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EUROPEAN INFORMATION - SIA

Internal Market Law of the European Union

Cases and Materials

Riga 2005

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Table of Contents

Wednesday 26 October 2005

18.00 - 19.30 Session No. 1

The internal market and the economic mechanisms for achieving an ever closer union

- The introduction will cover the economic background for the internal market, as well as the relation between the individual rights of free movement, and the links to other parts of EU law.

Reading

- Craig & de Búrca p. 3-10, 580-583, 936-938, 1170-1203

Cases

- Case 155/80, Judgment of the Court of 14 July 1981,
Oebel, ECR p. 1993 p. 008
- Case C-67/97, Judgment of the Court (Fifth Chamber)
of 3 December 1998, Bluhme, ECR p. i-8033 p. 015
- Case C-513/99, Judgment of the Court of 17 September 2002,
Concordia Bus, ECR p. i-7213 p. 024

19.30 - 21.00 Session No. 2

Technical and fiscal barriers to trade

- The lecture on technical and fiscal barriers to trade will cover the different prohibitions on restrictions in relation to the free movement of goods. The rule of reason and its relation to the treaty exemptions will be explained, together with the principles of subsidiarity and proportionality.

Reading

- Craig & de Búrca p. 613-641, 659-680

Cases

- Case 120/78, Judgment of the Court of 20 February 1979, Rewe-Zentral, ECR p. 649p. 040
- Case 178/84, Judgment of the Court of 12 March 1987, Germany, ECR p. 1227p. 047
- Case C-189/95, Judgment of the Court of 23 October 1997, Franzén, ECR p. i-5909 p. 062

Friday 28 October 2005

18.00 - 19.30 Session No. 3

Advertising and consumer protection

- The seminar will explore the development of and limits to the Keck principle, with special emphasis on the issues of advertising and consumer protection.

Reading

- Craig & de Búrca p. 641-658

Cases

- Case C-362/88, Judgment of the Court (Sixth Chamber) of 7 March 1990, GB-INNO-BM, ECR p. i-667 p. 076
- Case C-368/95, Judgment of the Court of 26 June 1997, Familiapress, ECR p. i-3689p. 083
- Case C-405/98, Judgment of the Court (Sixth Chamber) of 8 March 2001, Gourmet, ECR p. i-1795 p. 092

19.30 - 21.00 Session No. 4

Protection of intellectual property rights

- The seminar will examine the conflict of interests between the realisation of the internal market and the national character of many intellectual property rights, as well as the balance that the ECJ has tries to establish between the conflicting interests.

Reading

- Craig & de Búrca p. 1088-1122

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Cases

- Case C-316/95, Judgment of the Court of 9 July 1997,
Generics, ECR p. i-3929 p. 100
- Case C-349/95, Judgment of the Court of 11 November 1997,
Loendersloot, ECR p. i-6227 p. 110
- Case C-61/97, Judgment of the Court of 22 September 1998,
Videogramdistributører, ECR p. i-5171p. 122

Monday 31 October 2005

18.00 - 19.30 Session No. 5

Fiscal measures and environmental regulation

- The seminar will conclude the section of the course that is dedicated to the free movement of goods by looking at the application of the rules against fiscal barriers, especially in the field on protection of the environment.

Reading

- Craig & de Búrca p. 583-612

Cases

- Case C-129/96, Judgment of the Court of 18 December 1997,
Inter-Environnement Wallonie, ECR p. i-7411 p. 130
- Case C-389/00, Judgment of the Court (Fifth Chamber)
of 27 February 2003, Germany, ECR not yet publishedp. 140
- Case C-213/96, Judgment of the Court of 2 April 1998,
Outokumpu Oy, ECR p. i-1777 p. 149

19.30 - 21.00 Session No. 6

Development of the professional right of free movement

- The lecture will present the special issues related to the free movement of services and the right of establishment as contrasted against the right of free movement for goods. The gradual development of common standards will be exemplified by case law.

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Reading

- Craig & de Búrca p. 765-825

Cases

- Case C-55/94, Judgment of the Court of 30 November 1995, Gebhard, ECR p. i-4165 p. 159
- Joined cases C-369/96 and C-376/96, Judgment of the Court of 23 November 1999, Arblade, ECR p. i-8453 p. 170
- Case C-188/95, Judgment of the Court of 2 December 1997, Fantask, ECR p. i-6783p. 188

Tuesday 1 November 2005

18.00 - 19.30 Session No. 7

Free movement of television services

- The seminar will concentrate on the free movement of television services as the example of a service that in itself is capable of free movement.

Cases

- Case C-148/91, Judgment of the Court of 3 February 1993, Veronica, ECR p. i-487 p. 202
- Case C-56/96, Judgment of the Court (Sixth Chamber) of 5 June 1997, VT4, ECR p. i-3143 p. 209
- Case C-17/00, Judgment of the Court (Fifth Chamber) of 29 November 2001, Coster, ECR p. i-9445 p. 216

19.30 - 21.00 Session No. 8

Taxes and the right of establishment

- The seminar will explore the links between the harmonisation of company law and the realisation of the right to both primary and secondary establishment.

Cases

- Case 81/87, Judgment of the Court of 27 September 1988, Daily Mail, ECR p. 5483 p. 223

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- Case C-212/97, Judgment of the Court of 9 March 1999,
Centros, ECR p. i-1459 p. 231
- Case 63/86, Judgment of the Court of 14 January 1988,
Italy, ECR p. 29 p. 243

Friday 4 November 2005

18.00 - 19.30 Session No. 9

Free movement of persons

- The lecture will highlight important recent developments and discuss the practical consequences of an area without internal borders in which the physical free movement is constantly getting easier and what this means for the law in the area. In this context the Schengen agreement and border control issues will be discussed.

Reading

- Craig & de Búrca p. 701-765

Cases

- Case C-369/90, Judgment of the Court of 7 July 1992,
Micheletti, ECR p. i-4239 p. 250
- Case C-85/96, Judgment of the Court of 12 May 1998,
Martínez, ECR p. i-2691 p. 255
- Case C-60/00, Judgment of the Court of 11 July 2002,
Carpenter, ECR 2002, p. i-6279 p. 267

19.30 - 21.00 Session No. 10

Free movement of capital

- The lecture will focus on a critical presentation of the relevant treaty provisions and secondary legislation, as well as the contribution of case law in the field of free movement of capital. Also considered will be tax issues relating to the free movement of capital

Reading

- Craig & de Búrca p. 680-701

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Cases

- Case C-302/97, Judgment of the Court of 1 June 1999,
Klaus Konle, ECR p. i-3099 p. 278
- Case C-35/98 Judgment of the Court of 6 June 2000,
Staatssecretaris van Financien v B.G.M., ECR p. i-4071 p. 291
- Case C-423/98, Judgment of the Court of 13 July 2000,
Albore, ECR p. i -5965 p. 303

Thursday 8 November 2005

18.00-19.30

Exam

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**Judgment of the Court
of 14 July 1981
Summary proceedings against Sergius Oebel.
Reference for a preliminary ruling: Amtsgericht Wiesbaden - Germany.
Prohibition on night-work in bakeries.
Case 155/80.**

1 . COMMUNITY LAW - PRINCIPLES - EQUALITY OF TREATMENT - DISCRIMINATION ON THE GROUNDS OF NATIONALITY - PROHIBITION - SCOPE

(EEC TREATY , ART. 7)

2 . FREE MOVEMENT OF GOODS - QUANTITATIVE RESTRICTIONS ON EXPORTS - MEASURES HAVING EQUIVALENT EFFECT - CONCEPT - RULES BASED ON OBJECTIVE CRITERIA AND NOT DISTINGUISHING BETWEEN DOMESTIC TRADE AND EXPORT TRADE - EXCLUSION

(EEC TREATY , ART. 34)

3 . FREE MOVEMENT OF GOODS - QUANTITATIVE RESTRICTIONS - MEASURES HAVING EQUIVALENT EFFECT - RULES PROHIBITING NIGHTWORK IN BAKERIES - PERMISSIBILITY

(EEC TREATY , ARTS 30 AND 34)

1 . THE PRINCIPLE OF NON-DISCRIMINATION CONTAINED IN ARTICLE 7 OF THE EEC TREATY IS NOT INFRINGED BY RULES WHICH ARE APPLICABLE NOT ON THE BASIS OF THE NATIONALITY OF TRADERS , BUT ON THE BASIS OF THEIR LOCATION . THERE IS THEREFORE NO INFRINGEMENT OF ARTICLE 7 , EVEN IF , BY MEANS OF A STATUTORY PROVISION WHICH MAKES NO DISTINCTION DIRECTLY OR INDIRECTLY ON GROUNDS OF NATIONALITY , A MEMBER STATE CREATES A SITUATION AFFECTING THE COMPETITIVENESS OF TRADERS ESTABLISHED ON ITS TERRITORY COMPARED WITH TRADERS ESTABLISHED IN OTHER MEMBER STATES.

2 . ARTICLE 34 OF THE EEC TREATY CONCERNS NATIONAL MEASURES WHICH HAVE AS THEIR SPECIFIC OBJECT OR EFFECT THE RESTRICTION OF PATTERNS OF EXPORTS AND THEREBY THE ESTABLISHMENT OF A DIFFERENCE IN TREATMENT BETWEEN THE DOMESTIC TRADE OF A MEMBER STATE AND ITS EXPORT TRADE , IN SUCH A WAY AS TO PROVIDE A PARTICULAR ADVANTAGE FOR NATIONAL PRODUCTION OR FOR THE DOMESTIC MARKET OF THE STATE IN QUESTION .

THIS IS CLEARLY NOT THE CASE WITH RULES WHICH ARE PART OF ECONOMIC AND SOCIAL POLICY AND APPLY BY VIRTUE OF OBJECTIVE CRITERIA TO ALL THE UNDERTAKINGS IN A PARTICULAR INDUSTRY WHICH ARE ESTABLISHED WITHIN THE NATIONAL TERRITORY , WITHOUT LEADING TO ANY DIFFERENCE IN TREATMENT WHATSOEVER ON THE GROUND OF THE NATIONALITY OF TRADERS AND WITHOUT DISTINGUISHING BETWEEN THE DOMESTIC TRADE OF THE STATE IN QUESTION AND THE EXPORT TRADE.

3 . ARTICLES 30 AND 34 OF THE EEC TREATY DO NOT APPLY TO NATIONAL RULES WHICH PROHIBIT THE PRODUCTION OF ORDINARY AND FINE BAKER ' S WARES AND ALSO THEIR TRANSPORT AND DELIVERY TO INDIVIDUAL CONSUMERS AND RETAIL OUTLETS DURING THE NIGHT UP TO A CERTAIN HOUR.

IN [CASE 155/80](#)

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE AMTSGERICHT (LOCAL COURT) WIESBADEN FOR A PRELIMINARY RULING IN SUMMARY PROCEEDINGS PENDING BEFORE THAT COURT AGAINST

SERGIUS OEBEL ,

ON THE INTERPRETATION OF ARTICLES 7 , 30 AND 34 OF THE EEC TREATY ,

1 BY AN ORDER OF 22 APRIL 1980 , WHICH WAS RECEIVED AT THE COURT ON 2 JULY 1980 , THE AMTSGERICHT (LOCAL COURT) WIESBADEN REFERRED TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY TWO QUESTIONS FOR A PRELIMINARY RULING CONCERNING THE INTERPRETATION OF ARTICLES 7 , 30 AND 34 OF THE TREATY , IN ORDER TO DETERMINE THE CONFORMITY WITH COMMUNITY LAW OF NATIONAL RULES ON NIGHTWORK IN BAKERIES.

2 THESE QUESTIONS WERE RAISED IN THE COURSE OF A PROSECUTION FOR A CONTRAVENTION OF ARTICLE 5 OF THE GERMAN LAW ON WORKING HOURS IN BAKERIES (GESETZ UBER DIE ARBEITSZEIT IN BACKEREIEN UND KONDITOREIEN) , AS AMENDED ON 23 JULY 1969.

3 ARTICLE 5 (1) OF THE ABOVE-MENTIONED LAW PROVIDES IN SUBSTANCE THAT ON WORKING DAYS , SUBJECT TO CERTAIN EXCEPTIONS , NO PERSON SHALL BE PERMITTED TO WORK ON THE MAKING OF ORDINARY OR FINE BAKER ' S WARES AT NIGHT BETWEEN THE HOURS OF 10 P.M. AND 4 A.M. ARTICLE 5 (5) PROHIBITS THE TRANSPORT OF ORDINARY OR FINE BAKER ' S WARES FOR DELIVERY TO CONSUMERS OR RETAIL OUTLETS BETWEEN THE HOURS OF 10 P.M. AND 5.45 A.M. ACCORDING TO THE GERMAN GOVERNMENT , THAT PROHIBITION DOES NOT AFFECT TRANSPORT AND DELIVERY TO WHOLESALERS , INTERMEDIARIES SUCH AS BREAD SALESMEN , DISTRIBUTORS OF ORDINARY AND FINE BAKER ' S WARES OR TO WAREHOUSES BELONGING TO THE UNDERTAKING.

4 ACCORDING TO THE OBSERVATIONS OF THE PARTIES TO THE CASE , AND IN PARTICULAR THOSE OF THE GERMAN GOVERNMENT , THE LEGISLATION IN ISSUE IS DESIGNED MAINLY TO PROTECT WORKERS IN SMALL AND MEDIUM-SIZED BAKERIES , WHICH DO NOT HAVE ENOUGH STAFF TO BE ABLE TO ARRANGE WORK IN SHIFTS , AGAINST PERMANENT NIGHT-WORK LIKELY TO DAMAGE THEIR HEALTH . THE PURPOSE OF EXTENDING THE PROHIBITION TO THE LARGE UNDERTAKINGS IN THE INDUSTRY WHICH ARE ABLE TO ORGANIZE WORK IN SHIFTS IS TO PROTECT THE SMALL FAMILY BUSINESSES AGAINST COMMERCIAL COMPETITION.

5 BELIEVING THAT THIS LEGISLATION MIGHT BE INCOMPATIBLE WITH COMMUNITY LAW INASMUCH AS IT PREVENTS THE DELIVERY IN TIME OF FRESH ORDINARY AND FINE BAKER ' S WARES TO THE MEMBER STATES BORDERING THE FEDERAL REPUBLIC OF GERMANY AND SO CREATES DISTORTION IN COMPETITION WITHIN THE COMMUNITY , THE AMTSGERICHT WIESBADEN SUBMITTED THE FOLLOWING QUESTIONS :

' 1 . MUST ARTICLE 7 OF THE EEC TREATY BE INTERPRETED AS MEANING THAT THERE IS A BREACH OF THE PROHIBITION ON DISCRIMINATION IF BY MEANS OF A STATUTORY PROVISION A MEMBER STATE OF THE COMMUNITY CREATES A SITUATION WHICH CONSIDERABLY IMPAIRS THE COMPETITIVENESS OF ITS OWN NATIONALS IN RELATION TO COMPARABLE NATIONALS OF OTHER MEMBER STATES?

2.MUST ARTICLES 30 AND 34 OF THE EEC TREATY BE INTERPRETED AS MEANING THAT THE EFFECTS OF ARTICLE 5 OF THE GESETZ UBER DIE ARBEITSZEIT IN BACKEREIEN (LAW ON WORKING HOURS IN BAKERIES) IN REGARD TO THE EXPORT AND IMPORT OF FRESH BAKER ' S WARES ARE TO BE REGARDED AS MEASURES EQUIVALENT TO QUANTITATIVE RESTRICTIONS ON IMPORTS OR QUANTITATIVE RESTRICTIONS ON EXPORTS?

' '

FIRST QUESTION

6 IT IS CLEAR FROM THE GROUNDS SET OUT IN THE ORDER MAKING THE REFERENCE THAT THE PURPOSE OF THE FIRST QUESTION IS TO ASCERTAIN WHETHER RULES OF ONE MEMBER STATE WHICH , IN CERTAIN AREAS BORDERING OTHER MEMBER STATES IN WHICH THERE ARE NO SUCH RULES , LEAD TO DISTORTION OF COMPETITION TO THE DETRIMENT OF TRADERS ESTABLISHED IN THE TERRITORY OF THE FIRST STATE , ARE TO BE CONSIDERED AS DISCRIMINATORY UNDER ARTICLE 7 OF THE TREATY.

7 AS THE COURT HAS REPEATEDLY STATED , MOST RECENTLY IN ITS JUDGMENT OF 30 NOVEMBER 1978 (CASE 31/78 BUSSONE (1978) ECR 2429 , AT P. 2446), THE PRINCIPLE OF NON-DISCRIMINATION CONTAINED IN ARTICLE 7 IS NOT INFRINGED BY RULES WHICH ARE APPLICABLE NOT ON THE BASIS OF THE NATIONALITY OF TRADERS , BUT ON THE BASIS OF THEIR LOCATION.

8 IT FOLLOWS THAT NATIONAL RULES WHICH MAKE NO DISTINCTION , DIRECTLY OR INDIRECTLY , ON THE GROUND OF THE NATIONALITY OF THOSE SUBJECT TO SUCH RULES , DO NOT INFRINGE ARTICLE 7 , EVEN IF THEY AFFECT THE COMPETITIVENESS OF THE TRADERS COVERED BY THEM.

9 FURTHERMORE , AS THE COURT STATED IN ITS JUDGMENT OF 3 JULY 1979 (JOINED CASES 185 TO 204/78 VAN DAM (1979) ECR 2345 , AT P. 2361), IT CANNOT BE HELD CONTRARY TO THE PRINCIPLE OF NON-DISCRIMINATION TO APPLY NATIONAL LEGISLATION MERELY BECAUSE OTHER MEMBER STATES ALLEGEDLY APPLY LESS STRICT RULES.

10 THE ANSWER TO THE FIRST QUESTION MUST THEREFORE BE THAT ARTICLE 7 OF THE EEC TREATY MUST BE CONSTRUED AS PROHIBITING ONLY DISCRIMINATION ON THE GROUND OF THE NATIONALITY OF TRADERS. THERE IS , THEREFORE , NO INFRINGEMENT OF ARTICLE 7 EVEN IF BY MEANS OF A STATUTORY PROVISION WHICH MAKES NO DISTINCTION DIRECTLY OR INDIRECTLY ON GROUNDS OF NATIONALITY , A MEMBER STATE CREATES A SITUATION AFFECTING THE COMPETITIVENESS OF TRADERS ESTABLISHED ON ITS TERRITORY COMPARED WITH TRADERS ESTABLISHED IN OTHER MEMBER STATES.

SECOND QUESTION

11 BY THE SECOND QUESTION THE NATIONAL COURT ASKS WHETHER THE EFFECTS OF DOMESTIC LEGISLATION ON WORKING HOURS IN BAKERIES , SUCH AS THE GERMAN LAW IN ISSUE , IN REGARD TO THE EXPORT AND IMPORT OF FRESH BAKER ' S WARES ARE TO BE REGARDED AS MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE RESTRICTIONS ON IMPORTS OR EXPORTS WITHIN THE MEANING OF ARTICLES 30 AND 34 OF THE TREATY.

THE RESTRICTION ON PRODUCTION

12 IT CANNOT BE DISPUTED THAT THE PROHIBITION IN THE BREAD AND CONFECTIONERY INDUSTRY ON WORKING BEFORE 4 A.M. IN ITSELF CONSTITUTES A LEGITIMATE ELEMENT OF ECONOMIC AND SOCIAL POLICY , CONSISTENT WITH THE OBJECTIVES OF PUBLIC INTEREST PURSUED BY THE TREATY. INDEED , THIS PROHIBITION IS DESIGNED TO IMPROVE WORKING CONDITIONS IN A MANIFESTLY SENSITIVE INDUSTRY , IN WHICH THE PRODUCTION PROCESS EXHIBITS PARTICULAR CHARACTERISTICS RESULTING FROM BOTH THE NATURE OF THE PRODUCT AND THE HABITS OF CONSUMERS.

13 FOR THESE REASONS , SEVERAL MEMBER STATES OF THE COMMUNITY AS WELL AS A NUMBER OF NON-MEMBER STATES HAVE INTRODUCED SIMILAR RULES CONCERNING NIGHTWORK IN THIS INDUSTRY. IN THIS REGARD IT IS APPROPRIATE TO MENTION

CONVENTION NO 20 OF THE INTERNATIONAL LABOUR ORGANIZATION OF 8 JUNE 1925 CONCERNING NIGHTWORK IN BAKERIES WHICH , SUBJECT TO CERTAIN EXCEPTIONS , PROHIBITS THE PRODUCTION OF BREAD , PASTRIES OR SIMILAR PRODUCTS DURING THE NIGHT.

14 THE ACCUSED MAINTAINS THAT THE PROHIBITION ON THE PRODUCTION OF ORDINARY AND FINE BAKER ' S WARES BEFORE 4 A.M. CONSTITUTES AN EXPORT BARRIER PROHIBITED BY ARTICLE 34 OF THE TREATY. THIS IS ALLEGED TO BE THE CASE PARTICULARLY WITH REGARD TO PRODUCTS WHICH HAVE TO BE DELIVERED FRESH IN TIME FOR BREAKFAST AND WHICH MUST THEREFORE BE PRODUCED DURING THE NIGHT BEFORE THE DAY ON WHICH THEY ARE OFFERED FOR SALE .

15 HOWEVER , AS THE COURT HAS ALREADY DECLARED IN ITS JUDGMENT OF 8 NOVEMBER 1979 (CASE 15/79 GROENVELD (1979) ECR 3409), ARTICLE 34 CONCERNS NATIONAL MEASURES WHICH HAVE AS THEIR SPECIFIC OBJECT OR EFFECT THE RESTRICTION OF PATTERNS OF EXPORTS AND THEREBY THE ESTABLISHMENT OF A DIFFERENCE IN TREATMENT BETWEEN THE DOMESTIC TRADE OF A MEMBER STATE AND ITS EXPORT TRADE , IN SUCH A WAY AS TO PROVIDE A PARTICULAR ADVANTAGE FOR NATIONAL PRODUCTION OR FOR THE DOMESTIC MARKET OF THE STATE IN QUESTION.

16 THIS IS CLEARLY NOT THE CASE WITH RULES SUCH AS THOSE IN ISSUE , WHICH ARE PART OF ECONOMIC AND SOCIAL POLICY AND APPLY BY VIRTUE OF OBJECTIVE CRITERIA TO ALL THE UNDERTAKINGS IN A PARTICULAR INDUSTRY WHICH ARE ESTABLISHED WITHIN THE NATIONAL TERRITORY , WITHOUT LEADING TO ANY DIFFERENCE IN TREATMENT WHATSOEVER ON THE GROUND OF THE NATIONALITY OF TRADERS AND WITHOUT DISTINGUISHING BETWEEN THE DOMESTIC TRADE OF THE STATE IN QUESTION AND THE EXPORT TRADE.

THE RESTRICTIONS ON TRANSPORT AND DELIVERY

17 THE ACCUSED ALSO CHALLENGES THE PROHIBITION , INCLUDED IN THE RULES ON NIGHTWORK AT ISSUE BEFORE THE NATIONAL COURT , ON THE TRANSPORT AND DELIVERY OF ORDINARY AND FINE BAKER ' S WARES TO CONSUMERS OR RETAIL SHOPS BEFORE 5.45 A.M. HE SUBMITS THAT THIS PROHIBITION CONSTITUTES A MEASURE HAVING AN EFFECT EQUIVALENT TO RESTRICTIONS ON BOTH IMPORTS AND EXPORTS , BECAUSE , ON THE ONE HAND , IT PREVENTS PRODUCERS ESTABLISHED IN OTHER MEMBER STATES FROM DELIVERING THEIR WARES IN TIME TO CONSUMERS AND RETAIL SHOPS IN THE FEDERAL REPUBLIC OF GERMANY , WHILST , ON THE OTHER HAND , PRODUCERS ESTABLISHED IN THE FEDERAL REPUBLIC OF GERMANY ARE PREVENTED FROM DELIVERING IN TIME TO THE OTHER MEMBER STATES.

18 ACCORDING TO THE GERMAN GOVERNMENT , THE SOLE PURPOSE OF THE PROHIBITION ON TRANSPORT AND DELIVERY BEFORE 5.45 A.M. IS TO ENSURE COMPLIANCE WITH THE PROHIBITION ON PRODUCTION AT NIGHT , WHICH MIGHT OTHERWISE ESCAPE EFFECTIVE CONTROL ON THE PART OF THE AUTHORITIES. IT IS ALLEGED TO BE ESSENTIAL TO EXTEND THE PROHIBITION TO COVER PRODUCTS COMING FROM OTHER MEMBER STATES BECAUSE OTHERWISE PRODUCERS ESTABLISHED IN GERMANY WOULD BE AT A DISADVANTAGE IN RELATION TO COMPETITION FROM ABROAD , WHICH WOULD BE CONTRARY TO THE PRIN CIPLE OF EQUALITY . THEREFORE , IF PRODUCTS FROM OTHER MEMBER STATES WERE TO BE EXEMPT FROM SUCH A PROHIBITION , IT WOULD BE IMPOSSIBLE NOT ONLY TO MAINTAIN THE PROHIBITION FOR DOMESTIC PRODUCTS , BUT ALSO TO MAINTAIN THE RESTRICTIONS ON PRODUCTION TIMES.

19 IN THIS REGARD , IT MUST BE NOTED THAT THE RESTRICTIVE EFFECT OF THE

RULES CONTROLLING THE TIMES FOR THE TRANSPORT AND DELIVERY OF ORDINARY AND FINE BAKER ' S WARES , IN CONNECTION WITH THE CONTROL OF THE HOURS WHEN THOSE PRODUCTS MAY BE MANUFACTURED , MUST BE EVALUATED IN THE LIGHT OF THEIR SCOPE.

