interlinked that distinguishing them for copyright law

and EU harmonisation purposes may be superfluous. To quote the Advocate General:

[I]t does not seem to me to be necessary to proceed any further with that distinction, since, in short, all those concepts have the same effect of derogating from the copyright of the author of the original work which, in one way or another, is present in the — so to speak — derived work (paragraph 46).

This perspective appears well-founded. Opting for a different approach would not only conflict with the evolution of these concepts in various art fields but could also generate situations where a use incorporating both pastiche and parody is permissible under the pastiche exception but not under the parody exception. Given the close relationship among these genres, such an outcome might lead to challenging scenarios where the interpretation of the 'three' exceptions undermines the overall effectiveness and objectives of copyright law, potentially running counter to the principles established in the *Football Association Premier League* case (**C-403/08 and C-429/08** at 163).

While the CJEU did not explicitly delineate its stance on the matter, it can be argued that the CJEU endorsed a comprehensive understanding of parody. Firstly, the Belgian Court of Appeal's submission and the CJEU's case summary refer to the use in question as a caricature. Had the CJEU intended to differentiate between the three concepts within the realm of copyright law, it might have offered clarification, especially considering the Advocate General's explicit stance. In this context, the CJEU's omission to do so suggests agreement with the Advocate General's reasoning.

Conclusion: The Parody Exception Is More Inclusive Than Perceived

Many proponents of a separate pastiche exception do so in response to the perception that the parody exception is overly restrictive due to the requirement of humour or mockery. However, as **argued** previously, the parody exception is inherently flexible if correctly applied. Judges, in applying this exception, are neither tasked with making aesthetic judgments nor deciding the type of humour permissible. A more human rights-compliant approach is to interpret this requirement as necessitating the user's intent to remain within the bounds of freedom of expression. This approach aligns with fundamental rights and principles while preserving a wide spectrum of humorous expressions, including dark humour and other incongruities, all while upholding the exclusive rights of rights holders by ensuring that they and their protected works are not unduly denigrated.

The human rights framework offers further insights to realise the objectives of the parody exception. However, it is acknowledged that the parody exception cannot be extended to encompass all types of mashups and other remixes. Should such a broad exception be desired, it should be introduced by the EU legislator, complete with its own set of conditions for application.

Finally, if a radical shift in EU copyright law is contemplated, this endeavour lies within the purview of the legislator and would necessitate meticulous scrutiny in light of the three-step test and requires public consultation, especially considering the potential breadth of its scope and potential commercial impact, which might call into question its compatibility with the first and second steps.