20 IF SUCH RULES ARE CONFINED TO TRANSPORT FOR DELIVERY TO INDIVIDUAL CONSUMERS AND RETAIL OUTLETS ONLY , WITHOUT AFFECTING TRANSPORT AND DELIVERY TO WAREHOUSES OR INTERMEDIARIES , THEY CANNOT HAVE THE EFFECT OF RESTRICTING IMPORTS OR EXPORTS BETWEEN MEMBER STATES . IN THIS CASE , INDEED , TRADE WITHIN THE COMMUNITY REMAINS POSSIBLE AT ALL TIMES , SUBJECT TO THE SINGLE EXCEPTION THAT DELIVERY TO CONSUMERS AND RETAILERS IS RESTRICTED TO THE SAME EXTENT FOR ALL PRODUCERS , WHEREVER THEY ARE ESTABLISHED. UNDER THESE CIRCUMSTANCES , SUCH RULES ARE NOT CONTRARY TO ARTICLES 30 AND 34 OF THE TREATY.

21 THE REPLY TO THE SECOND QUESTION MUST THEREFORE BE THAT ARTICLES 30 AND 34 OF THE EEC TREATY DO NOT APPLY TO NATIONAL RULES WHICH PROHIBIT THE PRODUCTION OF ORDINARY AND FINE BAKER ' S WARES AND ALSO THEIR TRANSPORT AND DELIVERY TO INDIVIDUAL CONSUMERS AND RETAIL OUTLETS DURING THE NIGHT UP TO A CERTAIN HOUR.

22 THE COSTS INCURRED BY THE GERMAN GOVERNMENT , THE FRENCH GOVERNMENT AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE. AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED , A STEP IN THE PROSECUTION PENDING BEFORE THE NATIONAL COURT , COSTS ARE A MATTER FOR THAT COURT.

ON THOSE GROUNDS ,

THE COURT ,

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE AMTSGERICHT WIESBADEN BY ORDER OF 22 APRIL 1980 , HEREBY RULES :

1 . ARTICLE 7 OF THE EEC TREATY MUST BE CONSTRUED AS PROHIBITING ONLY DISCRIMINATION ON THE GROUND OF THE NATIONALITY OF TRADERS. THERE IS , THEREFORE , NO INFRINGEMENT OF ARTICLE 7 , EVEN IF , BY MEANS OF A STATUTORY PROVISION WHICH MAKES NO DISTINCTION DIRECTLY OR INDIRECTLY ON GROUNDS OF NATIONALITY , A MEMBER STATE CREATES A SITUATION AFFECTING THE COMPETITIVENESS OF TRADERS ESTABLISHED ON ITS TERRITORY COMPARED WITH TRADERS ESTABLISHED IN OTHER MEMBER STATES.

2 . ARTICLES 30 AND 34 OF THE EEC TREATY DO NOT APPLY TO NATIONAL RULES WHICH PROHIBIT THE PRODUCTION OF ORDINARY AND FINE BAKER ' S WARES AND ALSO THEIR TRANSPORT AND DELIVERY TO INDIVIDUAL CONSUMERS AND RETAIL OUTLETS DURING THE NIGHT UP TO A CERTAIN HOUR.

DOCNUM 61980J0155

AUTHOR Court of Justice of the European Communities

FORM Judgment

TREATY European Economic Community

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PUBREF European Court reports 1981 Page 01993
Swedish special edition VI Page 00171
Finnish special edition VI Page 00177
Spanish special edition 1981 Page 00545

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JURCIT 11957E007 : N 1 5 6 - 10
11957E030 : N 1 5 11 - 21
11957E034 : N 1 5 11 - 21
61978J0031 : N 7
61978J0185 : N 9
61979J0015 : N 15

CONCERNS Interprets 11957E007
Interprets 11957E030
Interprets 11957E034

SUB Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect

AUTLANG German

OBSERV Federal Republic of Germany ; France ; Commission ; Member States ; Institutions

NATIONA Federal Republic of Germany

NATCOUR *A9* Amtsgericht Wiesbaden, Vorlagebeschuß vom 22/04/1980 (19 JS 3515/79 - 77 OWI)
P1 Amtsgericht Wiesbaden, Schreiben vom 24/05/1982 (19 JS 3515/79 - 77 OWI)

NOTES Capelli, Fausto: Diritto comunitario e degli scambi internazionali 1981 p.566-590
Capelli, Fausto: Revue du Marché Commun 1981 p.421-435
Bieber, Roland: Europäische Grundrechte-Zeitschrift 1981 p.443-444
Feenstra, J.J.: S.E.W. ; Sociaal-economische wetgeving 1982 p.419-424
Oliver, Peter: European Law Review 1982 p.118-121
Evans, A.C.: New Law Journal 1983 p.35-37
Liberal Fernandes, Francisco: Questoes Laborais 1994 p.117-121
Feenstra, J.J.: Annotaties Hof van Justitie EG (Ed. W.E.J. Tjeenk Willink - Zwolle) 1995 p.540-545

PROCEDU Reference for a preliminary ruling

ADVGEN Capotorti

JUDGRAP

Everling

DATESof document: 14/07/1981
of application: 02/07/1980

**Judgment of the Court (Fifth Chamber)
of 3 December 1998**

Criminal proceedings against Ditlev Bluhme.

Reference for a preliminary ruling: Kriminalretten i Frederikshavn - Denmark.

Free movement of goods - Prohibition of quantitative restrictions and measures having equivalent effect between Member States - Derogations - Protection of the health and life of animals - Bees of the subspecies *Apis mellifera mellifera* (Læsø brown bee).

Case C-67/97.

1 Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Meaning - Prohibition on keeping certain animal species on part of the national territory

(EC Treaty, Art. 30)

2 Free movement of goods - Derogations - Protection of the health of animals - Conservation of biodiversity - Prohibition on keeping on an island any species of bee other than the subspecies *Apis mellifera mellifera* (Læsø brown bee) - Whether permissible

(EC Treaty, Art. 36)

1 A national legislative measure prohibiting the keeping of certain animal species on a particular part of the national territory and their importation to that part of the national territory constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.

A legislative measure of that kind, which concerns the intrinsic characteristics of the species in question, cannot be regarded as a measure regulating selling arrangements. Moreover, it has a direct and immediate impact on trade, and not effects too uncertain and too indirect for the obligation which it lays down not to be capable of being regarded as being of such a kind as to hinder trade between Member States.

2 A national legislative measure prohibiting the keeping on an island such as Læsø of any species of bee other than the subspecies *Apis mellifera mellifera* (Læsø brown bee) must be regarded as justified, under Article 36 of the Treaty, on the ground of the protection of the health and life of animals.

Measures to preserve an indigenous animal population with distinct characteristics contribute to the maintenance of biodiversity through ensuring the survival of the population concerned; their aim is thus to protect the life of those animals.

From the point of view of the conservation of biodiversity, it is immaterial whether the object of protection is a separate subspecies, a distinct strain within any given species or merely a local colony, so long as the populations in question have characteristics distinguishing them from others and are therefore judged worthy of protection either to shelter them from the risk of extinction, or, even in the absence of such risk, to serve a scientific or other interest in preserving the pure population at the location concerned.

In [Case C-67/97](#),

REFERENCE to the Court under Article 177 of the EC Treaty by the Kriminalret i Frederikshavn (Denmark) for a preliminary ruling in the criminal proceedings before that court against

Ditlev Bluhme,

on the interpretation of Article 30 of the EC Treaty and Article 2 of Council Directive 91/174/EEC of 25 March 1991 laying down zootechnical and pedigree requirements for the marketing of pure-bred

animals and amending Directives 77/504/EEC and 90/425/EEC (OJ 1991 L 85, p. 37),

THE COURT

(Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, J.C. Moitinho de Almeida, C. Gulmann, L. Sevón (Rapporteur) and M. Wathelet, Judges,

Advocate General: N. Fennelly,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Mr Bluhme, by Uffe Baller, of the Århus Bar,

- the Danish Government, by Peter Biering, Head of Division in the Ministry of Foreign Affairs, acting as Agent,

- the Italian Government, by Professor Umberto Leanza, Head of the Legal Service in the Ministry of Foreign Affairs, acting as Agent, assisted by Francesca Quadri, *Avvocato dello Stato*,

- the Norwegian Government, by Jan Bugge-Mahrt, Deputy Director General in the Ministry of Foreign Affairs, acting as Agent,

- the Commission of the European Communities, by Hans Støvlbæk, of its Legal Service, acting as Agent, having regard to the Report for the Hearing,

after hearing the oral observations of Mr Bluhme, represented by Uffe Baller, the Danish Government, represented by Jørgen Molde, Head of Division at the Ministry of Foreign Affairs, acting as Agent, the Italian Government, represented by Francesca Quadri, and the Commission, represented by Hans Støvlbæk at the hearing on 30 April 1998,

after hearing the Opinion of the Advocate General at the sitting on 16 June 1998,

gives the following

Judgment

Costs

39 The costs incurred by the Danish, Italian and Norwegian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Fifth Chamber),

in answer to the questions referred to it by the Kriminalret i Frederikshavn by order of 3 July 1995, hereby rules:

1. A national legislative measure prohibiting the keeping on an island such as Læsø of any species of bee other than the subspecies *Apis mellifera mellifera* (Læsø brown bee) constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the

EC Treaty.

2. A national legislative measure prohibiting the keeping on an island such as Læsø of any species of bee other than the subspecies *Apis mellifera mellifera* (Læsø brown bee) must be regarded as justified, under Article 36 of the Treaty, on the ground of the protection of the health and life of animals.

1 By order of 3 July 1995, received at the Court on 17 February 1997, the Kriminalret i Frederikshavn (Criminal Court, Frederikshavn) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a number of questions on the interpretation of Article 30 of the EC Treaty and Article 2 of Council Directive 91/174/EEC of 25 March 1991 laying down zootechnical and pedigree requirements for the marketing of pure-bred animals and amending Directives 77/504/EEC and 90/425/EEC (OJ 1991 L 85, p. 37, hereinafter 'the Directive').

2 The questions have been raised in criminal proceedings brought against Ditlev Bluhme for infringement of Danish legislation prohibiting the keeping on the island of Læsø of bees other than those of the subspecies *Apis mellifera mellifera* (Læsø brown bee).

3 Article 1 of the Directive provides:

'For the purposes of this Directive "pure-bred animal" shall mean any animal for breeding covered by Annex II to the Treaty the trade in which has not yet been the subject of more specific Community zootechnical legislation and which is entered or registered in a register or pedigree record kept by a recognised breeders' organisation or association.'

4 Article 2 of the Directive provides:

'Member States shall ensure that:

- the marketing of pure-bred animals and of the semen, ova and embryos thereof is not prohibited, restricted or impeded on zootechnical or pedigree grounds,
- in order to ensure that the requirement provided for in the first indent is satisfied, the criteria for approval and recognition of breeders' organisations or associations, the criteria for entry or registration in pedigree records or registers, the criteria for approval for reproduction of pure-bred animals and for the use of their semen, ova and embryos, and the certificate to be required for their marketing should be established in a non-discriminatory manner, with due regard for the principles laid down by the organisation or association which maintains the register or pedigree record of the breed in question.

Pending the implementation of detailed rules for application as provided for in Article 6, national laws shall remain applicable with due regard for the general provisions of the Treaty.'

5 Article 6 of the Directive provides that the detailed rules for application of the Directive are to be adopted in accordance with the so-called 'committee' procedure. No such rules have been adopted in relation to bees.

6 In Denmark, Article 14a of Law No 115 of 31 March 1982 on beekeeping (lov om biavl), introduced by Law No 267 of 6 May 1993, authorises the Minister for Agriculture to enact provisions to protect certain species of bee in certain areas defined by him, and in particular provisions concerning the removal or destruction of swarms of bees regarded as undesirable for protection reasons. Article 1 of Decision No 528 of 24 June 1993 on the keeping of bees on the island of Læsø (Bekendtgørelse om biavl på Laesø, hereinafter 'the Decision'), which was adopted pursuant to that enabling provision, prohibits the keeping on Læsø and certain neighbouring islands of nectar-gathering bees other than those of the subspecies *Apis mellifera mellifera* (Læsø brown bee).

7 The Decision also provides, in Article 2, for the removal or destruction of those other swarms or the replacement of their queen by one of the Læsø brown bee subspecies. Article 6 prohibits the introduction onto Læsø or neighbouring islands of living domestic bees, whatever their stage of development, or of reproductive material for domestic bees. Finally, Article 7 of the Decision provides for full State compensation in respect of any loss duly proved to have resulted from the destruction of a swarm pursuant to the Decision.

8 Mr Bluhme, who is being prosecuted for keeping on Læsø bees other than those of the subspecies *Apis mellifera mellifera* (Læsø brown bee), in breach of the Decision, argues inter alia that Article 30 of the Treaty precludes the national legislation.

9 Taking the view that resolution of the dispute before it depended on the interpretation of Community law, the Kriminalret decided to stay the proceedings and to refer the following questions to the Court:

‘I Concerning the interpretation of Article 30 of the EC Treaty:

- (1) Can Article 30 be interpreted as meaning that a Member State may, under certain circumstances, introduce rules prohibiting the keeping - and consequently the importation - of all bees other than bees belonging to the species *Apis mellifera mellifera* (Læsø brown bee) with regard to a specific island in the country in question, for example, an island of 114 km², one half of which consists of country villages and small ports, and is used for purposes of tourism or agriculture, while the other half consists of uncultivated land, that is to say, plantations, moorland, meadows, tidal meadows, beaches and dunes, which had on 1 January 1997 a population of 2 365, and which is an island on which opportunities for gainful activity are in general limited but where beekeeping constitutes one of the few forms of gainful activity by reason of the island's special flora and high proportion of uncultivated and extensively used land?
- (2) If a Member State can introduce such rules, the Court is requested to describe in general the conditions governing those rules and in particular to answer the following questions:
 - (a) Can a Member State introduce such rules as described in (1) on the ground that the rules concern solely such an island as described and that the effect of the rules is therefore geographically limited?
 - (b) Can a Member State introduce such rules as described in (1) if the reason for those rules lies in the desire to protect the bee strain *Apis mellifera mellifera* against eradication, an objective which, in the Member State's opinion, can be attained by excluding all other bee strains from the island in question?

In the criminal proceedings underlying this order for reference, the accused:

- disputes that there is at all any such bee strain as *Apis mellifera mellifera* and submits that the bees at present to be found on Læsø are a mixture of different bee strains;
- submits that the brown bees to be found on Læsø are not unique but are found in many parts of the world; and
- submits that those bees are not threatened with eradication.

In its response, the Court is therefore requested to indicate whether it is sufficient that the Member State in question considers it appropriate or necessary to introduce the rules as a step in preserving the bee population in question, or whether it must be regarded as a further condition that the bee strain exists, and/or that it is unique, and/or that it is threatened with eradication if the import ban is not valid or cannot be enforced.

- (c) If the grounds set out in (a) or in (b) cannot make it lawful to introduce such rules, can

a combination of those grounds make it so lawful?

II Concerning Council Directive 91/174/EEC of 25 March 1991 laying down zootechnical and pedigree requirements for the marketing of pure-bred animals and amending Directives 77/504/EEC and 90/425/EEC:

- (1) Under what circumstances can a bee be a pure-bred animal within the meaning attached to those words by Article 2 of Directive 91/174? Is a golden bee, for example, a pure-bred animal?
- (2) What constitutes a zootechnical ground (Article 2)?
- (3) What constitutes a pedigree ground (Article 2)?
- (4) Must Directive 91/174 be understood as meaning that a Member State may, notwithstanding the Directive, ban the importation onto an island such as that described in Question 1 of Part I and the existence there of all bees other than bees belonging to the strain *Apis mellifera mellifera*?

If a Member State can do so under certain conditions, the Court is requested to set out those conditions.'

Part II of the questions

10 By its questions the national court is essentially asking the Court to give an interpretation of Article 1 and the first paragraph of Article 2 of the Directive.

11 It should however be pointed out that, as the Danish Government and the Commission have rightly observed, no detailed rules for applying the Directive in relation to bees have been adopted under the procedure provided for by Article 6 of the Directive.

12 Therefore, pursuant to the second paragraph of Article 2 of the Directive, national laws remain applicable, subject, however, to due regard for the general provisions of the Treaty.

13 It is therefore in relation to Articles 30 and 36 of the EC Treaty that legislation such as that at issue in the main proceedings must be examined.

Part I of the questions

14 By its questions the national court is essentially asking whether national legislation prohibiting the keeping of any species of bee on an island such as Læsø other than the subspecies *Apis mellifera mellifera* (Læsø brown bee) constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the Treaty and whether, if that is the case, such legislation may be justified on the ground of the protection of the health and life of animals.

Existence of a measure having equivalent effect

15 Mr Bluhme and the Commission consider that a prohibition on the keeping on the island of Læsø of bees other than those belonging to the Læsø brown species involves a prohibition on importation, and thus constitutes a measure having equivalent effect contrary to Article 30 of the Treaty. Mr Bluhme considers that the legislation at issue in the main proceedings effectively precludes the importation onto the island of Læsø of bees from Member States. The Commission adds in that respect that Article 30 also applies to measures that concern only part of the territory of a Member State.

16 The Danish, Italian and Norwegian Governments, on the other hand, maintain that the establishment of pure breeding areas for a given species in a delimited geographical area within a Member State does not affect trade between Member States. The Danish and Norwegian Governments further maintain that the prohibition on importing onto the island of Læsø bees other than Læsø brown bees does not constitute discrimination in respect of bees originating in other Member States, is not intended to regulate trade between Member States, and has effects on trade that are too hypothetical and

uncertain to be regarded as a measure likely to obstruct it.

17 The Danish Government also argues that, since the national legislation does not concern the access of bees as goods to the Danish market, but merely regulates the conditions under which bees may be kept within that Member State, it falls outside the scope of Article 30 of the Treaty.

18 On that point, the Court observes that its case-law has long established that all measures capable of hindering intra-Community trade, whether directly or indirectly, actually or potentially, constitute measures having an effect equivalent to quantitative restrictions (Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, paragraph 5).

19 In so far as Article 6 of the legislative measure at issue in the main proceedings involves a general prohibition on the importation onto Læsø and neighbouring islands of living bees and reproductive material for domestic bees, it also prohibits their importation from other Member States, so that it is capable of hindering intra-Community trade. It therefore constitutes a measure having an effect equivalent to a quantitative restriction.

20 That conclusion is not altered by the fact that the measure in question applies to only part of the national territory (on this point, see Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad and Publivia v Departamento de Sanidad* [1991] ECR I-4151, paragraph 24; Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni and Others* [1993] ECR I-6621, paragraph 37).

21 Moreover, contrary to the Danish Government's argument that the prohibition on keeping certain bees on the island of Læsø must be regarded as a regulation on selling arrangements within the meaning of the judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, this Court finds, on the contrary, that the legislation in question concerns the intrinsic characteristics of the bees. In those circumstances, its application to the facts of the case cannot be a matter of a selling arrangement within the meaning of the judgment in *Keck and Mithouard* (Case C-368/95 *Familiapress v Heinrich Bauer Verlag* [1997] ECR I-3689, paragraph 11).

22 Finally, as the Advocate General points out at point 19 of his Opinion, since the Decision prohibits the importation of bees from other Member States onto a part of Danish territory, it has a direct and immediate impact on trade, and not effects too uncertain and too indirect for the obligation which it lays down not to be capable of being regarded as being of such a kind as to hinder trade between Member States.

23 It follows that a legislative measure prohibiting the keeping on an island such as Læsø of any species of bee other than the subspecies *Apis mellifera mellifera* (Læsø brown bee) constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.

Justification for legislation such as that at issue in the main proceedings

24 Mr Bluhme argues that the legislation in question cannot be justified on any ground, especially since, in his submission, there is no subspecies *Apis mellifera mellifera* (Læsø brown bee) that is genetically distinct and unique to the island of Læsø. Moreover, since such legislation does not fall within the scope of health policy, he submits that it cannot be justified under Council Directive 92/65/EEC of 13 July 1992 laying down animal health requirements governing trade in and imports into the Community of animals, semen, ova and embryos not subject to animal health requirements laid down in specific Community rules referred to in Annex A (I) to Directive 90/425/EEC (OJ 1992 L 268, p. 54).

25 The Danish Government considers that, should the Court regard the prohibition laid down by the Decision as a measure having an effect equivalent to a quantitative restriction, it is a measure applying to bees indiscriminately whatever their State of provenance which is justified by the

aim of protecting biological diversity, such aim being recognised, inter alia, by Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) and by the Convention on Biological Diversity signed at Rio de Janeiro on 5 June 1992, approved on behalf of the European Community by Council Decision 93/626/EEC of 25 October 1993 (OJ 1993 L 309, p. 1; hereinafter 'the Rio Convention'). The Danish Government goes on to explain that the subspecies *Apis mellifera mellifera* (Læsø brown bee) is disappearing and can be preserved only on the island of Læsø, so that the measure adopted is necessary to prevent the disappearance of the species and is proportionate to the aim pursued. Moreover, the Decision does not affect the possibility of carrying on bee-keeping on the island but merely regulates the species of bee which may be used.

26 The Danish Government concludes by referring to numerous scientific studies establishing the particular nature of that subspecies of bee in relation to others.

27 As its main argument, the Norwegian Government submits that the Danish legislation is justified on environmental protection grounds in accordance with Article 30 of the Treaty and the judgment in Case 120/78 REWE-Zentral v Bundesmonopolverwaltung für Branntwein [1979] ECR 649 ('Cassis de Dijon'), paragraph 8.

28 In the alternative, like the Italian Government and the Commission, it considers that the preservation of a rare and threatened species falls within the protection of the health and life of animals referred to in Article 36 of the Treaty.

29 In the Norwegian Government's submission, the establishment of pure breeding areas is the only means of preserving the Læsø brown bee.

30 The Commission maintains that the same ground of justification should be upheld if the species were not rare and threatened, but it was desirable on scientific grounds to breed a pure strain.

31 On the question of the existence of a disappearing subspecies *Apis mellifera mellifera* (Læsø brown bee), the Commission considers that this is an evidential matter which is therefore one for the national court to determine. It maintains that the prohibition should not extend to the keeping of brown bees of the species *Apis mellifera mellifera* from other Member States or from non-member countries in the absence of a valid reason to justify such a restriction, and points out that such a prohibition must not constitute a means of arbitrary discrimination or be aimed at protecting certain occupational interests.

32 The Italian Government states that there are several subspecies of *Apis mellifera mellifera*, identifiable as strains and within the latter as ecotypes, representing the result of a natural process of adaptation to environmental conditions and various territories.

33 On this question, the Court considers that measures to preserve an indigenous animal population with distinct characteristics contribute to the maintenance of biodiversity by ensuring the survival of the population concerned. By so doing, they are aimed at protecting the life of those animals and are capable of being justified under Article 36 of the Treaty.

34 From the point of view of such conservation of biodiversity, it is immaterial whether the object of protection is a separate subspecies, a distinct strain within any given species or merely a local colony, so long as the populations in question have characteristics distinguishing them from others and are therefore judged worthy of protection either to shelter them from a risk of extinction that is more or less imminent, or, even in the absence of such risk, on account of a scientific or other interest in preserving the pure population at the location concerned.

35 It does, however, have to be determined whether the national legislation was necessary and proportionate in relation to its aim of protection, or whether it would have been possible to achieve the same

result by less stringent measures (Case 124/81 Commission v United Kingdom [1983] ECR 203, paragraph 16).

36 Conservation of biodiversity through the establishment of areas in which a population enjoys special protection, which is a method recognised in the Rio Convention, especially Article 8a thereof, is already put into practice in Community law [in particular, by means of the special protection areas provided for in Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), or the special conservation areas provided for in Directive 92/43].

37 As for the threat of the disappearance of the Læsø brown bee, it is undoubtedly genuine in the event of mating with golden bees by reason of the recessive nature of the genes of the brown bee. The establishment by the national legislation of a protection area within which the keeping of bees other than Læsø brown bees is prohibited, for the purpose of ensuring the survival of the latter, therefore constitutes an appropriate measure in relation to the aim pursued.

38 The answer to be given must therefore be that a national legislative measure prohibiting the keeping on an island such as Læsø of any species of bee other than the subspecies *Apis mellifera mellifera* (Læsø brown bee) must be regarded as justified, under Article 36 of the Treaty, on the ground of the protection of the health and life of animals.

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**Judgment of the Court
of 17 September 2002**

Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne.

Reference for a preliminary ruling: Korkein hallinto-oikeus - Finland.

Public service contracts in the transport sector - Directives 92/50/EEC and 93/38/EEC - Contracting municipality which organises bus transport services and an economically independent entity of which participates in the tender procedure as a tenderer - Taking into account of criteria relating to the protection of the environment to determine the economically most advantageous tender - Whether permissible when the municipal entity which is tendering meets those criteria more easily.

Case C-513/99.

In [Case C-513/99](#),

REFERENCE to the Court under Article 234 EC by the Korkein hallinto-oikeus (Finland) for a preliminary ruling in the proceedings pending before that court between

Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab,

and

Helsingin kaupunki,

HKL-Bussiliikenne,

on the interpretation of Articles 2(1)(a), (2)(c) and (4) and 34(1) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1), and Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann and F. Macken (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, M. Wathelet, R. Schintgen and V. Skouris (Rapporteur), Judges, Advocate General: J. Mischo,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Concordia Bus Finland Oy Ab, by M. Heinonen, oikeustieteen kandidaatti,
- Helsingin kaupunki, by A.-L. Salo-Halinen, acting as Agent,
- the Finnish Government, by T. Pynnä, acting as Agent,
- the Greek Government, by D. Tsagkaraki and K. Grigoriou, acting as Agents,
- the Netherlands Government, by M.A. Fierstra, acting as Agent,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the Swedish Government, by A. Kruse, acting as Agent,
- the Commission of the European Communities, by M. Nolin, acting as Agent, assisted by E. Savia, avocat,

having regard to the Report for the Hearing,

after hearing the oral observations of Concordia Bus Finland Oy Ab, represented by M. Savola, asianajaja; Helsingin kaupunki, represented by A.-L. Salo-Halinen; the Finnish Government, represented by T. Pynnä; the Greek Government, represented by K. Grigoriou; the Austrian Government, represented by M. Winkler, acting as Agent; the Swedish Government, represented by A. Kruse; the United Kingdom Government, represented by R. Williams, Barrister; and the Commission, represented by M. Nolin, assisted by E. Savia, at the hearing on 9 October 2001,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2001,

gives the following

Judgment

Costs

94 The costs incurred by the Finnish, Greek, Netherlands, Austrian, Swedish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Korkein hallinto-oikeus by order of 17 December 1999, hereby rules:

1. Article 36(1)(a) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts must be interpreted as meaning that where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.
2. The principle of equal treatment does not preclude the taking into consideration of criteria connected with protection of the environment, such as those at issue in the main proceedings, solely because the contracting entity's own transport undertaking is one of the few undertakings able to offer a bus fleet satisfying those criteria.
3. The answer to the second and third questions would not be different if the procedure for the award of the public contract at issue in the main proceedings fell within the scope of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

1 By order of 17 December 1999, received at the Court on 28 December 1999, the Korkein hallinto-oikeus (Supreme Administrative Court) referred for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 2(1)(a), (2)(c) and (4) and 34(1) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom

of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1) ('Directive 93/38'), and Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

2 Those questions were raised in proceedings between Concordia Bus Finland Oy Ab ('Concordia') and Helsingin kaupunki (City of Helsinki) and HKL-Bussiliikenne ('HKL') concerning the validity of a decision of the Liikepalvelulautakunta (commercial service committee) of the city of Helsinki awarding the contract for the operation of a route in the urban bus network of Helsinki to HKL.

Legal background

Community legislation

Directive 92/50

3 Article 1 of Directive 92/50 provides:

'For the purposes of this Directive:

(a) public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of:

...

(ii) contracts awarded in the fields referred to in Articles 2, 7, 8 and 9 of Directive 90/531/EEC or fulfilling the conditions in Article 6(2) of the same Directive;

...'

4 Article 36 of Directive 92/50, headed 'Criteria for the award of contracts', reads as follows:

'1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting authority shall base the award of contracts may be:

- (a) where the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price; or
- (b) the lowest price only.

2. Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the tender notice the award criteria which it intends to apply, where possible in descending order of importance.'

Directive 93/38

5 Article 2 of Directive 93/38 provides:

'1. This Directive shall apply to contracting entities which:

- (a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;
- (b) when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

2. Relevant activities for the purposes of this Directive shall be:

...

- (c) the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service;

...

4. The provision of bus transport services to the public shall not be considered to be a relevant activity within the meaning of paragraph 2(c) where other entities are free to provide those services, either in general or in a particular geographical area, under the same condition as the contracting entities.

...'

6 Under Article 34 of Directive 93/38:

'1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting entities shall base the award of contracts shall be:

- (a) the most economically advantageous tender, involving various criteria depending on the contract in question, such as: delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price; or
- (b) the lowest price only.

2. In the case referred to in paragraph 1(a), contracting entities shall state in the contract documents or in the tender notice all the criteria which they intend to apply to the award, where possible in descending order of importance.

...' 7 Article 45(3) and (4) of Directive 93/38 states:

'3. Directive 90/531/EEC shall cease to have effect as from the date on which this Directive is applied by the Member States and this shall be without prejudice to the obligations of the Member States concerning the deadlines laid down in Article 37 of that Directive.

4. References to Directive 90/531/EEC shall be construed as referring to this Directive.'

National legislation

8 Directives 92/50 and 93/38 were transposed into Finnish law by the *Julkisista hankinnoista annettu laki* (Law on Public Procurement) 1505/1992, as amended by Laws 1523/1994 and 725/1995 ('Law 1505/1992').

9 Under Paragraph 1 of Law 1505/1992, State and local authorities and other contracting entities specified in the law must comply with the provisions of the law in order to create competition and ensure fair and non-discriminatory treatment of participants in tender procedures.

10 Under Paragraph 2 of Law 1505/1992, contracting entities include municipal authorities.

11 Paragraph 7(1) of Law 1505/1992 provides, first, that contracts are to be awarded as favourably as possible and, second, that the tender to be approved is the one which is cheapest in price or most advantageous in overall economic terms.

12 Procedures for the award of public contracts in Finland are regulated in more detail by Regulation 243/1995 on supply, service and works contracts exceeding the threshold values and by Regulation

567/1994 on contracts of entities operating in the water, energy, transport and telecommunications sectors exceeding the threshold value, as amended by Regulation 244/1995 ('Regulation 567/1994').

13 Paragraph 4(1) of Regulation 243/1995 excludes from the scope of that regulation contracts to which Regulation 567/1994 applies. Paragraph 1(10) of the latter excludes from its scope contracts to which Regulation 243/1995 applies.

14 Paragraph 43 of Regulation 243/1995 provides:

'1. The contracting entity must approve either the tender which is economically most advantageous overall according to the assessment criteria for the contract or the tender which is lowest in price. Criteria for assessment of overall economic advantage may be, for example, the price, delivery period, completion date, costs of use, quality, life cycle costs, aesthetic or functional characteristics, technical merit, maintenance services, reliability of delivery, technical assistance and environmental questions.

...'

15 Similarly, Paragraph 21(1) of Regulation 567/1994 lays down that the contracting entity must approve the tender which is economically most advantageous overall according to the assessment criteria for the supply, service or works, or the tender which is lowest in price. Criteria for assessment of overall economic advantage may be, for example, the price, delivery period, costs of use, life cycle costs, quality, environmental effects, aesthetic and functional characteristics, technical merit, maintenance services and technical assistance.

The main proceedings and the questions referred for a preliminary ruling

Organisation of bus transport services in the city of Helsinki

16 It appears from the order for reference that the Helsinki city council decided on 27 August 1997 to introduce tendering progressively for the entire bus transport network of the city of Helsinki, in such a way that the first route to be awarded would start operating from the autumn 1998 timetable.

17 Under the rules governing public transport in the city of Helsinki, the planning, development, implementation and other organisation and supervision of public transport, unless provided otherwise, are the responsibility of the Joukkoliikennelautakunta (public transport committee) and the Helsingin kaupungin liikennelaitos (transport department of the city of Helsinki, 'the transport department') which is subordinate to it.

18 According to the regulations applicable, the commercial service committee of the city of Helsinki is responsible for decisions on awarding public transport services within the city in accordance with the objectives adopted by the Helsinki city council and the public transport committee. In addition, the purchasing unit of the city of Helsinki is responsible for carrying out operations relating to contracts for urban public transport services.

19 The transport department is a commercial undertaking of the municipality which is divided operationally and economically into four production units (buses, trams, metro, and track and property services). The production unit for buses is HKL. The department also includes a head unit, which consists of a planning unit and an administrative and economic unit. The planning unit acts as an order-placing office concerned with the preparation of proposals for the public transport committee, the routes to be put out to tender, and the level of service to be required. The production units are economically distinct from the rest of the transport department and have separate accounting and balance sheets.

The tender procedure at issue in the main proceedings

20 By letter of 1 September 1997 and a notice published in the Official Journal of the European Communities of 4 September 1997, the purchasing unit of the city of Helsinki called for tenders

for operating the urban bus network within the city of Helsinki, in accordance with routes and timetables described in a document in seven lots. The main proceedings concern lot 6 of the tender notice, relating to route 62.

21 It appears from the documents in the case that, according to the tender notice, the contract would be awarded to the undertaking whose tender was most economically advantageous overall to the city. That was assessed by reference to three categories of criteria: the overall price of operation, the quality of the bus fleet, and the operator's quality and environment management.

22 As regards, first, the overall price asked, the most favourable tender would receive 86 points and the number of points of the other tenders would be calculated by using the following formula: Number of points = amount of the annual operating payment of the most favourable tender divided by the amount of the tender in question and multiplied by 86.

23 As regards, next, the quality of the vehicle fleet, a tenderer could receive a maximum of 10 additional points on the basis of a number of criteria. Thus points were awarded inter alia for the use of buses with nitrogen oxide emissions below 4 g/kWh (+2.5 points/bus) or below 2 g/kWh (+3.5 points/bus) and with external noise levels below 77 dB (+1 point/bus).

24 As regards, finally, the operator's quality and environment programme, additional points were to be awarded for various certified quality criteria and for a certified environment protection programme.

25 The purchasing office of the city of Helsinki received eight tenders for lot 6, including those from HKL and from Swebus Finland Oy Ab ('Swebus', subsequently Stagecoach Finland Oy Ab ('Stagecoach'), then Concordia). The latter's tender comprised two offers, designated A and B.

26 The commercial service committee decided on 12 February 1998 to choose HKL as the operator for the route in lot 6, as its tender was regarded as the most economically advantageous overall. According to the order for reference, Concordia (then Swebus) had submitted the lowest-priced tender, obtaining 81.44 points for its A offer and 86 points for its B offer. HKL obtained 85.75 points. As regards the bus fleet, HKL obtained the most points, 2.94 points, Concordia (then Swebus) obtaining 0.77 points for its A tender and -1.44 points for its B tender. The 2.94 points obtained for vehicle fleet by HKL included the maximum points for nitrogen oxide emissions below 2 g/kWh and a noise level below 77 dB. Concordia (then Swebus) did not receive any extra points for the criteria relating to the buses' nitrogen oxide emissions and noise level. HKL and Concordia obtained maximum points for their quality and environment certification. In those circumstances, HKL received the greatest number of points overall, 92.69. Concordia (then Swebus) took second place with 86.21 points for its A offer and 88.56 points for its B offer.

The proceedings before the national courts and tribunals

27 Concordia (then Swebus) made an application to the Kilpailuneuvosto (Finnish Competition Council) for the decision of the commercial service committee to be set aside, arguing inter alia that the award of additional points to a fleet with nitrogen oxide emissions and noise levels below certain limits was unfair and discriminatory. It submitted that additional points had been awarded for the use of a type of bus which only one tenderer, HKL, was in fact able to offer.

28 The Kilpailuneuvosto dismissed the application. It considered that the contracting entity was entitled to define the type of vehicle it wanted to be used. The selection criteria and their weight had to be determined objectively, however, taking into account the needs of the contracting entity and the quality of the service. The contracting entity had to be able, if necessary, to give reasons to justify its choice and the application of its criteria of assessment.

29 The Kilpailuneuvosto observed that the city of Helsinki's decision to give preference to low-pollution

buses was an environment policy decision aimed at reducing the harm caused to the environment by bus traffic. That did not constitute a procedural defect. If that criterion was applied to a tenderer unfairly, it was possible to intervene. The Kilpailuneuvosto found, however, that all the tenderers had the possibility, if they so wished, of acquiring buses powered by natural gas. It therefore concluded that it had not been shown that the criterion in question discriminated against Concordia.

30 Concordia (then Stagecoach) appealed to the Korkein hallinto-oikeus to have the decision of the Kilpailuneuvosto set aside. It argued that awarding additional points to the least polluting and least noisy buses favoured HKL, the only tenderer which was able in practice to use a fleet which could obtain those points. It further submitted that, in the overall assessment of the tenders, no account can be taken of ecological factors which are not directly linked to the subject-matter of the tender.

31 In its order for reference, the Korkein hallinto-oikeus states, first, that in order to decide whether Regulation 243/1995 or Regulation 567/1994 is applicable in the present case, it is necessary to examine whether the contract at issue in the main proceedings falls within the scope of Directive 92/50 or Directive 93/38. It notes that Annex VII to Directive 93/38 mentions, with respect to Finland, both the public or private entities which operate bus transport in accordance with the Laki luvanvaraisesta henkilöliikenteestä tiellä (Law on licensed passenger transport by road) 343/1991, and also the transport department which operates the metro and tram networks in Helsinki.

32 It states, next, that examination of the case also requires the interpretation of provisions of Community law as to whether a municipality, when awarding a contract of the kind at issue in the main proceedings, may take account of ecological considerations concerning the bus fleet tendered. If Concordia's argument as regards the points awarded for the environmental criteria and in other respects were accepted, that would mean that the number of points obtained by its B offer exceeded the points obtained by HKL.

33 It observes that Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38 do not mention environmental questions in the list of criteria for determining the economically most advantageous tender. It notes that the Court has ruled in Case 31/87 Gebroeders Beentjes [1988] ECR 4635 and Case C-324/93 Evans Medical and Macfarlan Smith [1995] ECR I-563 that in selecting the most economically advantageous tender the contracting authorities are free to choose the criteria to be used in awarding the contract. Their choice may relate only, however, to criteria designed to identify the most economically advantageous tender.

34 It refers, finally, to the Commission's communication of 11 March 1988, 'Public Procurement in the European Union' (COM(1998) 143 final), in which the Commission considers that it is legitimate to take environmental considerations into account for the purpose of choosing the economically most advantageous tender overall, if the organiser of the tender procedure itself benefits directly from the ecological qualities of the product.

35 In those circumstances, the Korkein hallinto-oikeus decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Are the provisions on the scope of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ..., in particular Article 2(1)(a), (2)(c) and (4), to be interpreted as meaning that that directive applies to a procedure of a city which is a contracting entity for the award of a contract concerning the operation of bus transport within the city, if

- the city is responsible for the planning, development, implementation and other organisation and supervision of public transport in its area,

- for the above functions the city has a public transport committee and a city transport department subordinate thereto,
- within the city transport department there is a planning unit which acts as an ordering unit which prepares proposals for the public transport committee on which routes should be put out to tender and what level of quality of services should be required, and
- within the city transport department there are production units, economically distinct from the rest of the transport department, including a unit which provides bus transport services and takes part in tender procedures relating thereto?

2. Are the Community provisions on public procurement, in particular Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts ... or the equivalent Article 34(1) of Directive 93/38/EEC, to be interpreted as meaning that, when organising a tender procedure concerning the operation of bus transport within the city, a city which is a contracting entity may, among the criteria for awarding the contract on the basis of the economically most advantageous tender, take into account, in addition to the tender price and the quality and environment programme of the transport operator and various other characteristics of the bus fleet, the low nitrogen oxide emissions and low noise level of the bus fleet offered by a tendering undertaking, in a manner announced beforehand in the tender notice, such that if the nitrogen oxide emissions or noise level of the individual buses are below a certain level, extra points for the fleet may be taken into account in the comparison?

3. If the answer to the above question is affirmative, are the Community provisions on public procurement to be interpreted as meaning that the awarding of extra points for the abovementioned characteristics relating to nitrogen oxide emissions and noise level of the fleet is, however, not permitted if it is known beforehand that the department operating bus transport belonging to the city which is the contracting entity is able to offer a bus fleet possessing the above characteristics, which in the circumstances only a few undertakings in the sector are otherwise able to offer?'

The questions referred for a preliminary ruling

36 It should be observed to begin with that, as may be seen from the order for reference, the arguments put forward by Concordia in support of its appeal to the Korkein hallinto-oikeus relate solely to the alleged unlawfulness of the points system for the criteria relating to the bus fleet specified in the invitation to tender at issue in the main proceedings.

37 Thus by its second and third questions the national court essentially asks, first, whether Article 36(1) of Directive 92/50 or Article 34(1)(a) of Directive 93/38 permits the inclusion, among the criteria for the award of a public contract on the basis of the most economically advantageous tender, of a reduction of the nitrogen oxide emissions or the noise level of the vehicles in such a way that if those emissions or that noise level is below a certain ceiling additional points may be awarded for the comparison of tenders.

38 It also asks, second, whether the rules laid down by those directives, in particular the principle of equal treatment, permit the taking into account of such criteria where it appears from the outset that the transport undertaking which belongs to the municipality organising the tender procedure is one of the few undertakings able to offer buses which satisfy those criteria.

39 It is clear that the provisions of Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38 have substantially the same wording.

40 Moreover, as appears from the order for reference, there was no discussion in the main proceedings as to the national or Community legislation applicable.

41 As may be seen from the wording of the first question, the Korkein hallinto-oikeus is not asking

the Court about the applicability of Directive 92/50, but only about the applicability of Directive 93/38 to the main proceedings.

42 It must therefore be considered, first, that the second and third questions relate to the compatibility with the relevant provisions of Directive 92/50 of award criteria such as those at issue in the main proceedings, and, second, that by its first question the national court essentially asks whether the answer to those questions would be different if Directive 93/38 were applicable. It follows that the second and third questions should be considered in turn, followed by the first question.

The second question

43 By its second question, the national court essentially asks whether Article 36(1)(a) of Directive 92/50 is to be interpreted as meaning that, where in the context of a public contract for the provision of urban bus transport services the contracting authority decides to award that contract to the tenderer submitting the most economically advantageous tender, it may take into account the reduction of nitrogen oxide emissions or the noise level of the vehicles in such a way that, if those emissions are or that noise level is below a certain ceiling, additional points may be awarded for the purposes of comparing the tenders.

Observations submitted to the Court

44 Concordia contends that in a public tender procedure the criteria for the decision must, in accordance with the wording of the relevant provisions of Community law, always be of an economic nature. If the objective of the contracting authority is to satisfy ecological or other considerations, recourse should be had to a procedure other than a public tender procedure.

45 On the other hand, the other parties to the main proceedings, the Member States which have submitted observations and the Commission submit that it is permissible to include ecological criteria in the criteria for the award of a public contract. They refer, first, to Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38, which list merely as examples factors which the contracting entity may take into account when awarding such a contract; next, they refer to Article 6 EC, which requires environmental protection to be integrated into the other policies of the Community; finally, they refer to the Beentjes and Evans Medical and Macfarlan Smith judgments, which allow a contracting entity to choose the criteria it regards as relevant when it assesses the tenders submitted.

46 In particular, the city of Helsinki and the Finnish Government state that it is in the interest of the city and its inhabitants for noxious emissions to be limited as much as possible. For the city of Helsinki itself, which is responsible for protection of the environment within its territory, direct economies follow from this, especially in the medico-social sector, which represents about 50% of its overall budget. Factors which contribute even on a modest scale to improving the overall state of health of the population enable it to reduce its charges rapidly and to a considerable extent.

47 The Greek Government adds that the discretion given to the national authorities as to the choice of the criteria for awarding public contracts presumes that that choice is not arbitrary and the criteria taken into consideration do not infringe the provisions of the EC Treaty, in particular the fundamental principles enshrined in it, such as freedom of establishment, freedom to provide services and prohibition of discrimination on grounds of nationality.

48 The Netherlands Government states that the criteria for awarding public contracts applied by the contracting authority must always have an economic dimension. It contends, however, that that condition is satisfied in the main proceedings, as the city of Helsinki is both the contracting authority and the body with financial responsibility for environment policy.

49 The Austrian Government submits that Directives 92/50 and 93/38 introduce two essential restrictions on the choice of the criteria for awarding public contracts. First, the criteria chosen by the contracting entity must relate to the contract to be awarded and make it possible to determine the most economically advantageous tender for it. Second, the criteria must be capable of guiding the discretion of the contracting entity on an objective basis and must not include elements of arbitrary choice. Moreover, according to the Government, the award criteria must be directly linked to the subject-matter of the contract, have effects which can be measured objectively, and be quantifiable at the economic level.

50 Similarly, the Swedish Government submits that the contracting entity's choice is limited, in that the award criteria must be related to the contract to be awarded and suitable for determining the most advantageous tender from the economic point of view. It adds that the criteria must also be consistent with the Treaty provisions on the free movement of goods and services.

51 According to the United Kingdom Government, the provisions of Article 36(1) of Directive 92/50 and Article 34(1) of Directive 93/38 must be interpreted as meaning that, when arranging an award procedure for the operation of bus transport services, a contracting authority or entity may, among other criteria for awarding the contract, take environmental criteria into consideration for assessing the economically most advantageous tender, provided that those criteria allow a comparison of all the tenders, are linked to the services to be provided, and have been published beforehand.

52 The Commission contends that the criteria for the award of public contracts which may be taken into consideration when assessing the economically most advantageous tender must satisfy four conditions. They must be objective, apply to all the tenders, be strictly linked to the subject-matter of the contract in question, and be of direct economic advantage to the contracting authority.

Findings of the Court

53 Article 36(1)(a) of Directive 92/50 provides that the criteria on which the contracting authority may base the award of contracts may, where the award is made to the economically most advantageous tender, be various criteria relating to the contract, such as, for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, or price.

54 In order to determine whether and under what conditions the contracting authority may, in accordance with Article 36(1)(a), take into consideration criteria of an ecological nature, it must be noted, first, that, as is clear from the wording of that provision, in particular the use of the expression 'for example', the criteria which may be used as criteria for the award of a public contract to the economically most advantageous tender are not listed exhaustively (see also, to that effect, Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraph 35).

55 Second, Article 36(1)(a) cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature. It cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority. That conclusion is also supported by the wording of the provision, which expressly refers to the criterion of the aesthetic characteristics of a tender.

56 Moreover, as the Court has already held, the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the free movement of services and goods (see, *inter alia*, SIAC Construction, paragraph 32).

57 In the light of that objective and also of the wording of the third sentence of the first subparagraph of Article 130r(2) of the EC Treaty, transferred by the Treaty of Amsterdam in slightly amended

form to Article 6 EC, which lays down that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, it must be concluded that Article 36(1)(a) of Directive 92/50 does not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender.

58 However, that does not mean that any criterion of that nature may be taken into consideration by the contracting authority.

59 While Article 36(1)(a) of Directive 92/50 leaves it to the contracting authority to choose the criteria on which it proposes to base the award of the contract, that choice may, however, relate only to criteria aimed at identifying the economically most advantageous tender (see, to that effect, concerning public works contracts, *Beentjes*, paragraph 19, *Evans Medical and Macfarlan Smith*, paragraph 42, and *SIAC Construction*, paragraph 36). Since a tender necessarily relates to the subject-matter of the contract, it follows that the award criteria which may be applied in accordance with that provision must themselves also be linked to the subject-matter of the contract.

60 It should be recalled, first, that, as the Court has already held, in order to determine the economically most advantageous tender, the contracting authority must be able to assess the tenders submitted and take a decision on the basis of qualitative and quantitative criteria relating to the contract in question (see, to that effect, concerning public works contracts, *Case 274/83 Commission v Italy* [1985] ECR 1077, paragraph 25).

61 Further, it also appears from the case-law that an award criterion having the effect of conferring on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer would be incompatible with Article 36(1)(a) of Directive 92/50 (see, to that effect, *Beentjes*, paragraph 26, and *SIAC Construction*, paragraph 37).

62 Next, it should be noted that the criteria adopted to determine the economically most advantageous tender must be applied in conformity with all the procedural rules laid down in Directive 92/50, in particular the rules on advertising. It follows that, in accordance with Article 36(2) of that directive, all such criteria must be expressly mentioned in the contract documents or the tender notice, where possible in descending order of importance, so that operators are in a position to be aware of their existence and scope (see, to that effect, concerning public works contracts, *Beentjes*, paragraphs 31 and 36, and *Case C-225/98 Commission v France* [2000] ECR I-7445, paragraph 51).

63 Finally, such criteria must comply with all the fundamental principles of Community law, in particular the principle of non-discrimination as it follows from the provisions of the Treaty on the right of establishment and the freedom to provide services (see, to that effect, *Beentjes*, paragraph 29, and *Commission v France*, paragraph 50).

64 It follows from the above considerations that, where the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, in accordance with Article 36(1)(a) of Directive 92/50, it may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

65 With respect to the main proceedings, it must be stated, first, that criteria relating to the level of nitrogen oxide emissions and the noise level of the buses, such as those at issue in those proceedings, must be regarded as linked to the subject-matter of a contract for the provision of urban bus transport services.

66 Next, criteria whereby additional points are awarded to tenders which meet certain specific and objectively quantifiable environmental requirements are not such as to confer an unrestricted freedom of choice on the contracting authority.

67 In addition, as stated in paragraphs 21 to 24 above, the criteria at issue in the main proceedings were expressly mentioned in the tender notice published by the purchasing office of the city of Helsinki.

68 Finally, whether the criteria at issue in the main proceedings comply in particular with the principle of non-discrimination falls to be examined in connection with the answer to the third question, which concerns precisely that point.

69 Consequently, in the light of all the foregoing, the answer to the second question must be that Article 36(1)(a) of Directive 92/50 is to be interpreted as meaning that where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

The third question

70 By its third question, the national court essentially asks whether the principle of equal treatment precludes the taking into consideration of criteria concerned with protection of the environment, such as those at issue in the main proceedings, because the contracting entity's own transport undertaking is one of the few undertakings able to offer a bus fleet satisfying those criteria.

Observations submitted to the Court

71 Concordia submits that the possibility of using buses powered by natural gas, which were in practice the only ones to meet the additional criterion of reducing the level of nitrogen oxide emissions and the noise level, was very limited. At the date of the invitation to tender, there was only one service station in the whole of Finland supplying natural gas. Its capacity enabled it to supply about 15 gas-powered buses. Shortly before the invitation to tender, HKL placed an order for 11 new gas-powered buses, which meant that the station's capacity was fully used and it was not possible to supply fuel to other vehicles. Moreover, the service station was only a provisional one.

72 Concordia concludes that HKL was the only tenderer which had a real possibility of offering gas-powered buses. It therefore proposes that the answer to the third question should be that awarding points according to the nitrogen oxide emissions and reduced noise levels of the buses cannot be permitted, at least in a case where not all the operators in the sector in question have, even theoretically, the possibility of offering services eligible for those points.

73 The city of Helsinki submits that it was not under any obligation to put its own bus transport services out to tender, either under Community legislation or under Finnish legislation. Since an award procedure always involves additional work and expense, it would have had no reasonable ground for organising that procedure if it had known that the undertaking it owns was the only one able to offer a bus fleet satisfying the conditions laid down in the tender notice, or if it had really wished to reserve to itself the operation of that transport.

74 The Finnish Government submits that assessing the objectivity of the criteria stated in the invitation to tender at issue in the main proceedings is ultimately a matter for the national court.

75 The Netherlands Government submits that it follows from the Court's case-law that the award criteria must be objective and that there must be no discrimination between tenderers. It says, however, that in paragraphs 32 and 33 of the judgment in Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697 the Court indeed held that where, following a procedure for the award of a public contract, only one tender remains, the contracting authority is not required to award the contract to the only tenderer judged to be suitable. But it does not follow that if, as a result of the award criteria applied, there is only one tenderer left, those criteria are unlawful. In any event, it is for the national court to determine whether, in the case at issue in the main proceedings, competition was in fact distorted.

76 According to the Austrian Government, the use of the award criteria at issue in the main proceedings may in principle be permitted, even in a case where, as here, only a comparatively small number of tenderers are able to satisfy those criteria. It appears, however, according to the Court's case-law (Case 45/87 *Commission v Ireland* [1988] ECR 4929), that there is a limit to the permissibility of certain minimum ecological standards where the criteria applied restrict the market for the services or goods to be supplied to the point where there is only one tenderer remaining. There is no indication, however, that that was the case in the main proceedings.

77 The Swedish Government submits that the taking into account of the criterion relating to nitrogen oxide emissions in the way in which this was done in the case at issue in the main proceedings meant that a tenderer which had buses powered by gas or alcohol was rewarded. According to the Government, there was nothing to prevent the other tenderers from acquiring such buses. They had been available on the market for some years.

78 The Swedish Government maintains that the award of additional points for low nitrogen oxide emissions and noise levels of the buses which the tenderer intends to operate does not constitute direct discrimination, but is applied without distinction. Moreover, it does not appear to be indirect discrimination, in the sense of necessarily having the effect of benefiting HKL.

79 According to the United Kingdom Government, Directive 93/38 does not prohibit the awarding of additional points in the assessment of tenders where it is known beforehand that few undertakings will be able to obtain those additional points, as long as the contracting entity has made it known at the stage of the tender notice that such additional points may be obtained.

80 The Commission considers that, in view of the divergent opinions of the parties in the context of the main proceedings, it is not in a position to determine whether the criteria which were applied breach the principle of equal treatment of tenderers. It is therefore for the national court to rule on that question and to determine, on the basis of objective, relevant and consistent evidence, whether those criteria were adopted with the sole purpose of selecting the undertaking which was eventually selected or were defined to that end.

Findings of the Court

81 It must be stated that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply and which lay down criteria for the award of contracts which are intended to ensure such competition (see, to that effect, Case C-243/89 *Commission v Denmark* [1993] ECR I-3353, paragraph 33).

82 Thus, according to the case-law cited in paragraph 63 above, the award criteria must observe the principle of non-discrimination as it follows from the Treaty provisions on freedom of establishment and freedom to provide services.

83 In the present case, it should be noted, first, that, as is apparent from the order for reference,

the award criteria at issue in the main proceedings were objective and applied without distinction to all tenders. Next, the criteria were directly linked to the fleet offered and were an integral part of a system of awarding points. Finally, under that system, additional points could be awarded on the basis of other criteria linked to the fleet, such as the use of low-floor buses, the number of seats and tip-up seats and the age of the buses.

84 Moreover, as Concordia acknowledged at the hearing, it won the tender for route 15 of the Helsinki urban bus network, even though that invitation to tender specifically required the operation of gas-powered vehicles.

85 It must therefore be held that, in such a factual context, the fact that one of the criteria adopted by the contracting entity to identify the economically most advantageous tender could be satisfied only by a small number of undertakings, one of which was an undertaking belonging to the contracting entity, is not in itself such as to constitute a breach of the principle of equal treatment.

86 In those circumstances, the answer to the third question must be that the principle of equal treatment does not preclude the taking into consideration of criteria connected with protection of the environment, such as those at issue in the main proceedings, solely because the contracting entity's own transport undertaking is one of the few undertakings able to offer a bus fleet satisfying those criteria.

The first question

87 By its first question, the national court essentially asks whether the answer to the second and third questions would be different if the procedure for the award of the public contract at issue in the main proceedings fell within the scope of Directive 93/38.

88 On this point, it must be noted, first, that the provisions of Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38 have substantially the same wording.

89 Second, the provisions concerning award criteria of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and those of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) also have substantially the same wording as those of Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38.

90 It should be observed, third, that those directives taken as a whole constitute the core of Community law on public contracts and are intended to attain similar objectives in their respective fields.

91 In those circumstances, there is no reason to give a different interpretation to two provisions which fall within the same field of Community law and have substantially the same wording.

92 It should also be noted that the Court has already held, in paragraph 33 of *Commission v Denmark*, that the duty to observe the principle of equal treatment lies at the very heart of all the public procurement directives. The documents in the main proceedings have not disclosed anything to show that, as regards the contracting entity's choice of award criteria, the interpretation of that principle should depend in this case on the particular directive applicable to the contract in question.

93 The answer to the first question must therefore be that the answer to the second and third questions would not be different if the procedure for the award of the public contract at issue in the main proceedings fell within the scope of Directive 93/38.

AUTHOR Court of Justice of the European Communities

FORM Judgment

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NATCOUR	*A9* Korkein hallinto-oikeus, välipäätös 17/12/1999 (4150 ; 1896/1/98)
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**Judgment of the Court
of 20 February 1979**

**Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein.
Reference for a preliminary ruling: Hessisches Finanzgericht - Germany.
Measures heaving an effect equivalent to quantitative restrictions.**

Case 120/78.

1 . STATE MONOPOLIES OF A COMMERCIAL CHARACTER - SPECIFIC PROVISION OF THE TREATY - SCOPE

(EEC TREATY , ART. 37)

2 . QUANTITATIVE RESTRICTIONS - MEASURES HAVING EQUIVALENT EFFECT - MARKETING OF A PRODUCT - DISPARITIES BETWEEN NATIONAL LAWS - OBSTACLES TO INTRA-COMMUNITY TRADE - PERMISSIBLE - CONDITIONS AND LIMITS

(EEC TREATY , ART. 30 AND 36)

3 . QUANTITATIVE RESTRICTIONS - MEASURES HAVING EQUIVALENT EFFECT - CONCEPT - MARKETING OF ALCOHOLIC BEVERAGES - FIXING OF A MINIMUM ALCOHOL CONTENT

(EEC TREATY , ART. 30)

1 . SINCE IT IS A PROVISION RELATING SPECIFICALLY TO STATE MONOPOLIES OF A COMMERCIAL CHARACTER , ARTICLE 37 OF THE EEC TREATY IS IRRELEVANT WITH REGARD TO NATIONAL PROVISIONS WHICH DO NOT CONCERN THE EXERCISE BY A PUBLIC MONOPOLY OF ITS SPECIFIC FUNCTION - NAMELY , ITS EXCLUSIVE RIGHT - BUT APPLY IN A GENERAL MANNER TO THE PRODUCTION AND MARKETING OF GIVEN PRODUCTS , WHETHER OR NOT THE LATTER ARE COVERED BY THE MONOPOLY IN QUESTION.

2 . IN THE ABSENCE OF COMMON RULES , OBSTACLES TO MOVEMENT WITHIN THE COMMUNITY RESULTING FROM DISPARITIES BETWEEN THE NATIONAL LAWS RELATING TO THE MARKETING OF A PRODUCT MUST BE ACCEPTED IN SO FAR AS THOSE PROVISIONS MAY BE RECOGNIZED AS BEING NECESSARY IN ORDER TO SATISFY MANDATORY REQUIREMENTS RELATING IN PARTICULAR TO THE EFFECTIVENESS OF FISCAL SUPERVISION , THE PROTECTION OF PUBLIC HEALTH , THE FAIRNESS OF COMMERCIAL TRANSACTIONS AND THE DEFENCE OF THE CONSUMER .

3 . THE CONCEPT OF ' ' MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE RESTRICTIONS ON IMPORTS ' ' , CONTAINED IN ARTICLE 30 OF THE EEC TREATY , IS TO BE UNDERSTOOD TO MEAN THAT THE FIXING OF A MINIMUM ALCOHOL CONTENT FOR ALCOHOLIC BEVERAGES INTENDED FOR HUMAN CONSUMPTION BY THE LEGISLATION OF A MEMBER STATE ALSO FALLS WITHIN THE PROHIBITION LAID DOWN IN THAT PROVISION WHERE THE IMPORTATION OF ALCOHOLIC BEVERAGES LAWFULLY PRODUCED AND MARKETED IN ANOTHER MEMBER STATE IS CONCERNED.

IN [CASE 120/78](#)

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE HESSISCHES FINANZGERICHT FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

REWE-ZENTRAL AG , HAVING ITS REGISTERED OFFICE IN COLOGNE ,

AND

BUNDESMONOPOLVERWALTUNG FÜR BRANNTWEIN (FEDERAL MONOPOLY ADMINISTRATION)

FOR SPIRITS),

ON THE INTERPRETATION OF ARTICLES 30 AND 37 OF THE EEC TREATY IN RELATION TO ARTICLE 100 (3) OF THE GERMAN LAW ON THE MONOPOLY IN SPIRITS ,

1BY ORDER OF 28 APRIL 1978 , WHICH WAS RECEIVED AT THE COURT ON 22 MAY , THE HESSISCHES FINANZGERICHT REFERRED TWO QUESTIONS TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY FOR A PRELIMINARY RULING ON THE INTERPRETATION OF ARTICLES 30 AND 37 OF THE EEC TREATY , FOR THE PURPOSE OF ASSESSING THE COMPATIBILITY WITH COMMUNITY LAW OF A PROVISION OF THE GERMAN RULES RELATING TO THE MARKETING OF ALCOHOLIC BEVERAGES FIXING A MINIMUM ALCOHOLIC STRENGTH FOR VARIOUS CATEGORIES OF ALCOHOLIC PRODUCTS.

2IT APPEARS FROM THE ORDER MAKING THE REFERENCE THAT THE PLAINTIFF IN THE MAIN ACTION INTENDS TO IMPORT A CONSIGNMENT OF ' ' CASSIS DE DIJON ' ' ORIGINATING IN FRANCE FOR THE PURPOSE OF MARKETING IT IN THE FEDERAL REPUBLIC OF GERMANY.

THE PLAINTIFF APPLIED TO THE BUNDESMONOPOLVERWALTUNG (FEDERAL MONOPOLY ADMINISTRATION FOR SPIRITS) FOR AUTHORIZATION TO IMPORT THE PRODUCT IN QUESTION AND THE MONOPOLY ADMINISTRATION INFORMED IT THAT BECAUSE OF ITS INSUFFICIENT ALCOHOLIC STRENGTH THE SAID PRODUCT DOES NOT HAVE THE CHARACTERISTICS REQUIRED IN ORDER TO BE MARKETED WITHIN THE FEDERAL REPUBLIC OF GERMANY.

3THE MONOPOLY ADMINISTRATION ' S ATTITUDE IS BASED ON ARTICLE 100 OF THE BRANNTWEINMONOPOLGESETZ AND ON THE RULES DRAWN UP BY THE MONOPOLY ADMINISTRATION PURSUANT TO THAT PROVISION , THE EFFECT OF WHICH IS TO FIX THE MINIMUM ALCOHOL CONTENT OF SPECIFIED CATEGORIES OF LIQUEURS AND OTHER POTABLE SPIRITS (VERORDNUNG UBER DEN MINDESTWEINGEISTGEHALT VON TRINKBRANNTWEINEN OF 28 FEBRUARY 1958 , BUNDESANZEIGER NO 48 OF 11 MARCH 1958).

THOSE PROVISIONS LAY DOWN THAT THE MARKETING OF FRUIT LIQUEURS , SUCH AS ' ' CASSIS DE DIJON ' ' , IS CONDITIONAL UPON A MINIMUM ALCOHOL CONTENT OF 25% , WHEREAS THE ALCOHOL CONTENT OF THE PRODUCT IN QUESTION , WHICH IS FREELY MARKETED AS SUCH IN FRANCE , IS BETWEEN 15 AND 20% .

4THE PLAINTIFF TAKES THE VIEW THAT THE FIXING BY THE GERMAN RULES OF A MINIMUM ALCOHOL CONTENT LEADS TO THE RESULT THAT WELL-KNOWN SPIRITS PRODUCTS FROM OTHER MEMBER STATES OF THE COMMUNITY CANNOT BE SOLD IN THE FEDERAL REPUBLIC OF GERMANY AND THAT THE SAID PROVISION THEREFORE CONSTITUTES A RESTRICTION ON THE FREE MOVEMENT OF GOODS BETWEEN MEMBER STATES WHICH EXCEEDS THE BOUNDS OF THE TRADE RULES RESERVED TO THE LATTER .

IN ITS VIEW IT IS A MEASURE HAVING AN EFFECT EQUIVALENT TO A QUANTITATIVE RESTRICTION ON IMPORTS CONTRARY TO ARTICLE 30 OF THE EEC TREATY .

SINCE , FURTHERMORE , IT IS A MEASURE ADOPTED WITHIN THE CONTEXT OF THE MANAGEMENT OF THE SPIRITS MONOPOLY , THE PLAINTIFF CONSIDERS THAT THERE IS ALSO AN INFRINGEMENT OF ARTICLE 37 , ACCORDING TO WHICH THE MEMBER STATES SHALL PROGRESSIVELY ADJUST ANY STATE MONOPOLIES OF A COMMERCIAL CHARACTER SO AS TO ENSURE THAT WHEN THE TRANSITIONAL PERIOD HAS ENDED NO DISCRIMINATION REGARDING THE CONDITIONS UNDER WHICH GOODS ARE PROCURED OR MARKETED EXISTS BETWEEN NATIONALS OF MEMBER STATES.

5IN ORDER TO REACH A DECISION ON THIS DISPUTE THE HESSISCHES FINANZGERICHT HAS REFERRED TWO QUESTIONS TO THE COURT , WORDED AS FOLLOWS :

1 . MUST THE CONCEPT OF MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE RESTRICTIONS ON IMPORTS CONTAINED IN ARTICLE 30 OF THE EEC TREATY BE UNDERSTOOD AS MEANING THAT THE FIXING OF A MINIMUM WINE-SPIRIT CONTENT FOR POTABLE SPIRITS LAID DOWN IN THE GERMAN BRANNTWEINMONOPOLGESETZ , THE RESULT OF WHICH IS THAT TRADITIONAL PRODUCTS OF OTHER MEMBER STATES WHOSE WINE-SPIRIT CONTENT IS BELOW THE FIXED LIMIT CANNOT BE PUT INTO CIRCULATION IN THE FEDERAL REPUBLIC OF GERMANY , ALSO COMES WITHIN THIS CONCEPT?

2 . MAY THE FIXING OF SUCH A MINIMUM WINE-SPIRIT CONTENT COME WITHIN THE CONCEPT OF ' ' DISCRIMINATION REGARDING THE CONDITIONS UNDER WHICH GOODS ARE PROCURED AND MARKETED... BETWEEN NATIONALS OF MEMBER STATES ' ' CONTAINED IN ARTICLE 37 OF THE EEC TREATY?

6THE NATIONAL COURT IS THEREBY ASKING FOR ASSISTANCE IN THE MATTER OF INTERPRETATION IN ORDER TO ENABLE IT TO ASSESS WHETHER THE REQUIREMENT OF A MINIMUM ALCOHOL CONTENT MAY BE COVERED EITHER BY THE PROHIBITION ON ALL MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE RESTRICTIONS IN TRADE BETWEEN MEMBER STATES CONTAINED IN ARTICLE 30 OF THE TREATY OR BY THE PROHIBITION ON ALL DISCRIMINATION REGARDING THE CONDITIONS UNDER WHICH GOODS ARE PROCURED AND MARKETED BETWEEN NATIONALS OF MEMBER STATES WITHIN THE MEANING OF ARTICLE 37.

7IT SHOULD BE NOTED IN THIS CONNEXION THAT ARTICLE 37 RELATES SPECIFICALLY TO STATE MONOPOLIES OF A COMMERCIAL CHARACTER.

THAT PROVISION IS THEREFORE IRRELEVANT WITH REGARD TO NATIONAL PROVISIONS WHICH DO NOT CONCERN THE EXERCISE BY A PUBLIC MONOPOLY OF ITS SPECIFIC FUNCTION - NAMELY , ITS EXCLUSIVE RIGHT - BUT APPLY IN A GENERAL MANNER TO THE PRODUCTION AND MARKETING OF ALCOHOLIC BEVERAGES , WHETHER OR NOT THE LATTER ARE COVERED BY THE MONOPOLY IN QUESTION.

THAT BEING THE CASE , THE EFFECT ON INTRA-COMMUNITY TRADE OF THE MEASURE REFERRED TO BY THE NATIONAL COURT MUST BE EXAMINED SOLELY IN RELATION TO THE REQUIREMENTS UNDER ARTICLE 30 , AS REFERRED TO BY THE FIRST QUESTION.

8IN THE ABSENCE OF COMMON RULES RELATING TO THE PRODUCTION AND MARKETING OF ALCOHOL - A PROPOSAL FOR A REGULATION SUBMITTED TO THE COUNCIL BY THE COMMISSION ON 7 DECEMBER 1976 (OFFICIAL JOURNAL C 309 , P . 2) NOT YET HAVING RECEIVED THE COUNCIL ' S APPROVAL - IT IS FOR THE MEMBER STATES TO REGULATE ALL MATTERS RELATING TO THE PRODUCTION AND MARKETING OF ALCOHOL AND ALCOHOLIC BEVERAGES ON THEIR OWN TERRITORY .

OBSTACLES TO MOVEMENT WITHIN THE COMMUNITY RESULTING FROM DISPARITIES BETWEEN THE NATIONAL LAWS RELATING TO THE MARKETING OF THE PRODUCTS IN QUESTION MUST BE ACCEPTED IN SO FAR AS THOSE PROVISIONS MAY BE RECOGNIZED AS BEING NECESSARY IN ORDER TO SATISFY MANDATORY REQUIREMENTS RELATING IN PARTICULAR TO THE EFFECTIVENESS OF FISCAL SUPERVISION , THE PROTECTION OF PUBLIC HEALTH , THE FAIRNESS OF COMMERCIAL TRANSACTIONS AND THE DEFENCE OF THE CONSUMER.

9THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY , INTERVENING IN THE

PROCEEDINGS , PUT FORWARD VARIOUS ARGUMENTS WHICH , IN ITS VIEW , JUSTIFY THE APPLICATION OF PROVISIONS RELATING TO THE MINIMUM ALCOHOL CONTENT OF ALCOHOLIC BEVERAGES , ADDUCING CONSIDERATIONS RELATING ON THE ONE HAND TO THE PROTECTION OF PUBLIC HEALTH AND ON THE OTHER TO THE PROTECTION OF THE CONSUMER AGAINST UNFAIR COMMERCIAL PRACTICES.

10AS REGARDS THE PROTECTION OF PUBLIC HEALTH THE GERMAN GOVERNMENT STATES THAT THE PURPOSE OF THE FIXING OF MINIMUM ALCOHOL CONTENTS BY NATIONAL LEGISLATION IS TO AVOID THE PROLIFERATION OF ALCOHOLIC BEVERAGES ON THE NATIONAL MARKET , IN PARTICULAR ALCOHOLIC BEVERAGES WITH A LOW ALCOHOL CONTENT , SINCE , IN ITS VIEW , SUCH PRODUCTS MAY MORE EASILY INDUCE A TOLERANCE TOWARDS ALCOHOL THAN MORE HIGHLY ALCOHOLIC BEVERAGES.

11SUCH CONSIDERATIONS ARE NOT DECISIVE SINCE THE CONSUMER CAN OBTAIN ON THE MARKET AN EXTREMELY WIDE RANGE OF WEAKLY OR MODERATELY ALCOHOLIC PRODUCTS AND FURTHERMORE A LARGE PROPORTION OF ALCOHOLIC BEVERAGES WITH A HIGH ALCOHOL CONTENT FREELY SOLD ON THE GERMAN MARKET IS GENERALLY CONSUMED IN A DILUTED FORM.

12THE GERMAN GOVERNMENT ALSO CLAIMS THAT THE FIXING OF A LOWER LIMIT FOR THE ALCOHOL CONTENT OF CERTAIN LIQUEURS IS DESIGNED TO PROTECT THE CONSUMER AGAINST UNFAIR PRACTICES ON THE PART OF PRODUCERS AND DISTRIBUTORS OF ALCOHOLIC BEVERAGES.

THIS ARGUMENT IS BASED ON THE CONSIDERATION THAT THE LOWERING OF THE ALCOHOL CONTENT SECURES A COMPETITIVE ADVANTAGE IN RELATION TO BEVERAGES WITH A HIGHER ALCOHOL CONTENT , SINCE ALCOHOL CONSTITUTES BY FAR THE MOST EXPENSIVE CONSTITUENT OF BEVERAGES BY REASON OF THE HIGH RATE OF TAX TO WHICH IT IS SUBJECT.

FURTHERMORE , ACCORDING TO THE GERMAN GOVERNMENT , TO ALLOW ALCOHOLIC PRODUCTS INTO FREE CIRCULATION WHEREVER , AS REGARDS THEIR ALCOHOL CONTENT , THEY COMPLY WITH THE RULES LAID DOWN IN THE COUNTRY OF PRODUCTION WOULD HAVE THE EFFECT OF IMPOSING AS A COMMON STANDARD WITHIN THE COMMUNITY THE LOWEST ALCOHOL CONTENT PERMITTED IN ANY OF THE MEMBER STATES , AND EVEN OF RENDERING ANY REQUIREMENTS IN THIS FIELD INOPERATIVE SINCE A LOWER LIMIT OF THIS NATURE IS FOREIGN TO THE RULES OF SEVERAL MEMBER STATES.

13AS THE COMMISSION RIGHTLY OBSERVED , THE FIXING OF LIMITS IN RELATION TO THE ALCOHOL CONTENT OF BEVERAGES MAY LEAD TO THE STANDARDIZATION OF PRODUCTS PLACED ON THE MARKET AND OF THEIR DESIGNATIONS , IN THE INTERESTS OF A GREATER TRANSPARENCY OF COMMERCIAL TRANSACTIONS AND OFFERS FOR SALE TO THE PUBLIC.

HOWEVER , THIS LINE OF ARGUMENT CANNOT BE TAKEN SO FAR AS TO REGARD THE MANDATORY FIXING OF MINIMUM ALCOHOL CONTENTS AS BEING AN ESSENTIAL GUARANTEE OF THE FAIRNESS OF COMMERCIAL TRANSACTIONS , SINCE IT IS A SIMPLE MATTER TO ENSURE THAT SUITABLE INFORMATION IS CONVEYED TO THE PURCHASER BY REQUIRING THE DISPLAY OF AN INDICATION OF ORIGIN AND OF THE ALCOHOL CONTENT ON THE PACKAGING OF PRODUCTS.

14IT IS CLEAR FROM THE FOREGOING THAT THE REQUIREMENTS RELATING TO THE MINIMUM ALCOHOL CONTENT OF ALCOHOLIC BEVERAGES DO NOT SERVE A PURPOSE WHICH IS IN THE GENERAL INTEREST AND SUCH AS TO TAKE PRECEDENCE OVER THE

REQUIREMENTS OF THE FREE MOVEMENT OF GOODS , WHICH CONSTITUTES ONE OF THE FUNDAMENTAL RULES OF THE COMMUNITY.

IN PRACTICE , THE PRINCIPLE EFFECT OF REQUIREMENTS OF THIS NATURE IS TO PROMOTE ALCOHOLIC BEVERAGES HAVING A HIGH ALCOHOL CONTENT BY EXCLUDING FROM THE NATIONAL MARKET PRODUCTS OF OTHER MEMBER STATES WHICH DO NOT ANSWER THAT DESCRIPTION.

IT THEREFORE APPEARS THAT THE UNILATERAL REQUIREMENT IMPOSED BY THE RULES OF A MEMBER STATE OF A MINIMUM ALCOHOL CONTENT FOR THE PURPOSES OF THE SALE OF ALCOHOLIC BEVERAGES CONSTITUTES AN OBSTACLE TO TRADE WHICH IS INCOMPATIBLE WITH THE PROVISIONS OF ARTICLE 30 OF THE TREATY

THERE IS THEREFORE NO VALID REASON WHY , PROVIDED THAT THEY HAVE BEEN LAWFULLY PRODUCED AND MARKETED IN ONE OF THE MEMBER STATES , ALCOHOLIC BEVERAGES SHOULD NOT BE INTRODUCED INTO ANY OTHER MEMBER STATE ; THE SALE OF SUCH PRODUCTS MAY NOT BE SUBJECT TO A LEGAL PROHIBITION ON THE MARKETING OF BEVERAGES WITH AN ALCOHOL CONTENT LOWER THAN THE LIMIT SET BY THE NATIONAL RULES.

15CONSEQUENTLY , THE FIRST QUESTION SHOULD BE ANSWERED TO THE EFFECT THAT THE CONCEPT OF ' ' MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE RESTRICTIONS ON IMPORTS ' ' CONTAINED IN ARTICLE 30 OF THE TREATY IS TO BE UNDERSTOOD TO MEAN THAT THE FIXING OF A MINIMUM ALCOHOL CONTENT FOR ALCOHOLIC BEVERAGES INTENDED FOR HUMAN CONSUMPTION BY THE LEGISLATION OF A MEMBER STATE ALSO FALLS WITHIN THE PROHIBITION LAID DOWN IN THAT PROVISION WHERE THE IMPORTATION OF ALCOHOLIC BEVERAGES LAWFULLY PRODUCED AND MARKETED IN ANOTHER MEMBER STATE IS CONCERNED .

COSTS

16THE COSTS INCURRED BY THE GOVERNMENT OF THE KINGDOM OF DENMARK , THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE.

SINCE THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION BEFORE THE HESSISCHES FINANZGERICHT , COSTS ARE A MATTER FOR THAT COURT.

ON THOSE GROUNDS ,

THE COURT ,

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE HESSISCHES FINANZGERICHT BY ORDER OF 28 APRIL 1978 , HEREBY RULES :

THE CONCEPT OF ' ' MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE RESTRICTIONS ON IMPORTS ' ' CONTAINED IN ARTICLE 30 OF THE EEC TREATY IS TO BE UNDERSTOOD TO MEAN THAT THE FIXING OF A MINIMUM ALCOHOL CONTENT FOR ALCOHOLIC BEVERAGES INTENDED FOR HUMAN CONSUMPTION BY THE LEGISLATION OF A MEMBER STATE ALSO FALLS WITHIN THE PROHIBITION LAID DOWN IN THAT PROVISION WHERE THE IMPORTATION OF ALCOHOLIC BEVERAGES LAWFULLY PRODUCED AND MARKETED IN ANOTHER MEMBER STATE IS CONCERNED.

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NATIONA Federal Republic of Germany

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**Judgment of the Court
of 12 March 1987**

**Commission of the European Communities v Federal Republic of Germany.
Failure of a State to fulfil its obligations - Purity requirement for beer.
Case 178/84.**

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1 . FREE MOVEMENT OF GOODS - QUANTITATIVE RESTRICTIONS - MEASURES HAVING EQUIVALENT EFFECT - MARKETING OF PRODUCTS - DISPARITIES BETWEEN NATIONAL LAWS - BARRIERS TO INTRA-COMMUNITY TRADE - PERMISSIBILITY - CONDITIONS AND LIMITS

(EEC TREATY, ART. 30)

2 . FREE MOVEMENT OF GOODS - QUANTITATIVE RESTRICTIONS - MEASURES HAVING EQUIVALENT EFFECT - LEGISLATION RESTRICTING A GENERIC DESIGNATION TO PRODUCTS MANUFACTURED IN ACCORDANCE WITH NATIONAL RULES - JUSTIFICATION - NONE

(EEC TREATY, ART. 30)

3 . FREE MOVEMENT OF GOODS - QUANTITATIVE RESTRICTIONS - MEASURES HAVING EQUIVALENT EFFECT - SYSTEM OF MANDATORY CONSUMER INFORMATION FOR CONSUMERS SHOWING A PREFERENCE FOR PRODUCTS MADE FROM PARTICULAR RAW MATERIALS - PERMISSIBILITY - CONDITIONS

(EEC TREATY, ART. 30)

4 . FREE MOVEMENT OF GOODS - DEROGATIONS - PROTECTION OF PUBLIC HEALTH - RULES ON THE USE OF FOOD ADDITIVES - JUSTIFICATION - CONDITIONS AND LIMITS

(EEC TREATY, ARTS 30 AND 36)

1 . IN THE ABSENCE OF COMMON RULES RELATING TO THE MARKETING OF THE PRODUCTS CONCERNED, OBSTACLES TO FREE MOVEMENT WITHIN THE COMMUNITY RESULTING FROM DISPARITIES BETWEEN THE NATIONAL LAWS MUST BE ACCEPTED IN SO FAR AS SUCH RULES, APPLICABLE TO DOMESTIC AND TO IMPORTED PRODUCTS WITHOUT DISTINCTION, MAY BE RECOGNIZED AS BEING NECESSARY IN ORDER TO SATISFY MANDATORY REQUIREMENTS RELATING INTER ALIA TO CONSUMER PROTECTION. IT IS ALSO NECESSARY FOR SUCH RULES TO BE PROPORTIONATE TO THE AIM IN VIEW. IF A MEMBER STATE HAS A CHOICE BETWEEN VARIOUS MEASURES TO ATTAIN THE SAME OBJECTIVE IT SHOULD CHOOSE THE MEANS WHICH LEAST RESTRICTS THE FREE MOVEMENT OF GOODS.

2 . A MEMBER STATE IS NOT ENTITLED - ON THE GROUNDS OF THE REQUIREMENTS OF CONSUMER PROTECTION - TO RESTRICT THE USE OF A DESIGNATION TO PRODUCTS SATISFYING THE REQUIREMENTS OF ITS NATIONAL LEGISLATION . FIRSTLY, CONSUMERS' CONCEPTIONS ARE LIKELY TO VARY FROM ONE MEMBER STATE TO ANOTHER AND TO EVOLVE IN THE COURSE OF TIME WITHIN A MEMBER STATE, AND HENCE THE LEGISLATION OF THAT STATE MUST NOT CRYSTALLIZE GIVEN CONSUMER HABITS SO AS TO CONSOLIDATE AN ADVANTAGE ACQUIRED BY NATIONAL INDUSTRIES CONCERNED TO COMPLY WITH THEM, AND, SECONDLY, A GENERIC DESIGNATION MAY NOT BE RESTRICTED TO PRODUCTS MANUFACTURED IN ACCORDANCE WITH THE RULES IN FORCE IN THAT MEMBER STATE .

3 . WHERE CONSUMERS IN A MEMBER STATE ATTRIBUTE SPECIFIC QUALITIES TO

A PRODUCT MANUFACTURED FROM PARTICULAR RAW MATERIALS, IT IS LEGITIMATE FOR THE MEMBER STATE IN QUESTION TO SEEK TO GIVE CONSUMERS THE INFORMATION WHICH WILL ENABLE THEM TO MAKE THEIR CHOICE IN THE LIGHT OF THAT CONSIDERATION. BUT THE MEANS USED TO THAT END MUST NOT PREVENT THE IMPORTATION OF PRODUCTS WHICH HAVE BEEN LEGALLY MANUFACTURED AND MARKETED IN OTHER MEMBER STATES. WHILST A SYSTEM OF MANDATORY INFORMATION IS PERMISSIBLE, IT MUST NOT ENTAIL NEGATIVE ASSESSMENTS FOR IMPORTED PRODUCTS MANUFACTURED IN ACCORDANCE WITH PROCESSES OTHER THAN THOSE IN USE IN THE IMPORTING MEMBER STATE.

4 . IN VIEW OF THE UNCERTAINTIES AT THE PRESENT STATE OF SCIENTIFIC RESEARCH WITH REGARD TO FOOD ADDITIVES AND OF THE ABSENCE OF HARMONIZATION OF NATIONAL LAW, ARTICLES 30 AND 36 OF THE TREATY DO NOT PREVENT NATIONAL LEGISLATION FROM RESTRICTING THE CONSUMPTION OF ADDITIVES BY SUBJECTING THEIR USE TO PRIOR AUTHORIZATION GRANTED BY A MEASURE OF GENERAL APPLICATION FOR SPECIFIC ADDITIVES, IN RESPECT OF ALL PRODUCTS, FOR CERTAIN PRODUCTS ONLY OR FOR CERTAIN USES.

HOWEVER, IN APPLYING SUCH LEGISLATION TO IMPORTED PRODUCTS CONTAINING ADDITIVES WHICH ARE AUTHORIZED IN THE MEMBER STATE OF PRODUCTION BUT PROHIBITED IN THE MEMBER STATE OF IMPORTATION, THE NATIONAL AUTHORITIES MUST, IN VIEW OF THE PRINCIPLE OF PROPORTIONALITY UNDERLYING THE LAST SENTENCE OF ARTICLE 36 OF THE TREATY, RESTRICT THEMSELVES TO WHAT IS ACTUALLY NECESSARY TO SECURE THE PROTECTION OF PUBLIC HEALTH. ACCORDINGLY THE USE OF A SPECIFIC ADDITIVE WHICH IS AUTHORIZED IN ANOTHER MEMBER STATE MUST BE AUTHORIZED IN THE CASE OF A PRODUCT IMPORTED FROM THAT MEMBER STATE WHERE, IN VIEW, ON THE ONE HAND, OF THE FINDINGS OF INTERNATIONAL SCIENTIFIC RESEARCH, AND IN PARTICULAR OF THE WORK OF THE COMMUNITY' S SCIENTIFIC COMMITTEE FOR FOOD, THE CODEX ALIMENTARIUS COMMITTEE OF THE FAO AND THE WORLD HEALTH ORGANIZATION, AND, ON THE OTHER HAND, OF THE EATING HABITS PREVAILING IN THE IMPORTING MEMBER STATE, THE ADDITIVE IN QUESTION DOES NOT PRESENT A RISK TO PUBLIC HEALTH AND MEETS A REAL NEED, ESPECIALLY A TECHNICAL ONE. THE CONCEPT OF TECHNOLOGICAL NEED MUST BE ASSESSED IN THE LIGHT OF THE RAW MATERIALS UTILIZED AND BEARING IN MIND THE ASSESSMENT MADE BY THE AUTHORITIES OF THE MEMBER STATE WHERE THE PRODUCT WAS MANUFACTURED AND THE FINDINGS OF INTERNATIONAL SCIENTIFIC RESEARCH .

BY VIRTUE OF THE PRINCIPLE OF PROPORTIONALITY, TRADERS MUST ALSO BE ABLE TO APPLY, UNDER A PROCEDURE WHICH IS EASILY ACCESSIBLE TO THEM AND CAN BE CONCLUDED WITHIN A REASONABLE TIME, FOR THE USE OF SPECIFIC ADDITIVES TO BE AUTHORIZED BY A MEASURE OF GENERAL APPLICATION.

IT MUST BE OPEN TO TRADERS TO CHALLENGE BEFORE THE COURTS AN UNJUSTIFIED FAILURE TO GRANT AUTHORIZATION. WITHOUT PREJUDICE TO THE RIGHT OF THE COMPETENT NATIONAL AUTHORITIES OF THE IMPORTING MEMBER STATE TO ASK TRADERS TO PRODUCE THE INFORMATION IN THEIR POSSESSION WHICH MAY BE USEFUL FOR THE PURPOSE OF ASSESSING THE FACTS, IT IS FOR THOSE AUTHORITIES TO DEMONSTRATE THAT THE PROHIBITION IS JUSTIFIED ON GROUNDS RELATING TO THE PROTECTION OF THE HEALTH OF ITS POPULATION.

IN [CASE 178/84](#)

COMMISSION OF THE EUROPEAN COMMUNITIES, REPRESENTED BY R. C. BERAUD, PRINCIPAL

LEGAL ADVISER, AND J. SACK, A MEMBER OF ITS LEGAL DEPARTMENT, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICE OF G . KREMLIS, ALSO A MEMBER OF THE COMMISSION' S LEGAL DEPARTMENT, JEAN MONNET BUILDING, KIRCHBERG,

APPLICANT,

V

FEDERAL REPUBLIC OF GERMANY, REPRESENTED BY M. SEIDEL, MINISTERIALRAT AT THE FEDERAL MINISTRY OF ECONOMIC AFFAIRS, J. DIETRICH, MINISTERIALRAT AT THE FEDERAL MINISTRY OF YOUTH, FAMILY AFFAIRS AND HEALTH, J. SEDEMUND, RECHTSANWALT, COLOGNE, AND R. LUKES, PROFESSOR OF LAW IN THE UNIVERSITY OF MUENSTER, ACTING AS AGENTS, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICE OF THE CHANCELLOR OF THE EMBASSY OF THE FEDERAL REPUBLIC OF GERMANY, 20-22 AVENUE E . REUTER,

DEFENDANT,

CONCERNING THE APPLICATION OF THE "REINHEITSGEBOT" ((PURITY REQUIREMENT)) TO BEERS IMPORTED FROM OTHER MEMBER STATES,

THE COURT

COMPOSED OF : LORD MACKENZIE STUART, PRESIDENT, Y. GALMOT, C. KAKOURIS, T . F. O' HIGGINS AND F. SCHOCKWEILER (PRESIDENTS OF CHAMBERS), G. BOSCO, T. KOOPMANS, O. DUE, U. EVERLING, K. BAHLMANN, R . JOLIET, J. C. MOITINHO DE ALMEIDA AND G. C. RODRIGUEZ IGLESIAS, JUDGES,

ADVOCATE GENERAL : SIR GORDON SLYNN

REGISTRAR : H. A. RUEHL, PRINCIPAL ADMINISTRATOR

HAVING REGARD TO THE REPORT FOR THE HEARING AS SUPPLEMENTED FOLLOWING THE HEARING ON 13 AND 14 MAY 1986,

AFTER HEARING THE OPINION OF THE ADVOCATE GENERAL DELIVERED AT THE SITTING ON 18 SEPTEMBER 1986,

GIVES THE FOLLOWING

JUDGMENT

COSTS

55 UNDER ARTICLE 69 (2) OF THE RULES OF PROCEDURE THE UNSUCCESSFUL PARTY IS TO BE ORDERED TO PAY THE COSTS. SINCE THE FEDERAL REPUBLIC OF GERMANY HAS FAILED IN ITS SUBMISSIONS, IT MUST BE ORDERED TO PAY THE COSTS .

ON THOSE GROUNDS,

THE COURT

HEREBY :

(1) DECLARES THAT, BY PROHIBITING THE MARKETING OF BEERS LAWFULLY MANUFACTURED AND MARKETED IN ANOTHER MEMBER STATE IF THEY DO NOT COMPLY WITH ARTICLES 9 AND 10 OF THE BIERSTEUERGESETZ, THE FEDERAL REPUBLIC OF GERMANY HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLE 30 OF THE EEC TREATY;

(2) ORDERS THE FEDERAL REPUBLIC OF GERMANY TO PAY THE COSTS.

1 BY AN APPLICATION LODGED AT THE COURT REGISTRY ON 6 JULY 1984, THE COMMISSION OF THE EUROPEAN COMMUNITIES HAS BROUGHT AN ACTION UNDER ARTICLE 169 OF THE EEC TREATY FOR A DECLARATION THAT, BY PROHIBITING THE MARKETING OF BEERS LAWFULLY MANUFACTURED AND MARKETED IN ANOTHER MEMBER STATE IF THEY DO NOT COMPLY WITH ARTICLES 9 AND 10 OF THE BIERSTEUERGESETZ (LAW ON BEER DUTY) (LAW OF 14 MARCH 1952, BUNDESGESETZBLATT I, P. 149), THE FEDERAL REPUBLIC OF GERMANY HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLE 30 OF THE EEC TREATY.

2 REFERENCE IS MADE TO THE REPORT FOR THE HEARING FOR THE FACTS OF THE CASE, THE COURSE OF THE PROCEDURE AND THE ARGUMENTS OF THE PARTIES, WHICH ARE MENTIONED OR DISCUSSED HEREINAFTER ONLY IN SO FAR AS IS NECESSARY FOR THE REASONING OF THE COURT.

THE APPLICABLE NATIONAL LAW

3 IN THE COURSE OF THE PROCEEDINGS BEFORE THE COURT, THE GERMAN GOVERNMENT GAVE THE FOLLOWING ACCOUNT OF ITS LEGISLATION ON BEER, WHICH WAS NOT CONTESTED BY THE COMMISSION AND IS TO BE ACCEPTED FOR THE PURPOSES OF THESE PROCEEDINGS.

4 AS FAR AS THE PRESENT PROCEEDINGS ARE CONCERNED, THE BIERSTEUERGESETZ COMPRISES, ON THE ONE HAND, MANUFACTURING RULES WHICH APPLY AS SUCH ONLY TO BREWERIES IN THE FEDERAL REPUBLIC OF GERMANY AND, ON THE OTHER, RULES ON THE UTILIZATION OF THE DESIGNATION "BIER" (BEER), WHICH APPLY BOTH TO BEER BREWED IN THE FEDERAL REPUBLIC OF GERMANY AND TO IMPORTED BEER.

5 THE RULES GOVERNING THE MANUFACTURE OF BEER ARE SET OUT IN ARTICLE 9 OF THE BIERSTEUERGESETZ. ARTICLE 9 (1) PROVIDES THAT BOTTOM-FERMENTED BEERS MAY BE MANUFACTURED ONLY FROM MALTED BARLEY, HOPS, YEAST AND WATER. ARTICLE 9 (2) LAYS DOWN THE SAME REQUIREMENTS WITH REGARD TO THE MANUFACTURE OF TOP-FERMENTED BEER BUT AUTHORIZES THE USE OF OTHER MALTS, TECHNICALLY PURE CANE SUGAR, BEET SUGAR OR INVERT SUGAR AND GLUCOSE AND COLOURANTS OBTAINED FROM THOSE SUGARS. ARTICLE 9 (3) STATES THAT MALT MEANS ANY CEREAL ARTIFICIALLY GERMINATED . IT MUST BE NOTED IN THAT CONNECTION THAT UNDER ARTICLE 17 (4) OF THE DURCHFUEHRUNGSBESTIMMUNGEN ZUM BIERSTEUERGESETZ (IMPLEMENTING PROVISIONS TO THE BIERSTEUERGESETZ) OF 14 MARCH 1952 (BUNDESGESETZBLATT I, P. 153) RICE, MAIZE AND SORGHUM ARE NOT TREATED AS CEREALS FOR THE PURPOSES OF ARTICLE 9 (3) OF THE BIERSTEUERGESETZ. UNDER ARTICLE 9 (7) OF THE BIERSTEUERGESETZ, DEROGATIONS FROM THE MANUFACTURING RULES LAID DOWN IN ARTICLE 9 (1) AND (2) MAY BE GRANTED ON APPLICATION IN SPECIFIC CASES IN RESPECT OF THE MANUFACTURE OF SPECIAL BEERS, BEER INTENDED FOR EXPORT OR BEER INTENDED FOR SCIENTIFIC EXPERIMENTS. IN ADDITION, UNDER ARTICLE 9 (8), ARTICLE 9 (1) AND (2) DO NOT APPLY TO BREWERIES MAKING BEER FOR CONSUMPTION ON THEIR PREMISES (HAUSBRAUER). UNDER ARTICLE 18 (1) (1) OF THE BIERSTEUERGESETZ FINES MAY BE IMPOSED FOR CONTRAVENTIONS OF THE MANUFACTURING RULES SET OUT IN ARTICLE 9.

6 THE RULES ON THE COMMERCIAL UTILIZATION OF THE DESIGNATION "BIER" ARE SET OUT IN ARTICLE 10 OF THE BIERSTEUERGESETZ. UNDER THAT PROVISION ONLY FERMENTED BEVERAGES SATISFYING THE REQUIREMENTS SET OUT IN ARTICLE 9 (1), (2), (4), (5) AND (6) OF THE BIERSTEUERGESETZ MAY BE MARKETED UNDER THE DESIGNATION "BIER" - STANDING ALONE OR AS PART OF A COMPOUND DESIGNATION - OR UNDER OTHER DESIGNATIONS, OR WITH PICTORIAL REPRESENTATIONS, GIVING

THE IMPRESSION THAT THE BEVERAGE IN QUESTION IS BEER. ARTICLE 10 OF THE BIERSTEUERGESETZ ENTAILS MERELY A PARTIAL PROHIBITION ON MARKETING IN SO FAR AS BEVERAGES NOT MANUFACTURED IN CONFORMITY WITH THE AFOREMENTIONED MANUFACTURING RULES MAY BE SOLD UNDER OTHER DESIGNATIONS, PROVIDED THAT THOSE DESIGNATIONS DO NOT OFFEND AGAINST THE RESTRICTIONS LAID DOWN IN THAT PROVISION. CONTRAVENTIONS OF THE RULES ON DESIGNATION MAY GIVE RISE TO A FINE UNDER ARTICLE 18 (1) (4) OF THE BIERSTEUERGESETZ.

7 IMPORTS INTO THE FEDERAL REPUBLIC OF GERMANY OF BEERS CONTAINING ADDITIVES WILL ALSO BE CONFRONTED BY THE ABSOLUTE PROHIBITION ON MARKETING IN ARTICLE 11 (1) (2) OF THE GESETZ UEBER DEN VERKEHR MIT LEBENSMITTELN, TABAKERZEUGNISSEN, KOSMETISCHEN MITTELN UND SONSTIGEN BEDARFSGEGENSTAENDEN (LAW ON FOODSTUFFS, TOBACCO PRODUCTS, COSMETICS AND OTHER CONSUMER GOODS), HEREINAFTER REFERRED TO AS THE "FOODSTUFFS LAW", OF 15 AUGUST 1974 (BUNDESGESETZBLATT I, P.*1945).

8 UNDER THE FOODSTUFFS LAW, WHICH IS BASED ON CONSIDERATIONS OF PREVENTIVE HEALTH PROTECTION, ALL ADDITIVES ARE IN PRINCIPLE PROHIBITED, UNLESS THEY HAVE BEEN AUTHORIZED. ARTICLE 2 OF THE LAW DEFINES ADDITIVES AS "SUBSTANCES WHICH ARE INTENDED TO BE ADDED TO FOODSTUFFS IN ORDER TO ALTER THEIR CHARACTERISTICS OR TO GIVE THEM SPECIFIC PROPERTIES OR PRODUCE SPECIFIC EFFECTS". IT DOES NOT COVER "SUBSTANCES WHICH ARE OF NATURAL ORIGIN OR ARE CHEMICALLY IDENTICAL TO NATURAL SUBSTANCES AND WHICH, ACCORDING TO GENERAL TRADE USAGE, ARE MAINLY USED ON ACCOUNT OF THEIR NUTRITIONAL, OLFATORY OR GUSTATORY VALUE OR AS STIMULANTS, AND DRINKING AND TABLE WATER".

9 ARTICLE 11 (1) (1) OF THE FOODSTUFFS LAW PROHIBITS THE USE OF UNAUTHORIZED ADDITIVES, WHETHER PURE OR MIXED WITH OTHER SUBSTANCES, FOR THE MANUFACTURE OR PROCESSING BY WAY OF TRADE OF FOODSTUFFS INTENDED TO BE MARKETED. ARTICLE 11 (2) (1) AND ARTICLE 11 (3) PROVIDE THAT THAT PROHIBITION DOES NOT COVER PROCESSING AIDS OR ENZYMES. ARTICLE 11 (2) (1) DEFINES PROCESSING AIDS AS "ADDITIVES WHICH ARE ELIMINATED FROM THE FOODSTUFF ALTOGETHER OR TO SUCH AN EXTENT THAT THEY... ARE PRESENT IN THE PRODUCT FOR SALE TO THE CONSUMER ... ONLY AS TECHNICALLY UNAVOIDABLE AND TECHNOLOGICALLY INSIGNIFICANT RESIDUES IN AMOUNTS WHICH ARE NEGLIGIBLE FROM THE POINT OF VIEW OF HEALTH, ODOUR AND TASTE".

10 ARTICLE 11 (1) (2) OF THE FOODSTUFFS LAW PROHIBITS THE MARKETING BY WAY OF TRADE OF PRODUCTS MANUFACTURED OR PROCESSED IN CONTRAVENTION OF ARTICLE 11 (1) (1) OR NOT CONFORMING WITH A REGULATION ISSUED PURSUANT TO ARTICLE 12 (1). UNDER ARTICLE 12 (1) A MINISTERIAL REGULATION APPROVED BY THE BUNDESRAT MAY AUTHORIZE THE USE OF CERTAIN ADDITIVES FOR GENERAL USE, FOR USE IN SPECIFIC FOODSTUFFS OR FOR SPECIFIC APPLICATIONS PROVIDED THAT IT IS COMPATIBLE WITH CONSUMER PROTECTION FROM THE POINT OF VIEW OF TECHNOLOGICAL, NUTRITIONAL AND DIETARY REQUIREMENTS. THE RELEVANT AUTHORIZATIONS ARE SET OUT IN THE ANNEXES TO THE VERORDNUNG UEBER DIE ZULASSUNG VON ZUSATZSTOFFEN ZU LEBENSMITTELN (REGULATION ON THE AUTHORIZATION OF ADDITIVES IN FOODSTUFFS) OF 22 DECEMBER 1981 (BUNDESGESETZBLATT I, P.*1633), HEREINAFTER REFERRED TO AS "THE REGULATION ON ADDITIVES".

11 AS A FOODSTUFF, BEER IS SUBJECT TO THE LEGISLATION ON ADDITIVES, BUT IT IS GOVERNED BY SPECIAL RULES. THE RULES ON MANUFACTURE IN ARTICLE 9

OF THE BIERSTEUERGESETZ PRECLUDE THE USE OF ANY SUBSTANCES, INCLUDING ADDITIVES, OTHER THAN THOSE LISTED THEREIN. AS A RESULT, THOSE RULES CONSTITUTE SPECIFIC PROVISIONS ON ADDITIVES WITHIN THE MEANING OF ARTICLE 1 (3) OF THE REGULATION ON ADDITIVES. THAT PARAGRAPH PROVIDES THAT THE REGULATION ON ADDITIVES IS TO BE WITHOUT PREJUDICE TO ANY CONTRARY PROVISIONS PROHIBITING, RESTRICTING OR AUTHORIZING THE USE OF ADDITIVES IN PARTICULAR FOODSTUFFS. IN THIS WAY, ADDITIVES AUTHORIZED FOR GENERAL USE OR FOR SPECIFIC USES IN THE ANNEXES TO THE REGULATION ON ADDITIVES MAY NOT BE USED IN THE MANUFACTURE OF BEER. HOWEVER, THAT EXCEPTION APPLIES ONLY TO SUBSTANCES WHICH ARE ADDITIVES WITHIN THE MEANING OF THE LAW ON FOODSTUFFS AND WHOSE USE IS NOT COVERED BY AN EXCEPTION LAID DOWN IN THE FOODSTUFFS LAW ITSELF, WHICH WAS ENACTED AFTER THE BIERSTEUERGESETZ. CONSEQUENTLY, THE PROHIBITION ON THE USE OF ADDITIVES IN BEER DOES NOT COVER PROCESSING AIDS OR ENZYMES.

12 AS A RESULT, ARTICLE 11 (1) (2) OF THE FOODSTUFFS LAW, IN CONJUNCTION WITH ARTICLE 9 OF THE BIERSTEUERGESETZ, HAS THE EFFECT OF PROHIBITING THE IMPORTATION INTO THE FEDERAL REPUBLIC OF GERMANY OF BEERS CONTAINING SUBSTANCES COVERED BY THE BAN ON THE USE OF ADDITIVES LAID DOWN BY ARTICLE 11 (1) (1) OF THE FOODSTUFFS LAW.

THE SUBJECT-MATTER OF THE PROCEEDINGS

13 IT MUST FIRST BE ESTABLISHED WHETHER THE PROCEEDINGS ARE LIMITED TO THE PROHIBITION OF THE MARKETING UNDER THE DESIGNATION "BIER" OF BEER MANUFACTURED IN OTHER MEMBER STATES IN ACCORDANCE WITH RULES INCONSISTENT WITH ARTICLE 9 OF THE BIERSTEUERGESETZ OR WHETHER THEY EXTEND TO THE BAN ON THE IMPORTATION OF BEER CONTAINING ADDITIVES WHICH ARE AUTHORIZED IN THE MEMBER STATE OF ORIGIN BUT PROHIBITED IN THE FEDERAL REPUBLIC OF GERMANY.

14 IN ITS LETTER GIVING THE FEDERAL REPUBLIC OF GERMANY FORMAL NOTICE, THE COMMISSION'S OBJECTIONS WERE DIRECTED AGAINST ARTICLES 9 AND 10 OF THE BIERSTEUERGESETZ IN SO FAR AS THEY PRECLUDED THE IMPORTATION INTO THE FEDERAL REPUBLIC OF GERMANY OF BEERS WHICH, ALTHOUGH LAWFULLY MANUFACTURED IN OTHER MEMBER STATES, HAD NOT BEEN BREWED IN CONFORMITY WITH THE RULES APPLICABLE IN THE FEDERAL REPUBLIC OF GERMANY. THE COMMISSION TOOK THE VIEW THAT THAT MARKETING PROHIBITION COULD NOT BE JUSTIFIED ON GROUNDS OF THE PUBLIC INTEREST RELATING TO THE PROTECTION OF CONSUMERS OR THE SAFEGUARDING OF PUBLIC HEALTH.

15 IN ITS REPLY TO THAT LETTER THE GERMAN GOVERNMENT ARGUED THAT THE REINHEITSGEBOT WAS VITAL IN ORDER TO SAFEGUARD PUBLIC HEALTH: IF BEER WAS MANUFACTURED USING ONLY THE RAW MATERIALS LISTED IN ARTICLE 9 OF THE BIERSTEUERGESETZ THE USE OF ADDITIVES COULD BE AVOIDED. IN A SUPPLEMENTARY LETTER DATED 15 DECEMBER 1982 TO A MEMBER OF THE COMMISSION, THE GERMAN GOVERNMENT REPEATED THAT ARGUMENT AND MADE IT CLEAR THAT THE REQUIREMENT TO USE ONLY THE RAW MATERIALS LISTED IN ARTICLE 9 OF THE BIERSTEUERGESETZ INCLUDED THE PROHIBITION OF THE USE OF ADDITIVES, WHICH WAS DESIGNED TO PROTECT PUBLIC HEALTH.

16 IN ITS REASONED OPINION THE COMMISSION ADHERED TO ITS POINT OF VIEW. IT CONSIDERED THAT THE FACT THAT BEER BREWED ACCORDING TO THE GERMAN TRADITION OF THE REINHEITSGEBOT COULD BE MANUFACTURED WITHOUT ADDITIVES DID NOT SIGNIFY GENERALLY THAT THERE WAS NO TECHNOLOGICAL NECESSITY FOR

THE USE OF ADDITIVES IN BEER BREWED ACCORDING TO OTHER TRADITIONS OR USING OTHER RAW MATERIALS. THE QUESTION OF THE TECHNOLOGICAL NECESSITY FOR THE USE OF ADDITIVES COULD BE DECIDED ONLY IN THE LIGHT OF THE MANUFACTURING METHODS EMPLOYED AND IN RELATION TO SPECIFIC ADDITIVES.

17 IN ITS REPLY TO THE REASONED OPINION THE GERMAN GOVERNMENT REITERATED ITS ARGUMENTS RELATING TO PREVENTIVE HEALTH PROTECTION WHICH, IN ITS VIEW, JUSTIFIED THE PROVISIONS IN ARTICLES 9 AND 10 OF THE BIERSTEUERGESETZ. HOWEVER, IT DID NOT ELUCIDATE THE EXACT SCOPE OF THAT LEGISLATION OR ITS RELATIONSHIP WITH THE RULES ON ADDITIVES.

18 IN THE STATEMENT OF THE GROUNDS IT RELIES ON IN ITS APPLICATION, THE COMMISSION COMPLAINS OF THE BARRIERS TO IMPORTS RESULTING FROM THE APPLICATION OF THE BIERSTEUERGESETZ TO BEERS MANUFACTURED IN OTHER MEMBER STATES FROM OTHER RAW MATERIALS OR USING ADDITIVES AUTHORIZED IN THOSE STATES.

19 IT WAS ONLY WHEN IT SUBMITTED ITS DEFENCE THAT THE GERMAN GOVERNMENT STATED THAT THE RULES ON THE PURITY OF BEER WERE CONTAINED IN TWO SEPARATE BUT COMPLEMENTARY PIECES OF LEGISLATION, AND PROVIDED THE DESCRIPTION OF ITS LEGISLATION WHICH IS GIVEN ABOVE.

20 IN ITS REPLY THE COMMISSION SET OUT ITS SEPARATE OBJECTIONS TO THE RULES ON DESIGNATION IN ARTICLE 10 OF THE BIERSTEUERGESETZ AND TO THE ABSOLUTE BAN ON ADDITIVES IN BEER. IN THE COMMISSION' S VIEW, THE GERMAN GOVERNMENT' S COMPREHENSIVE DESCRIPTION OF THE APPLICABLE LAW DOES NOT FUNDAMENTALLY ALTER THE FACTS UNDERLYING THIS CASE. THE COMMISSION STRESSES THAT ITS APPLICATION IS NOT AIMED EXCLUSIVELY AT ARTICLES 9 AND 10 OF THE BIERSTEUERGESETZ BUT GENERALLY AT THE PROHIBITION ON THE MARKETING OF BEER FROM OTHER MEMBER STATES WHICH DOES NOT SATISFY THE MANUFACTURING CRITERIA SET OUT IN THOSE PROVISIONS . IN ITS OPINION, THE PRECISE STATUTORY BASIS FOR THAT PROHIBITION IS OF NO IMPORTANCE.

21 IN THOSE CIRCUMSTANCES THERE ARE TWO REASONS WHY IT MUST BE CONSIDERED THAT THE APPLICATION IS DIRECTED BOTH AGAINST THE PROHIBITION ON THE MARKETING UNDER THE DESIGNATION "BIER" OF BEERS MANUFACTURED IN OTHER MEMBER STATES IN ACCORDANCE WITH RULES NOT CORRESPONDING TO THOSE IN ARTICLE 9 OF THE BIERSTEUERGESETZ, AND AGAINST THE PROHIBITION ON THE IMPORTATION OF BEERS CONTAINING ADDITIVES WHOSE USE IS AUTHORIZED IN THE MEMBER STATE OF ORIGIN BUT FORBIDDEN IN THE FEDERAL REPUBLIC OF GERMANY.

22 IN THE FIRST PLACE, THE COMMISSION IDENTIFIED THE SUBSTANCE OF THE INFRINGEMENT FROM THE OUTSET IN SO FAR AS FROM THE BEGINNING OF THE PRE-LITIGATION PROCEDURE IT CHALLENGED THE PROHIBITION ON MARKETING BEER IMPORTED INTO THE FEDERAL REPUBLIC OF GERMANY FROM OTHER MEMBER STATES WHICH IS NOT BREWED IN ACCORDANCE WITH THE RULES IN FORCE IN THE FEDERAL REPUBLIC OF GERMANY. IT REFERRED TO ARTICLE 9 OF THE BIERSTEUERGESETZ ONLY IN ORDER TO SPECIFY THOSE RULES MORE PRECISELY . AS THE GERMAN GOVERNMENT STATED, THE SCOPE OF ARTICLE 9 IS NOT RESTRICTED TO RAW MATERIALS BUT ALSO COVERS ADDITIVES. BESIDES, THE ARGUMENTS DEVELOPED BY THE COMMISSION DURING THE PRE-LITIGATION PROCEDURE TO THE EFFECT THAT AN ABSOLUTE BAN ON ADDITIVES IS INAPPROPRIATE SHOW THAT IT INTENDED ITS ACTION TO COVER THAT PROHIBITION .

23 IN THE SECOND PLACE, IT MUST BE OBSERVED THAT, FROM THE START OF THE PROCEDURE, THE GERMAN GOVERNMENT ITSELF RAISED IN ITS DEFENCE MAINLY ARGUMENTS CONCERNING ADDITIVES AND THE PROTECTION OF PUBLIC HEALTH, WHICH SHOWS THAT IT UNDERSTOOD AND ACKNOWLEDGED THAT THE SUBJECT-MATTER OF THE PROCEEDINGS ALSO COVERED THE ABSOLUTE BAN ON THE USE OF ADDITIVES AND MAKES IT CLEAR THAT IT HAS NOT BEEN DENIED THE RIGHT TO A FAIR HEARING IN THAT RESPECT.

THE PROHIBITION ON THE MARKETING UNDER THE DESIGNATION "BIER" OF BEERS NOT COMPLYING WITH THE REQUIREMENTS OF ARTICLE 9 OF THE BIERSTEUERGESETZ

24 IT MUST BE NOTED IN THE FIRST PLACE THAT THE PROVISION ON THE MANUFACTURE OF BEER SET OUT IN ARTICLE 9 OF THE BIERSTEUERGESETZ CANNOT IN ITSELF CONSTITUTE A MEASURE HAVING AN EFFECT EQUIVALENT TO A QUANTITATIVE RESTRICTION ON IMPORTS CONTRARY TO ARTICLE 30 OF THE EEC TREATY, SINCE IT APPLIES ONLY TO BREWERIES IN THE FEDERAL REPUBLIC OF GERMANY . ARTICLE 9 OF THE BIERSTEUERGESETZ IS AT ISSUE IN THIS CASE ONLY IN SO FAR AS ARTICLE 10 OF THAT LAW, WHICH COVERS BOTH PRODUCTS IMPORTED FROM OTHER MEMBER STATES AND PRODUCTS MANUFACTURED IN GERMANY, REFERS THERETO IN ORDER TO DETERMINE THE BEVERAGES WHICH MAY BE MARKETED UNDER THE DESIGNATION "BIER".

25 AS FAR AS THOSE RULES ON DESIGNATION ARE CONCERNED, THE COMMISSION CONCEDES THAT AS LONG AS HARMONIZATION HAS NOT BEEN ACHIEVED AT COMMUNITY LEVEL THE MEMBER STATES HAVE THE POWER IN PRINCIPLE TO LAY DOWN RULES GOVERNING THE MANUFACTURE, THE COMPOSITION AND THE MARKETING OF BEVERAGES. IT STRESSES, HOWEVER, THAT RULES WHICH, LIKE ARTICLE 10 OF THE BIERSTEUERGESETZ, PROHIBIT THE USE OF A GENERIC DESIGNATION FOR THE MARKETING OF PRODUCTS MANUFACTURED PARTLY FROM RAW MATERIALS, SUCH AS RICE AND MAIZE, OTHER THAN THOSE WHOSE USE IS PRESCRIBED IN THE NATIONAL TERRITORY ARE CONTRARY TO COMMUNITY LAW . IN ANY EVENT, SUCH RULES GO BEYOND WHAT IS NECESSARY IN ORDER TO PROTECT THE GERMAN CONSUMER, SINCE THAT COULD BE DONE SIMPLY BY MEANS OF LABELLING OR NOTICES. THOSE RULES THEREFORE CONSTITUTE AN IMPEDIMENT TO TRADE CONTRARY TO ARTICLE 30 OF THE EEC TREATY.

26 THE GERMAN GOVERNMENT HAS FIRST SOUGHT TO JUSTIFY ITS RULES ON PUBLIC-HEALTH GROUNDS. IT MAINTAINS THAT THE USE OF RAW MATERIALS OTHER THAN THOSE PERMITTED BY ARTICLE 9 OF THE BIERSTEUERGESETZ WOULD INEVITABLY ENTAIL THE USE OF ADDITIVES. HOWEVER, AT THE HEARING THE GERMAN GOVERNMENT CONCEDED THAT ARTICLE 10 OF THE BIERSTEUERGESETZ, WHICH IS MERELY A RULE ON DESIGNATION, WAS EXCLUSIVELY INTENDED TO PROTECT CONSUMERS. IN ITS VIEW, CONSUMERS ASSOCIATE THE DESIGNATION "BIER" WITH A BEVERAGE MANUFACTURED FROM ONLY THE RAW MATERIALS LISTED IN ARTICLE 9 OF THE BIERSTEUERGESETZ. CONSEQUENTLY, IT IS NECESSARY TO PREVENT THEM FROM BEING MISLED AS TO THE NATURE OF THE PRODUCT BY BEING LED TO BELIEVE THAT A BEVERAGE CALLED "BIER" COMPLIES WITH THE REINHEITSGEBOT WHEN THAT IS NOT THE CASE. THE GERMAN GOVERNMENT MAINTAINS THAT ITS RULES ARE NOT PROTECTIONIST IN AIM. IT STRESSES IN THAT REGARD THAT THE RAW MATERIALS WHOSE USE IS SPECIFIED IN ARTICLE 9 (1) AND (2) OF THE BIERSTEUERGESETZ ARE NOT NECESSARILY OF NATIONAL ORIGIN . ANY TRADER MARKETING PRODUCTS SATISFYING THE PRESCRIBED RULES IS FREE TO USE THE DESIGNATION "BIER" AND THOSE RULES CAN READILY BE COMPLIED WITH OUTSIDE THE FEDERAL REPUBLIC OF GERMANY.

27 ACCORDING TO A CONSISTENT LINE OF DECISIONS OF THE COURT (ABOVE ALL,

THE JUDGMENT OF 11 JULY 1974 IN CASE 8/74 PROCUREUR DU ROI V DASSONVILLE ((1974)) ECR 837) THE PROHIBITION OF MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE RESTRICTIONS UNDER ARTICLE 30 OF THE EEC TREATY COVERS "ALL TRADING RULES ENACTED BY MEMBER STATES WHICH ARE CAPABLE OF HINDERING, DIRECTLY OR INDIRECTLY, ACTUALLY OR POTENTIALLY, INTRA-COMMUNITY TRADE ".

28 THE COURT HAS ALSO CONSISTENTLY HELD (IN PARTICULAR IN THE JUDGMENT OF 20 FEBRUARY 1979 IN CASE 120/78 REWE-ZENTRAL AG V BUNDESMONOPOLVERWALTUNG ((1979)) ECR 649, AND THE JUDGMENT OF 10 NOVEMBER 1982 IN CASE 261/81 WALTER RAU LEBENSMITTELWERKE V DE SMEDT ((1982)) ECR 3961) THAT "IN THE ABSENCE OF COMMON RULES RELATING TO THE MARKETING OF THE PRODUCTS CONCERNED, OBSTACLES TO FREE MOVEMENT WITHIN THE COMMUNITY RESULTING FROM DISPARITIES BETWEEN THE NATIONAL LAWS MUST BE ACCEPTED IN SO FAR AS SUCH RULES, APPLICABLE TO DOMESTIC AND TO IMPORTED PRODUCTS WITHOUT DISTINCTION, MAY BE RECOGNIZED AS BEING NECESSARY IN ORDER TO SATISFY MANDATORY REQUIREMENTS RELATING INTER ALIA TO CONSUMER PROTECTION. IT IS ALSO NECESSARY FOR SUCH RULES TO BE PROPORTIONATE TO THE AIM IN VIEW. IF A MEMBER STATE HAS A CHOICE BETWEEN VARIOUS MEASURES TO ATTAIN THE SAME OBJECTIVE IT SHOULD CHOOSE THE MEANS WHICH LEAST RESTRICTS THE FREE MOVEMENT OF GOODS ".

29 IT IS NOT CONTESTED THAT THE APPLICATION OF ARTICLE 10 OF THE BIERSTEUERGESETZ TO BEERS FROM OTHER MEMBER STATES IN WHOSE MANUFACTURE RAW MATERIALS OTHER THAN MALTED BARLEY HAVE BEEN LAWFULLY USED, IN PARTICULAR RICE AND MAIZE, IS LIABLE TO CONSTITUTE AN OBSTACLE TO THEIR IMPORTATION INTO THE FEDERAL REPUBLIC OF GERMANY.

30 ACCORDINGLY, IT MUST BE ESTABLISHED WHETHER THE APPLICATION OF THAT PROVISION MAY BE JUSTIFIED BY IMPERATIVE REQUIREMENTS RELATING TO CONSUMER PROTECTION.

31 THE GERMAN GOVERNMENT' S ARGUMENT THAT ARTICLE 10 OF THE BIERSTEUERGESETZ IS ESSENTIAL IN ORDER TO PROTECT GERMAN CONSUMERS BECAUSE, IN THEIR MINDS, THE DESIGNATION "BIER" IS INSEPARABLY LINKED TO THE BEVERAGE MANUFACTURED SOLELY FROM THE INGREDIENTS LAID DOWN IN ARTICLE 9 OF THE BIERSTEUERGESETZ MUST BE REJECTED.

32 FIRSTLY, CONSUMERS' CONCEPTIONS WHICH VARY FROM ONE MEMBER STATE TO THE OTHER ARE ALSO LIKELY TO EVOLVE IN THE COURSE OF TIME WITHIN A MEMBER STATE. THE ESTABLISHMENT OF THE COMMON MARKET IS, IT SHOULD BE ADDED, ONE OF THE FACTORS THAT MAY PLAY A MAJOR CONTRIBUTORY ROLE IN THAT DEVELOPMENT. WHEREAS RULES PROTECTING CONSUMERS AGAINST MISLEADING PRACTICES ENABLE SUCH A DEVELOPMENT TO BE TAKEN INTO ACCOUNT, LEGISLATION OF THE KIND CONTAINED IN ARTICLE 10 OF THE BIERSTEUERGESETZ PREVENTS IT FROM TAKING PLACE. AS THE COURT HAS ALREADY HELD IN ANOTHER CONTEXT (JUDGMENT OF 27 FEBRUARY 1980 IN CASE 170/78 COMMISSION V UNITED KINGDOM ((1980)) ECR 417), THE LEGISLATION OF A MEMBER STATE MUST NOT "CRYSTALLIZE GIVEN CONSUMER HABITS SO AS TO CONSOLIDATE AN ADVANTAGE ACQUIRED BY NATIONAL INDUSTRIES CONCERNED TO COMPLY WITH THEM ".

33 SECONDLY, IN THE OTHER MEMBER STATES OF THE COMMUNITY THE DESIGNATIONS CORRESPONDING TO THE GERMAN DESIGNATION "BIER" ARE GENERIC DESIGNATIONS FOR A FERMENTED BEVERAGE MANUFACTURED FROM MALTED BARLEY, WHETHER MALTED

BARLEY ON ITS OWN OR WITH THE ADDITION OF RICE OR MAIZE . THE SAME APPROACH IS TAKEN IN COMMUNITY LAW AS AN BE SEEN FROM HEADING NO 22.03 OF THE COMMON CUSTOMS TARIFF. THE GERMAN LEGISLATURE ITSELF UTILIZES THE DESIGNATION "BIER" IN THAT WAY IN ARTICLE 9 (7) AND (8) OF THE BIERSTEUERGESETZ IN ORDER TO REFER TO BEVERAGES NOT COMPLYING WITH THE MANUFACTURING RULES LAID DOWN IN ARTICLE 9 (1) AND (2).

34 THE GERMAN DESIGNATION "BIER" AND ITS EQUIVALENTS IN THE LANGUAGES OF THE OTHER MEMBER STATES OF THE COMMUNITY MAY THEREFORE NOT BE RESTRICTED TO BEERS MANUFACTURED IN ACCORDANCE WITH THE RULES IN FORCE IN THE FEDERAL REPUBLIC OF GERMANY.

35 IT IS ADMITTEDLY LEGITIMATE TO SEEK TO ENABLE CONSUMERS WHO ATTRIBUTE SPECIFIC QUALITIES TO BEERS MANUFACTURED FROM PARTICULAR RAW MATERIALS TO MAKE THEIR CHOICE IN THE LIGHT OF THAT CONSIDERATION. HOWEVER, AS THE COURT HAS ALREADY EMPHASIZED (JUDGMENT OF 9 DECEMBER 1981 IN CASE 193/80 COMMISSION V ITALY ((1981)) ECR 3019), THAT POSSIBILITY MAY BE ENSURED BY MEANS WHICH DO NOT PREVENT THE IMPORTATION OF PRODUCTS WHICH HAVE BEEN LAWFULLY MANUFACTURED AND MARKETED IN OTHER MEMBER STATES AND, IN PARTICULAR, "BY THE COMPULSORY AFFIXING OF SUITABLE LABELS GIVING THE NATURE OF THE PRODUCT SOLD ". BY INDICATING THE RAW MATERIALS UTILIZED IN THE MANUFACTURE OF BEER "SUCH A COURSE WOULD ENABLE THE CONSUMER TO MAKE HIS CHOICE IN FULL KNOWLEDGE OF THE FACTS AND WOULD GUARANTEE TRANSPARENCY IN TRADING AND IN OFFERS TO THE PUBLIC ". IT MUST BE ADDED THAT SUCH A SYSTEM OF MANDATORY CONSUMER INFORMATION MUST NOT ENTAIL NEGATIVE ASSESSMENTS FOR BEERS NOT COMPLYING WITH THE REQUIREMENTS OF ARTICLE 9 OF THE BIERSTEUERGESETZ.

36 CONTRARY TO THE GERMAN GOVERNMENT' S VIEW, SUCH A SYSTEM OF CONSUMER INFORMATION MAY OPERATE PERFECTLY WELL EVEN IN THE CASE OF A PRODUCT WHICH, LIKE BEER, IS NOT NECESSARILY SUPPLIED TO CONSUMERS IN BOTTLES OR IN CANS CAPABLE OF BEARING THE APPROPRIATE DETAILS. THAT IS BORNE OUT, ONCE AGAIN, BY THE GERMAN LEGISLATION ITSELF. ARTICLE 26 (1) AND (2) OF THE AFOREMENTIONED REGULATION IMPLEMENTING THE BIERSTEUERGESETZ PROVIDES FOR A SYSTEM OF CONSUMER INFORMATION IN RESPECT OF CERTAIN BEERS, EVEN WHERE THOSE BEERS ARE SOLD ON DRAUGHT, WHEN THE REQUISITE INFORMATION MUST APPEAR ON THE CASKS OR THE BEER TAPS .

37 IT FOLLOWS FROM THE FOREGOING THAT BY APPLYING THE RULES ON DESIGNATION IN ARTICLE 10 OF THE BIERSTEUERGESETZ TO BEERS IMPORTED FROM OTHER MEMBER STATES WHICH WERE MANUFACTURED AND MARKETED LAWFULLY IN THOSE STATES THE FEDERAL REPUBLIC OF GERMANY HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLE 30 OF THE EEC TREATY.

THE ABSOLUTE BAN ON THE MARKETING OF BEERS CONTAINING ADDITIVES

38 IN THE COMMISSION' S OPINION THE ABSOLUTE BAN ON THE MARKETING OF BEERS CONTAINING ADDITIVES CANNOT BE JUSTIFIED ON PUBLIC-HEALTH GROUNDS . IT MAINTAINS THAT THE OTHER MEMBER STATES CONTROL VERY STRICTLY THE UTILIZATION OF ADDITIVES IN FOODSTUFFS AND DO NOT AUTHORIZE THE USE OF ANY GIVEN ADDITIVE UNTIL THOROUGH TESTS HAVE ESTABLISHED THAT IT IS HARMLESS. IN THE COMMISSION' S VIEW, THERE SHOULD BE A PRESUMPTION THAT BEERS MANUFACTURED IN OTHER MEMBER STATES WHICH CONTAIN ADDITIVES AUTHORIZED THERE REPRESENT NO DANGER TO PUBLIC HEALTH . THE COMMISSION ARGUES THAT IF THE FEDERAL REPUBLIC

OF GERMANY WISHES TO OPPOSE THE IMPORTATION OF SUCH BEERS THEN IT BEARS THE ONUS OF PROVING THAT SUCH BEERS ARE A DANGER TO PUBLIC HEALTH. THE COMMISSION CONSIDERS THAT IN THIS CASE THAT BURDEN OF PROOF HAS NOT BEEN DISCHARGED. IN ANY EVENT, THE RULES ON ADDITIVES APPLYING TO BEER IN THE FEDERAL REPUBLIC OF GERMANY ARE DISPROPORTIONATE IN SO FAR AS THEY COMPLETELY PRECLUDE THE USE OF ADDITIVES WHEREAS THE RULES FOR OTHER BEVERAGES, SUCH AS SOFT DRINKS, ARE MUCH MORE FLEXIBLE.

39 FOR ITS PART, THE GERMAN GOVERNMENT CONSIDERS THAT IN VIEW OF THE DANGERS RESULTING FROM THE UTILIZATION OF ADDITIVES WHOSE LONG-TERM EFFECTS ARE NOT YET KNOWN AND IN PARTICULAR OF THE RISKS RESULTING FROM THE ACCUMULATION OF ADDITIVES IN THE ORGANISM AND THEIR INTERACTION WITH OTHER SUBSTANCES, SUCH AS ALCOHOL, IT IS NECESSARY TO MINIMIZE THE QUANTITY OF ADDITIVES INGESTED. SINCE BEER IS A FOODSTUFF OF WHICH LARGE QUANTITIES ARE CONSUMED IN GERMANY, THE GERMAN GOVERNMENT CONSIDERS THAT IT IS PARTICULARLY DESIRABLE TO PROHIBIT THE USE OF ANY ADDITIVE IN ITS MANUFACTURE, ESPECIALLY IN SO FAR AS THE USE OF ADDITIVES IS NOT TECHNOLOGICALLY NECESSARY AND CAN BE AVOIDED IF ONLY THE INGREDIENTS LAID DOWN IN THE BIERSTEUERGESETZ ARE USED . IN THOSE CIRCUMSTANCES, THE GERMAN RULES ON ADDITIVES IN BEER ARE FULLY JUSTIFIED BY THE NEED TO SAFEGUARD PUBLIC HEALTH AND DO NOT INFRINGE THE PRINCIPLE OF PROPORTIONALITY.

40 IT IS NOT CONTESTED THAT THE PROHIBITION ON THE MARKETING OF BEERS CONTAINING ADDITIVES CONSTITUTES A BARRIER TO THE IMPORTATION FROM OTHER MEMBER STATES OF BEERS CONTAINING ADDITIVES AUTHORIZED IN THOSE STATES, AND IS TO THAT EXTENT COVERED BY ARTICLE 30 OF THE EEC TREATY . HOWEVER, IT MUST BE ASCERTAINED WHETHER IT IS POSSIBLE TO JUSTIFY THAT PROHIBITION UNDER ARTICLE 36 OF THE TREATY ON GROUNDS OF THE PROTECTION OF HUMAN HEALTH.

41 THE COURT HAS CONSISTENTLY HELD (IN PARTICULAR IN THE JUDGMENT OF 14 JULY 1983 IN CASE 174/82 SANDOZ BV ((1983)) ECR 2445) THAT "IN SO FAR AS THERE ARE UNCERTAINTIES AT THE PRESENT STATE OF SCIENTIFIC RESEARCH IT IS FOR THE MEMBER STATES, IN THE ABSENCE OF HARMONIZATION, TO DECIDE WHAT DEGREE OF PROTECTION OF THE HEALTH AND LIFE OF HUMANS THEY INTEND TO ASSURE, HAVING REGARD HOWEVER TO THE REQUIREMENTS OF THE FREE MOVEMENT OF GOODS WITHIN THE COMMUNITY ".

42 AS MAY ALSO BE SEEN FROM THE DECISIONS OF THE COURT (AND ESPECIALLY THE JUDGMENT OF 14 JULY 1983 IN THE SANDOZ CASE, CITED ABOVE, THE JUDGMENT OF 10 DECEMBER 1985 IN CASE 247/84 MOTTE ((1985)) ECR 3887, AND THE JUDGMENT OF 6 MAY 1986 IN CASE 304/84 MINISTERE PUBLIC V MULLER AND OTHERS ((1986)) ECR 1511), IN SUCH CIRCUMSTANCES COMMUNITY LAW DOES NOT PRECLUDE THE ADOPTION BY THE MEMBER STATES OF LEGISLATION WHEREBY THE USE OF ADDITIVES IS SUBJECTED TO PRIOR AUTHORIZATION GRANTED BY A MEASURE OF GENERAL APPLICATION FOR SPECIFIC ADDITIVES, IN RESPECT OF ALL PRODUCTS, FOR CERTAIN PRODUCTS ONLY OR FOR CERTAIN USES. SUCH LEGISLATION MEETS A GENUINE NEED OF HEALTH POLICY, NAMELY THAT OF RESTRICTING THE UNCONTROLLED CONSUMPTION OF FOOD ADDITIVES.

43 HOWEVER, THE APPLICATION TO IMPORTED PRODUCTS OF PROHIBITIONS ON MARKETING PRODUCTS CONTAINING ADDITIVES WHICH ARE AUTHORIZED IN THE MEMBER STATE OF PRODUCTION BUT PROHIBITED IN THE MEMBER STATE OF IMPORTATION IS PERMISSIBLE ONLY IN SO FAR AS IT COMPLIES WITH THE REQUIREMENTS OF ARTICLE 36 OF THE

TREATY AS IT HAS BEEN INTERPRETED BY THE COURT .

44 IT MUST BE BORNE IN MIND, IN THE FIRST PLACE, THAT IN ITS JUDGMENTS IN THE SANDOZ, MOTTE AND MULLER CASES, CITED ABOVE, THE COURT INFERRED FROM THE PRINCIPLE OF PROPORTIONALITY UNDERLYING THE LAST SENTENCE OF ARTICLE 36 OF THE TREATY THAT PROHIBITIONS ON THE MARKETING OF PRODUCTS CONTAINING ADDITIVES AUTHORIZED IN THE MEMBER STATE OF PRODUCTION BUT PROHIBITED IN THE MEMBER STATE OF IMPORTATION MUST BE RESTRICTED TO WHAT IS ACTUALLY NECESSARY TO SECURE THE PROTECTION OF PUBLIC HEALTH. THE COURT ALSO CONCLUDED THAT THE USE OF A SPECIFIC ADDITIVE WHICH IS AUTHORIZED IN ANOTHER MEMBER STATE MUST BE AUTHORIZED IN THE CASE OF A PRODUCT IMPORTED FROM THAT MEMBER STATE WHERE, IN VIEW, ON THE ONE HAND, OF THE FINDINGS OF INTERNATIONAL SCIENTIFIC RESEARCH, AND IN PARTICULAR OF THE WORK OF THE COMMUNITY' S SCIENTIFIC COMMITTEE FOR FOOD, THE CODEX ALIMENTARIUS COMMITTEE OF THE FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO) AND THE WORLD HEALTH ORGANIZATION, AND, ON THE OTHER HAND, OF THE EATING HABITS PREVAILING IN THE IMPORTING MEMBER STATE, THE ADDITIVE IN QUESTION DOES NOT PRESENT A RISK TO PUBLIC HEALTH AND MEETS A REAL NEED, ESPECIALLY A TECHNICAL ONE.

45 SECONDLY, IT SHOULD BE REMEMBERED THAT, AS THE COURT HELD IN ITS JUDGMENT OF 6 MAY 1986 IN THE MULLER CASE, CITED ABOVE, BY VIRTUE OF THE PRINCIPLE OF PROPORTIONALITY, TRADERS MUST ALSO BE ABLE TO APPLY, UNDER A PROCEDURE WHICH IS EASILY ACCESSIBLE TO THEM AND CAN BE CONCLUDED WITHIN A REASONABLE TIME, FOR THE USE OF SPECIFIC ADDITIVES TO BE AUTHORIZED BY A MEASURE OF GENERAL APPLICATION.

46 IT SHOULD BE POINTED OUT THAT IT MUST BE OPEN TO TRADERS TO CHALLENGE BEFORE THE COURTS AN UNJUSTIFIED FAILURE TO GRANT AUTHORIZATION. WITHOUT PREJUDICE TO THE RIGHT OF THE COMPETENT NATIONAL AUTHORITIES OF THE IMPORTING MEMBER STATE TO ASK TRADERS TO PRODUCE THE INFORMATION IN THEIR POSSESSION WHICH MAY BE USEFUL FOR THE PURPOSE OF ASSESSING THE FACTS, IT IS FOR THOSE AUTHORITIES TO DEMONSTRATE, AS THE COURT HELD IN ITS JUDGMENT OF 6 MAY 1986 IN THE MULLER CASE, CITED ABOVE, THAT THE PROHIBITION IS JUSTIFIED ON GROUNDS RELATING TO THE PROTECTION OF THE HEALTH OF ITS POPULATION.

47 IT MUST BE OBSERVED THAT THE GERMAN RULES ON ADDITIVES APPLICABLE TO BEER RESULT IN THE EXCLUSION OF ALL THE ADDITIVES AUTHORIZED IN THE OTHER MEMBER STATES AND NOT THE EXCLUSION OF JUST SOME OF THEM FOR WHICH THERE IS CONCRETE JUSTIFICATION BY REASON OF THE RISKS WHICH THEY INVOLVE IN VIEW OF THE EATING HABITS OF THE GERMAN POPULATION; MOREOVER THOSE RULES DO NOT LAY DOWN ANY PROCEDURE WHEREBY TRADERS CAN OBTAIN AUTHORIZATION FOR THE USE OF A SPECIFIC ADDITIVE IN THE MANUFACTURE OF BEER BY MEANS OF A MEASURE OF GENERAL APPLICATION.

48 AS REGARDS MORE SPECIFICALLY THE HARMFULNESS OF ADDITIVES, THE GERMAN GOVERNMENT, CITING EXPERTS' REPORTS, HAS REFERRED TO THE RISKS INHERENT IN THE INGESTION OF ADDITIVES IN GENERAL. IT MAINTAINS THAT IT IS IMPORTANT, FOR REASONS OF GENERAL PREVENTIVE HEALTH PROTECTION, TO MINIMIZE THE QUANTITY OF ADDITIVES INGESTED, AND THAT IT IS PARTICULARLY ADVISABLE TO PROHIBIT ALTOGETHER THEIR USE IN THE MANUFACTURE OF BEER, A FOODSTUFF CONSUMED IN CONSIDERABLE QUANTITIES BY THE GERMAN POPULATION.

49 HOWEVER, IT APPEARS FROM THE TABLES OF ADDITIVES AUTHORIZED FOR USE IN THE VARIOUS FOODSTUFFS SUBMITTED BY THE GERMAN GOVERNMENT ITSELF THAT SOME OF THE ADDITIVES AUTHORIZED IN OTHER MEMBER STATES FOR USE IN THE MANUFACTURE OF BEER ARE ALSO AUTHORIZED UNDER THE GERMAN RULES, IN PARTICULAR THE REGULATION ON ADDITIVES, FOR USE IN THE MANUFACTURE OF ALL, OR VIRTUALLY ALL, BEVERAGES. MERE REFERENCE TO THE POTENTIAL RISKS OF THE INGESTION OF ADDITIVES IN GENERAL AND TO THE FACT THAT BEER IS A FOODSTUFF CONSUMED IN LARGE QUANTITIES DOES NOT SUFFICE TO JUSTIFY THE IMPOSITION OF STRICTER RULES IN THE CASE OF BEER .

50 AS REGARDS THE NEED, AND IN PARTICULAR THE TECHNOLOGICAL NEED, FOR ADDITIVES, THE GERMAN GOVERNMENT ARGUES THAT THERE IS NO NEED FOR ADDITIVES IF BEER IS MANUFACTURED IN ACCORDANCE WITH THE REQUIREMENTS OF ARTICLE 9 OF THE BIERSTEUERGESETZ.

51 IT MUST BE EMPHASIZED THAT MERE REFERENCE TO THE FACT THAT BEER CAN BE MANUFACTURED WITHOUT ADDITIVES IF IT IS MADE FROM ONLY THE RAW MATERIALS PRESCRIBED IN THE FEDERAL REPUBLIC OF GERMANY DOES NOT SUFFICE TO PRECLUDE THE POSSIBILITY THAT SOME ADDITIVES MAY MEET A TECHNOLOGICAL NEED. SUCH AN INTERPRETATION OF THE CONCEPT OF TECHNOLOGICAL NEED, WHICH RESULTS IN FAVOURING NATIONAL PRODUCTION METHODS, CONSTITUTES A DISGUISED MEANS OF RESTRICTING TRADE BETWEEN MEMBER STATES.

52 THE CONCEPT OF TECHNOLOGICAL NEED MUST BE ASSESSED IN THE LIGHT OF THE RAW MATERIALS UTILIZED AND BEARING IN MIND THE ASSESSMENT MADE BY THE AUTHORITIES OF THE MEMBER STATE WHERE THE PRODUCT WAS LAWFULLY MANUFACTURED AND MARKETED. ACCOUNT MUST ALSO BE TAKEN OF THE FINDINGS OF INTERNATIONAL SCIENTIFIC RESEARCH AND IN PARTICULAR THE WORK OF THE COMMUNITY' S SCIENTIFIC COMMITTEE FOR FOOD, THE CODEX ALIMENTARIUS COMMITTEE OF THE FAO AND THE WORLD HEALTH ORGANIZATION.

53 CONSEQUENTLY, IN SO FAR AS THE GERMAN RULES ON ADDITIVES IN BEER ENTAIL A GENERAL BAN ON ADDITIVES, THEIR APPLICATION TO BEERS IMPORTED FROM OTHER MEMBER STATES IS CONTRARY TO THE REQUIREMENTS OF COMMUNITY LAW AS LAID DOWN IN THE CASE-LAW OF THE COURT, SINCE THAT PROHIBITION IS CONTRARY TO THE PRINCIPLE OF PROPORTIONALITY AND IS THEREFORE NOT COVERED BY THE EXCEPTION PROVIDED FOR IN ARTICLE 36 OF THE EEC TREATY

54 IN VIEW OF THE FOREGOING CONSIDERATIONS IT MUST BE HELD THAT BY PROHIBITING THE MARKETING OF BEERS LAWFULLY MANUFACTURED AND MARKETED IN ANOTHER MEMBER STATE IF THEY DO NOT COMPLY WITH ARTICLES 9 AND 10 OF THE BIERSTEUERGESETZ, THE FEDERAL REPUBLIC OF GERMANY HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLE 30 OF THE EEC TREATY.

DOCNUM 61984J0178
AUTHOR Court of Justice of the European Communities
FORM Judgment

TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1984 ; J ; judgment
PUBREF	European Court reports 1987 Page 01227 Swedish special edition IX Page 00037 Finnish special edition IX Page 00037
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JURCIT	11957E030 : N 1 24 25 27 37 40 54 11957E036 : N 40 - 53 31968R0950-22-03 : N 33 61974J0008 : N 27 61978J0120 : N 28 61978J0170 : N 32 61980J0193 : N 35 61981J0261 : N 28 61982J0174 : N 41 42 44 61984J0247 : N 42 44 61984J0304 : N 42 44 - 46
CONCERNS	Failure concerning 11957E030
SUB	Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Consumer protection
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Federal Republic of Germany ; Member States
NATIONA	Federal Republic of Germany
NOTES	Zipfel, Walter: Neue juristische Wochenschrift 1987 p.2113-2117 Van Kraay, Frans: Law Teacher 1987 Vol.21 p.284-287 Rabe, Hans-Jürgen: Europarecht 1987 p.253-262 Rütsch, Claus-Jörg: Betriebs-Berater 1987 p.856-858 Mortelmans, K.J.M.: Tijdschrift voor consumentenrecht 1987 p.259-263 Masclat, Jean-Claude: Revue trimestrielle de droit européen 1987 p.361-369 Moench, Christoph: Neue juristische Wochenschrift 1987 p.1109-1112 Hohmann, Harald: Juristenzeitung 1987 p.959-965 Emmerich, Volker: Juristische Schulung 1987 p.652-653 Capelli, Fausto: Revue du Marché Commun 1987 p.693-702 Brealey, Mark: European Intellectual Property Review 1987 p.302-304 Cartou, Louis: Recueil Dalloz Sirey 1987 Som. p.394-395 Zipfel, Walter: Zeitschrift für das gesamte Lebensmittelrecht 1987 p.337-347 Gündisch, Jürgen: Zeitschrift für das gesamte Lebensmittelrecht 1987 p.347-359 Funck-Brentano, Lise: La Semaine juridique - édition entreprise 1987 I 16237 Dausen, Manfred A.: Zeitschrift für das gesamte Lebensmittelrecht 1987

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PROCEDU Proceedings concerning failure by Member State - successful
ADVGEN Sir Gordon Slynn
JUDGRAP Joliet
DATES of document: 12/03/1987
 of application: 06/07/1984

**Judgment of the Court
of 23 October 1997
Criminal proceedings against Harry Franzén.
Reference for a preliminary ruling: Landskrona Tingsrätt - Sweden.
Articles 30 and 37 of the EC Treaty - Monopoly on the retail of alcoholic beverages.
Case C-189/95.**

1 National monopolies of a commercial character - Article 37 of the Treaty - Purpose - Reconciling the requirements of the common market with the Member States' interests in maintaining certain monopolies of a commercial character - Obligation to adjust monopolies so as to exclude any discrimination between nationals of the Member States regarding the conditions under which goods are procured and marketed

(EC Treaty, Art. 37)

2 National monopolies of a commercial character - Article 37 of the Treaty - National monopoly on the retail of alcoholic beverages - Monopoly characterized by criteria and methods for selecting products, a retail sales network and non-discriminatory methods of promoting products or not liable to put at a disadvantage, in fact or in law, beverages imported from other Member States - Whether permissible

(EC Treaty, Art. 37)

3 Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Importation of alcoholic beverages reserved to holders of a production licence or a wholesale licence - Obstacle to the importation of alcoholic beverages from other Member States - Justification - Protection of public health - None

(EC Treaty, Arts 30 and 36)

4 The purpose of Article 37 of the Treaty is to reconcile the possibility for Member States to maintain certain monopolies of a commercial character as instruments for the pursuit of public interest aims with the requirements of the establishment and functioning of the common market. It aims at the elimination of obstacles to the free movement of goods, save, however, for restrictions on trade which are inherent in the existence of the monopolies in question.

Thus, Article 37 requires that the organization and operation of such a monopoly be arranged so as to exclude any discrimination between nationals of Member States as regards conditions of supply and outlets, so that trade in goods from other Member States is not put at a disadvantage, in law or in fact, in relation to that in domestic goods and that competition between the economies of the Member States is not distorted.

5 Article 37 of the Treaty does not preclude national provisions relating to the organization of a national monopoly on the retail of alcoholic beverages laying down such matters as the criteria or methods for the selection of products by the monopoly and rules relating to the establishment of retail outlets or to the promotion of products sold by the monopoly, if those provisions are neither discriminatory nor liable to put at a disadvantage, in law or in fact, beverages imported from other Member States.

6 Articles 30 and 36 of the Treaty preclude domestic provisions allowing only traders holding a production licence or a wholesale licence to import alcoholic beverages if the licensing system constitutes an obstacle to the importation of alcoholic beverages from other Member States by entailing additional costs for those beverages, such as intermediary costs, payment of charges and fees for the grant of a licence and costs arising from the obligation to maintain storage capacity in the territory of the Member State concerned, and if it is not established that the licensing system set up under those national provisions, in particular as regards the conditions relating to storage

capacity and the high fees and charges which licence holders are required to pay, is proportionate to the public health aim pursued or that this aim could not have been attained by measures less restrictive of intra-Community trade.

In [Case C-189/95](#),

REFERENCE to the Court under Article 177 of the EC Treaty by the Landskrona Tingsrätt (Sweden) for a preliminary ruling in the criminal proceedings before that court against

Harry Franzén

on the interpretation of Articles 30 and 37 of the EC Treaty,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm, M. Wathelet (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, P.J.G. Kapteyn, J.L. Murray, D.A.O. Edward, J.-P. Puissechet (Rapporteur), G. Hirsch, P. Jann and L. Sevón, Judges,

Advocate General: M.B. Elmer,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Harry Franzén, by Per Löfqvist, Lennart Lindström and Carl Michael von Quitzow, Advocates, Stockholm,
- the Swedish Government, by Lotty Nordling, Under-Secretary for Legal Affairs in the Department for Foreign Trade of the Ministry of Foreign Affairs, acting as Agent,
- the French Government, by Catherine de Salins, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Jean-Marc Belorgey, Special Adviser in that Ministry, acting as Agents,
- the Finnish Government, by Esa Paasivirta, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,
- the Norwegian Government, by Didrik Tønseth, Advocate at the Ministry of Foreign Affairs, acting as Agent,
- the Commission of the European Communities, by Richard Wainwright, Principal Legal Adviser, and Jean-François Pasquier, a national civil servant on secondment to its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Harry Franzén, represented by Per Löfqvist, Lennart Lindström and Carl Michael von Quitzow; of the Swedish Government, represented by Lotty Nordling and Erik Brattgård, Assistant Under-Secretary at the Department of Foreign Trade of the Ministry of Foreign Affairs, acting as Agent; of the Finnish Government, represented by Holger Rotkirch, Ambassador, Head of the Legal Affairs Department of the Ministry of Foreign Affairs, Esa Paasivirta and Tuula Pynnä, Legal Adviser at the Ministry of Foreign Affairs, acting as Agents; of the Norwegian Government, represented by Didrik Tønseth; and of the Commission, represented by Knut Simonsson, of its Legal Service, acting as Agent, assisted by Jean-François Pasquier, at the hearing on 19 November 1996,

after hearing the Opinion of the Advocate General at the sitting on 4 March 1997,

gives the following

Judgment

Costs

83 The costs incurred by the Swedish, French, Finnish and Norwegian Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Landskrona Tingsrätt by judgment of 14 June 1995, hereby rules:

1. Article 37 of the EC Treaty does not preclude domestic provisions relating to the existence and operation of a national monopoly on the retail of alcoholic beverages such as those mentioned in the order for reference.

2. Articles 30 and 36 of the EC Treaty preclude domestic provisions allowing only traders holding a production licence or a wholesale licence to import alcoholic beverages on conditions such as those laid down by Swedish legislation.

1 By judgment of 14 June 1995, received at the Court on 16 June 1995, the Landskrona Tingsrätt (District Court, Landskrona) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Articles 30 and 37 of that Treaty.

2 The questions have been raised in criminal proceedings brought against Harry Franzén for infringement of the Alkohollag (1994:1738) of 16 December 1994 (Swedish Law on Alcohol, hereinafter 'the Law on Alcohol' or 'the Law').

The Law on Alcohol

3 The Law on Alcohol, which entered into force on 1 January 1995, regulates production and trade in alcoholic beverages in Sweden. Its aim is to limit the consumption of alcoholic beverages, in particular those of high alcoholic strength, in order to reduce the harmful effects which their consumption has on human health.

4 For the purposes of the Law 'alcoholic beverages' means beverages having an alcoholic strength by volume exceeding 2.25%. Such beverages include 'wine' (fermented beverage based on grapes or other fruit, with an alcoholic strength by volume not exceeding 22%), 'beer' (malt-based fermented beverage, with an alcoholic strength by volume of between 2.25% and 3.5%), 'strong beer' (malt-based fermented beverage, with an alcoholic strength by volume exceeding 3.5%) and 'spirit' drinks (alcoholic beverages other than wine, beer or strong beer).

5 Under the Law, the production of alcoholic beverages is subject to the holding of a 'production licence' whilst wholesale trade in spirits, wine and strong beer is subject to the holding of a 'wholesale licence'. However, the Law allows persons holding a production licence to engage in wholesale trade in the products covered by the licence.

6 The Law also makes the importation of wine, strong beer or spirit drinks into Sweden subject to the possession of a production licence or a wholesale licence.

7 Licences are issued by the Alkoholinspektion (Alcohol Inspectorate), upon applications accompanied by supporting documents, pursuant to decisions of the inspectorate. In the case of foreign applicants, such decisions will state that account must be taken of documents which such applicants may reasonably obtain from their national authorities.

8 Submission of an application is subject to payment of a fixed charge, which, at the material time, was SKR 25 000. According to Mr Franzén, who has not been challenged on this point, the charge is not reimbursed if an application for a licence is rejected.

9 The Alcohol Inspectorate must carry out an objective, impartial assessment of the application, taking into consideration the applicant's personal and economic situation and all factors relevant to the issue of a licence, such as the applicant's professional knowledge, in particular of the rules applicable to trade in alcohol in Sweden, and his ability to comply with the provisions of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1). It must also check the applicant's ability to comply with the law and perform his obligations towards the State, in particular by examining his financial resources and investigating whether he has any criminal convictions.

10 An applicant must show that he has sufficient storage capacity to engage in his activity. The Alcohol Inspectorate will examine, case by case, the capacity required, having regard to the form of the applicant's activity. In particular, storage capacity is not required of traders who supply beverages directly to buyers located in national territory.

11 An applicant must also provide a bank guarantee to cover payment of excise duties which, as warehousekeeper or consignee of goods, he may be required to pay under Directive 92/12.

12 Finally, each year the holder of a licence must pay a charge for the monitoring of his premises, the rates of which are set by the State. At the material time, the basic rate was between SKR 10 000 and SKR 323 750, depending on the kind of beverages and the quantities produced or marketed.

13 In reply to written questions from the Court, the Swedish Government explained that the Law on Alcohol did not require an applicant for a licence to be resident in Sweden, which was expressly indicated in a decision of 5 October 1995. It confirmed this point at the hearing.

14 According to evidence provided to the Court, 223 production or wholesale licences had been issued by 7 October 1996.

15 The Law on Alcohol has made a State company, specially constituted for this purpose, responsible for the retail of wine, strong beer and spirits. The company designated for this purpose is Systembolaget Aktiebolag (hereinafter 'Systembolaget'), a company wholly owned by the Swedish State.

16 The activities, operation and inspection procedures of Systembolaget are laid down in an agreement made with the State.

17 The Law on Alcohol also makes the sale over the counter of wine, strong beer and spirit drinks subject to the holding of a 'beverage retail licence'.

18 Holders of production or wholesale licences may sell beverages only to the company responsible for their retail, to other holders of production or wholesale licences or to holders of beverage retail licences. The retail company itself may apply for licences in order to effect wholesale sales of alcoholic beverages to holders of beverage retail licences.

19 The intentional or inadvertent sale of alcoholic beverages without a licence is subject to criminal penalties.

20 Finally, the Lag med vissa bestämmelser om marknadsföring av alkoholdrycker (1978:763) (Law enacting certain measures governing the marketing of alcoholic beverages), whilst not laying down a general prohibition of advertising of alcoholic beverages, prohibits measures encouraging their consumption, such as insistent or high-pressure promotion techniques, doorstep selling and advertising on radio and television and in newspapers and periodicals. However, the promotion of alcoholic

beverages is allowed in written material made available to the public at retail points, in particular those of Systembolaget, and in means of transport with a licence to serve alcohol. Nor does that Law prohibit reference being made to alcoholic beverages in press articles, in particular in columns devoted to wine and drink appearing in daily newspapers or periodicals.

The rules governing the operation of Systembolaget

21 The agreement between Systembolaget and the Swedish State, which entered into force on 1 January 1995, provides in particular that the company is to:

- conduct its activities in such a way that any injurious effects of a public, social and medical nature arising from the consumption of alcohol are prevented as much as possible;
- select the beverages which it markets on the basis of their quality, their possible adverse effects on human health, customer demand and other business or ethical considerations;
- provide in writing to any supplier the reasons why it has decided not to include or to drop a product from its range and to inform it of their rights of appeal;
- adopt marketing and information measures which are impartial and independent of the origin of beverages;
- take steps to ensure that new beverages which it markets become known to consumers, whilst having regard to the restrictions laid down in the Law on Alcohol;
- set its margins according to objective criteria independent of the origin of beverages;
- run its business along rational lines, provide quality service and set its prices so as to cover its costs and ensure the State a reasonable return on its capital and avoid any unnecessary marking up of the prices of beverages;
- establish or close sales outlets according to management constraints, the services to be provided and alcohol policy, whilst in principle allowing each commune applying for one to have a sales outlet and ensuring that, in places where there is no sales outlet, alcoholic beverages can be sold by dispatch to order at the cost of Systembolaget;
- set the opening times of sales outlets in accordance with guidelines laid down by the Riksdag (Swedish Parliament).

22 According to the evidence before the Court, Systembolaget has 384 'shops' spread across Sweden. The products sold by Systembolaget may also be ordered and delivered in around 550 sales outlets in rural areas (grocery shops, newsagents, tobacconists, filling stations and so forth) or upon 56 bus routes and 45 rural postal rounds.

23 Under its internal rules, the beverages marketed by Systembolaget (2 454 products in October 1995) are grouped in 'assortments'. The 'basic' assortment comprises beverages in the lower or medium-range price categories, available throughout the year in all sales outlets (1 288 products in October 1995). The 'provisional' assortment comprises beverages whose availability is limited, in particular during part of the year only, such as vintage wines and seasonal drinks (930 products in October 1995). The 'trial' assortment comprises beverages made available on a trial basis in certain 'shops' with a view to their being included in the 'basic' assortment (236 products in October 1995). The 'by order' assortment comprises products which Systembolaget does not hold in stock but which may be obtained on order. Systembolaget also imports beverages upon request and at the expense of its customers ('private' imports).

24 The beverages in the first three assortments appear on a general price list which is published several times a year and made available in 'shops' and Systembolag sales outlets or upon subscription.

The 'by order' products appear on a special list, available on request in the 'shops'. New products marketed by Systembolaget are presented in the monthly information review published by the monopoly, which is made available in its 'shops' and sales outlets and is sent to subscribers, to restaurants and to newspaper, radio and television wine critics. The reviews are also displayed in the windows of the monopoly's 'shops'.

25 Systembolaget draws up an annual purchase plan for its products which is revised each quarter. The company invites production and wholesale licence-holders to submit offers. A preliminary selection is then made on the basis of economic or commercial criteria, such as price competitiveness and commercial history, followed by a 'blind' tasting trial. The products selected are then included in the 'basic' assortment or the 'provisional' assortment. Products not selected may, at the supplier's request, be put in the 'trial' assortment after selection on the basis of a new tasting test carried out by a panel of consumers.

As a rule, beverages are kept in the 'basic' assortment only if their sales reach predetermined quantities and market shares.

26 According to the evidence submitted to the Court, Systembolaget marketed 185.2 million litres of alcoholic beverages from January to September 1995 (45.2% from Sweden and 41.8% from other Member States) and 176.9 million litres of alcoholic beverages from January to September 1996 (45.1% from Sweden and 40.6% from other Member States). During the first eight months of 1996, Systembolaget received 12 576 offers, of which 10 711 were from Member States of the Community (227 from Sweden and 10 484 from other Member States), examined 7 417 of them, of which 6 325 were from the Community (149 from Sweden and 6 176 from other Member States), and accepted 908, of which 704 were from the Community (85 from Sweden and 619 from other Member States).

The facts of the case and procedure before the national court

27 Mr Franzén is being prosecuted before the Landskrona Tingsrätt for, inter alia, on 1 January 1995 intentionally selling without a licence wine purchased from Systembolaget or imported from Denmark.

28 He claimed before that court that he could not be convicted of any offence because the Law on Alcohol was contrary to Articles 30 and 37 of the Treaty.

29 Unsure how it should respond to that argument, the Landskrona Tingsrätt decided to stay proceedings and submit the following questions to the Court for a preliminary ruling:

'1. Is a statutory monopoly such as that of Systembolaget compatible with Article 30 of the Treaty of Rome?

2. Is a statutory monopoly such as that of Systembolaget contrary to Article 37 of the Treaty of Rome and, if so, must the monopoly be abolished or is an adjustment possible?

3. If a monopoly such as that of Systembolaget is to be regarded as being contrary to Article 37, is any period of adjustment available or should it have been abolished or an adjustment made by 1 January 1995?'

The first two questions

30 By its first two questions the national court is asking whether Articles 30 and 37 of the Treaty preclude national provisions governing a domestic monopoly on the retail of alcoholic beverages, such as those mentioned in the order for reference.

31 Whilst these questions will prompt the Court to consider the rules of law applicable to the monopoly in question in the main proceedings, they do not bear upon the question whether the action of the authorities responsible for managing the monopoly may in specific cases be discriminatory towards, in particular, suppliers from other Member States.

32 Mr Franzén contends that Articles 30 and 37 of the Treaty preclude the provisions in question. According to him, the maintenance of a retail monopoly, such as that now existing in Sweden, impedes the importation of alcoholic beverages into Sweden in several ways and enables Systembolaget to promote the marketing of domestic products. He points out that alcoholic beverages produced in other Member States can be sold in Sweden only if they are imported by a production or wholesale licence-holder and if they are selected on the basis of restrictive and arbitrary criteria set by Systembolaget. Such beverages can be marketed only through a restricted sales network and they cannot be promoted otherwise than by Systembolaget. Mr Franzén also contends that the rules governing the monopoly do not form legislation restricting or prohibiting certain selling arrangements, within the meaning of the judgments given in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 and in Case C-391/92 *Commission v Greece* [1995] ECR I-1621, in particular because they concern the activity of an undertaking which is not subject to any competition and do not govern the activity of undertakings exposed to the free play of competition.

33 The French, Finnish, Swedish and Norwegian Governments and the Commission consider that neither Article 30 nor Article 37 of the Treaty preclude national provisions such as those referred to by the national court in this case. They point out that Article 37 does not require the abolition of retail monopolies but simply requires that they be adjusted so that they do not involve rules which are discriminatory according to the origin of products or according to the nationality of traders. In their view, the monopoly in question in the main proceedings meets those conditions. They also consider that the rules applicable to the monopoly do not hinder, directly or indirectly, intra-Community trade. Such rules limit or prohibit certain selling arrangements and affect the marketing of domestic products and imported products in the same way.

34 As is clear from the reasoning in the order for reference and the observations submitted to the Court, the questions raised by the national court concern not only the domestic provisions relating to the existence and operation of the monopoly but also, more generally, the provisions which, although not governing the operation of the monopoly, nevertheless have a direct bearing upon it, as is the case with the rules relating to production and wholesale licences.

35 Having regard to the case-law of the Court, it is necessary to examine the rules relating to the existence and operation of the monopoly with reference to Article 37 of the Treaty, which is specifically applicable to the exercise, by a domestic commercial monopoly, of its exclusive rights (judgments in Case 91/75 *Hauptzollamt Göttingen v Miritz* [1976] ECR 217, paragraph 5; Case 120/78 *REWE-Zentral AG v Bundesmonopolverwaltung für Branntwein* ('Cassis de Dijon') [1979] ECR 649, paragraph 7; and Case 91/78 *Hansen v Hauptzollamt Flensburg* [1979] ECR 935, paragraphs 9 and 10).

36 On the other hand, the effect on intra-Community trade of the other provisions of the domestic legislation which are separable from the operation of the monopoly although they have a bearing upon it, must be examined with reference to Article 30 of the Treaty (see, to this effect, the judgments in *Miritz*, cited above, paragraph 5, *Cassis de Dijon*, cited above, paragraph 7, and Case 86/78 *Peureux v Services Fiscaux de la Haute-Saône et du Territoire de Belfort* [1979] ECR 897, paragraph 35).

The rules relating to the existence and operation of the monopoly

37 It is clear not only from the wording of Article 37 but also from the position which it occupies in the general scheme of the Treaty that the article is designed to ensure compliance with the fundamental principle that goods should be able to move freely throughout the common market, in particular by requiring quantitative restrictions and measures having equivalent effect in trade between Member States to be abolished, and thereby to ensure maintenance of normal conditions of competition between the economies of Member States in the event that a given product is subject,

in one or other of those States, to a national monopoly of a commercial character (judgments in Case 59/75 *Pubblico Ministero v Manghera and Others* [1976] ECR 91, paragraph 9; Hansen, cited above, paragraph 8; Case 78/82 *Commission v Italy* [1983] ECR 1955, paragraph 11; Case C-347/88 *Commission v Greece* [1990] ECR I-4747, paragraph 42; and Case C-387/93 *Banchero* [1995] ECR I-4663, paragraph 27, hereinafter 'Banchero II').

38 However, the Court has repeatedly stated that Article 37 does not require national monopolies having a commercial character to be abolished but requires them to be adjusted in such a way as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States (see the judgments cited above: *Manghera*, paragraph 5; Hansen, paragraph 8; *Commission v Italy*, paragraph 11 and *Banchero II*, paragraph 27).

39 The purpose of Article 37 of the Treaty is to reconcile the possibility for Member States to maintain certain monopolies of a commercial character as instruments for the pursuit of public interest aims with the requirements of the establishment and functioning of the common market. It aims at the elimination of obstacles to the free movement of goods, save, however, for restrictions on trade which are inherent in the existence of the monopolies in question.

40 Thus, Article 37 requires that the organization and operation of the monopoly be arranged so as to exclude any discrimination between nationals of Member States as regards conditions of supply and outlets, so that trade in goods from other Member States is not put at a disadvantage, in law or in fact, in relation to that in domestic goods and that competition between the economies of the Member States is not distorted (see, to this effect, the judgment in *Commission v Italy*, cited above, paragraph 11).

41 In the present case, it is not contested that, in aiming to protect public health against the harm caused by alcohol, a domestic monopoly on the retail of alcoholic beverages, such as that conferred on *Systembolaget*, pursues a public interest aim.

42 It is therefore necessary to determine whether a monopoly of this kind is arranged in a way which meets the conditions referred to in paragraphs 39 and 40 above.

The product selection system

43 Mr Franzén contends that beverages are selected and maintained in the assortments of *Systembolaget* pursuant to criteria which are not only restrictive but also arbitrary and not subject to any possible review.

44 It must first be pointed out in this regard that the agreement made between the State and *Systembolaget* requires the latter to select the products which it markets on the basis of their quality, lack of adverse effects on human health, consumer demand and business or ethical considerations, that is to say on the basis of criteria independent of the origin of the products.

45 It must be examined next whether the criteria and methods of selection used by *Systembolaget* are discriminatory or likely to put imported products at a disadvantage.

46 First of all, it is apparent from the explanations provided to the Court that the purchase plan followed by the monopoly in calling for offers is based on foreseeable changes in consumer demand. The producer, importer and consumer organizations are also consulted about this when the plan is drawn up.

47 Second, the calls for offers made by *Systembolaget* concern all production or wholesale licence-holders and all types of beverage, irrespective of their origin.

48 Third, the offers are selected by *Systembolaget* on the basis of purely commercial criteria (price competitiveness of the product, commercial history, etc.) or qualitative criteria ('blind' tasting),

which are not apt to put domestic products at an advantage.

49 It is true that the beverages selected are maintained in the basic assortment of Systembolaget only if their sales exceed a certain volume and gain a certain market share. However, this constraint, although it may have the consequence of handicapping small producers, is not in itself apt to afford a direct or indirect advantage to domestic products. In any event, it appears justified both with regard to the freedom of choice which the monopoly has in its commercial policy and by the requirements inherent in its management. For its aim is to provide a variety of alcoholic beverages in all the monopoly's sales outlets during a specific period within limits compatible with the need to run the monopoly profitably. Furthermore, it does not concern products whose quantities are by nature limited, such as vintages or seasonal drinks, which are included in the 'provisional' assortment.

50 Fourth, there are other ways for traders to have their products marketed by the monopoly: those whose offers are not selected by Systembolaget may ask for their products to undergo a second qualitative test before a panel of consumers and, if they pass it, for the monopoly to market them on a trial basis for a given period. Products which have not been accepted by Systembolaget and which fulfil the objective conditions laid down in clause 4 of the agreement between the State and Systembolaget may be included in the 'by order' assortment and sold at the customer's request. Finally, Systembolaget is required to import any alcoholic beverage at the request and cost of the consumer.

51 Fifth, traders are entitled to be told the reasons for decisions taken by the monopoly regarding the selection of beverages and their maintenance in the 'basic' assortment and may challenge such decisions before a board offering every guarantee of independence.

52 So, having regard to the evidence before the Court, the criteria and selection methods used by Systembolaget do not appear to be either discriminatory or apt to put imported products at a disadvantage.

The monopoly's sales network

53 Mr Franzén contends that the sales network maintained by Systembolaget is restricted and does not offer the full range of beverages available, which restricts even more the possibilities of sale.

54 It is true that a monopoly such as Systembolaget has only a limited number of 'shops'. However, it does not appear from the information provided to the Court that the number of sales outlets are limited to the point of compromising consumers' procurement of supplies of domestic or imported alcoholic beverages.

55 First of all, under the agreement which it has made with the State, Systembolaget must establish or close sales outlets on the basis of management constraints, consumer demand and the necessities of alcohol policy and ensure that each commune which so wishes has a sales outlet and that all points of the territory are served at least by dispatch deliveries.

56 Second, according to the information provided to the Court, alcoholic beverages may be ordered and supplied in the monopoly's 384 'shops', through around 550 sales outlets as well as along 56 bus routes and on 45 rural post rounds. Furthermore, there is at least one 'shop' in 259 of the 288 Swedish communes and Systembolaget is planning for every commune to have at least one 'shop' in 1998.

57 Finally, even if the retail network of Systembolaget is still imperfect, this circumstance does not adversely affect the sale of alcoholic beverages from other Member States more than the sale of alcoholic beverages produced in Sweden (see, *mutatis mutandis*, in relation to Article 30 of the Treaty, *Banchero II*, cited above, paragraph 40).

The promotion of alcoholic beverages

58 Mr Franzén also contends that the system for promoting alcoholic beverages favours the marketing of beverages produced in Sweden. He points out that the promotion of alcoholic beverages is confined to mere provision of information about the products, varying in form depending on whether the products are in the 'basic' assortment or in the 'by order' assortment, that the information is provided by the monopoly alone, without any control by suppliers and, furthermore, that suppliers may not canvas persons in charge of the monopoly's 'shops'.

59 As far as these points are concerned, it must be observed first of all that the restriction of the possibilities for promoting alcoholic beverages to the public is inherent in the situation where there is only one operator on the market for their retail.

60 Second, the monopoly rules do not prohibit producers or importers from promoting their products to the monopoly. Although suppliers may not directly promote products to managers of the monopoly's 'shops', it appears that this prohibition is designed to meet the concern, expressed by some suppliers, in particular to the Swedish Competition Authority (Konkurrensverket), that there should be strictly equal conditions for the promotion of products.

61 It must also be pointed out that the promotion of alcoholic beverages to the public is subject, in the Member State in question, to a general restriction, the validity of which has not been called in question by the national court nor challenged by Mr Franzén. That restriction consists, in particular, of a ban on advertising on radio and television and in all newspapers or other periodicals, that is to say the means traditionally used by producers to promote their products to the public. However, alcoholic beverages selected by Systembolaget may be advertised in written material available at sales outlets. Furthermore, any alcoholic beverage may be mentioned in press articles.

62 As far as product promotion is concerned, the agreement made between the Swedish State and Systembolaget requires the latter to adopt marketing and advertising measures which are impartial and independent of the origin of the products and to endeavour to make known new beverages to consumers whilst taking account of the restrictions in the Law on Alcohol.

63 Although it is true that the monopoly's promotion of alcoholic beverages is mainly in the form of product presentation, it appears that this method of promotion simply meets the obligations which are referred to above. It must, however, be noted that new products are systematically presented either in the monthly review distributed by the monopoly or to newspaper, radio and television wine critics, or, finally, in displays in the monopoly's 'shops'.

64 Finally, it must be noted that the method of promotion used by the monopoly applies independently of products' origin and is not in itself apt to put at a disadvantage, in fact or in law, beverages imported from other Member States in relation to those produced on national territory.

65 Whilst it is true that beverages in the 'by order' assortment appear on a special price list which can be provided at the consumer's request, this difference of treatment, which is also independent of the origin of the products, is justified by the fact that these beverages are not held in stock by Systembolaget and are not therefore in a situation comparable to that of beverages in the other assortments.

66 So, having regard to the evidence before the Court, it appears that a retail monopoly such as that in question in the main proceedings meets the conditions for being compatible with Article 37 of the Treaty, set out in paragraphs 39 and 40 of this judgment.

The other provisions of national legislation bearing upon the operation of the monopoly

67 As explained above, in view of the arguments which have been exchanged before both the national court and this Court, the questions referred for a preliminary ruling must be understood as also relating to the provisions of the domestic legislation which, although not, strictly speaking, regulating

the functioning of the monopoly, nevertheless have a direct bearing upon it. Those provisions must be examined with reference to Article 30 of the Treaty.

68 On this point, Mr Franzén observes that the monopoly may obtain supplies only from holders of production licences or wholesale licences whose grant is subject to restrictive conditions and that such an obligation necessarily impedes imports of products from other Member States.

69 According to the established case-law of the Court, all trading rules which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade constitute measures having an effect equivalent to quantitative restrictions (judgment in Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, paragraph 5).

70 In a national system such as that in question in the main proceedings, only holders of production licences or wholesale licences are allowed to import alcoholic beverages, that is to say traders who fulfil the restrictive conditions to which issue of those licences is subject. According to the information provided to the Court during the proceedings, the traders in question must provide sufficient personal and financial guarantees to carry on the activities in question, concerning in particular their professional knowledge, their financial capacity and possession of storage capacity sufficient to meet the needs of their activities. Furthermore, the submission of an application is subject to payment of a high fixed charge (SKR 25 000), which is not reimbursed if the application is rejected. Finally, in order to keep his licence, a trader must pay an annual supervision fee, which is also high (between SKR 10 000 and SKR 323 750 for the basic amounts, depending on the kinds of beverage and the quantities produced or marketed).

71 The licensing system constitutes an obstacle to the importation of alcoholic beverages from other Member States in that it imposes additional costs on such beverages, such as intermediary costs, payment of charges and fees for the grant of a licence, and costs arising from the obligation to maintain storage capacity in Sweden.

72 According to the Swedish Government's own evidence, the number of licences issued is low (223 in October 1996) and almost all of these licences have been issued to traders established in Sweden.

73 Domestic legislation such as that in question in the main proceedings is therefore contrary to Article 30 of the Treaty.

74 The Swedish Government has, however, invoked Article 36 of the EC Treaty. It maintains that its legislation was justified on grounds relating to the protection of human health.

75 It is indeed so that measures contrary to Article 30 may be justified on the basis of Article 36 of the Treaty. All the same, according to established case-law (*Cassis de Dijon*, cited above; Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln v Mars* [1995] ECR I-1923, paragraph 15; Case C-368/95 *Familiapress* [1997] ECR I-0000, paragraph 19; and Joined Cases C-34/95, C-35/95 and C-36/95 *De Agostini and TV-Shop* [1997] ECR I-0000, paragraph 45), the domestic provisions in question must be proportionate to the aim pursued and not attainable by measures less restrictive of intra-Community trade.

76 Although the protection of human health against the harmful effects of alcohol, on which the Swedish Government relies, is indisputably one of the grounds which may justify derogation from Article 30 of the Treaty (see, to this effect, the judgment in Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivia v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* [1991] ECR I-4151, paragraph 13), the Swedish Government has not established that the licensing system set up by the Law on Alcohol, in particular as regards the conditions relating to storage capacity and the high fees and charges which licence-holders are required to pay, was proportionate to the public health aim pursued or that this aim could not have

been attained by measures less restrictive of intra-Community trade.

77 It must therefore be held that Articles 30 and 36 of the Treaty preclude domestic provisions allowing only traders holding a production licence or a wholesale licence to import alcoholic beverages on conditions such as those laid down by Swedish legislation.

Breach of Article 52 of the EC Treaty and of the public procurement directives

78 In his observations, Mr Franzén also contends that some of the provisions of the Law on Alcohol are contrary to Article 52 of the Treaty and to Community directives on public procurement.

79 In this regard, it must be reiterated that, under the division of jurisdiction provided for by Article 177 of the Treaty in preliminary ruling proceedings, it is for the national court alone to determine the subject-matter of the questions which it wishes to refer to the Court. The Court cannot, at the request of one party to the main proceedings, examine questions which have not been submitted to it by the national court. If, in view of the course of the proceedings, the national court were to consider it necessary to obtain further interpretations of Community law, it would be for it to make a fresh reference to the Court (Case 311/84 CBEM v CLT and IPB [1985] ECR 3261, paragraph 10; Case C-337/88 SAFA v Amministrazione della Finanze dello Stato [1990] ECR I-1, paragraph 20; and Case C-196/89 Nespoli and Crippa [1990] ECR I-3647, paragraph 23).

80 The reply to be given to the first two questions must therefore be that Article 37 of the Treaty does not preclude domestic provisions relating to the existence and operation of a national monopoly on the retail of alcoholic beverages such as those mentioned in the order for reference. However, Articles 30 and 36 of the Treaty preclude domestic provisions allowing only traders holding a production licence or a wholesale licence to import alcoholic beverages on conditions such as those laid down by Swedish legislation.

The third question

81 The third question was submitted only in the event that the Court considered that Article 37 precluded domestic provisions governing the organization of a national monopoly on the retail of alcoholic beverages, such as those mentioned in the order for reference.

82 Having regard to the answer given to the first two questions, it is not necessary to reply to this question.

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OBSERV	Sweden ; France ; Finland ; Norway ; Commission ; Member States ; Institutions
NATIONA	Sweden
NATCOUR	*A9* Landskrona tingsrätt, beslut den 14/06/95 (B 235/94) - Rydén, Magnus: Ny Juridik 1997 no 1 p.80-91 *P1* Landskrona tingsrätt, dom den 15/09/98 (B 235/94) - Europarättslig tidskrift 1999 p.164-170
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1999 no 202 p.65-78

PROCEDU Reference for a preliminary ruling
ADVGEN Elmer
JUDGRAP Puissochet
DATES of document: 23/10/1997
of application: 16/06/1995

**Judgment of the Court (Sixth Chamber)
of 7 March 1990**

GB-INNO-BM v Confédération du commerce luxembourgeois.

Reference for a preliminary ruling: Cour de cassation - Grand-Duchy de Luxembourg.

Free movement of goods - National prohibition on publication of the duration of a special offer or the price previously charged.

Case C-362/88.

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1 . Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Concept - Restrictions on cross-frontier advertising

(EEC Treaty, Arts 30, 31 and 36)

2 . Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Prohibition against referring, in advertisements for a special purchase offer, to the duration of the offer or the price previously charged - Application to advertising lawfully distributed in another Member State - Not permissible - Justification - Consumer protection - Not justifiable

(EEC Treaty, Arts 30 and 36)

1 . Legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect trade, be such as to restrict the volume of trade because it affects marketing opportunities.

Free movement of goods concerns not only traders but also individuals . it requires, particularly in frontier areas, that consumers resident in one Member State may travel freely to the territory of another Member State to shop under the same conditions as the local population. That freedom for consumers is compromised if they are deprived of access to advertising available in the country where purchases are made. Consequently a prohibition against distributing such advertising must be examined in the light of Articles 30, 31 and 36 of the EEC Treaty.

2 . Under Articles 30 and 36 of the Treaty, advertising lawfully distributed in another Member State cannot be made subject to national legislation prohibiting the inclusion, in advertisements relating to a special purchase offer, of a statement showing the duration of the offer or the previous price.

Since Community law regards the provision of information to the consumer as one of the principal requirements with regard to consumer protection, Article 30 of the Treaty cannot be interpreted as meaning that national legislation which denies the consumer access to certain kinds of information may be justified by mandatory requirements concerning consumer protection.

In Case [C-362/88](#)

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour de cassation of the Grand Duchy of Luxembourg for a preliminary ruling in the proceedings pending before that court between

GB-INNO-BM, a company incorporated under Belgian law, Brussels,

and

Confédération du commerce luxembourgeois, a non-profit-making association established in Luxembourg, on the interpretation of Articles 30 and 36 of the EEC Treaty,

THE COURT (Sixth Chamber)

composed of : C. N. Kakouris, President of Chamber, T. Koopmans, G . F . Mancini, T. F. O' Higgins and M. Diez de Velasco, Judges,

Advocate General : C. O. Lenz

Registrar : D. Louterman, Principal Administrator

after considering the observations submitted on behalf of

GB-INNO-BM, a company incorporated under Belgian law, the appellant, by Nicolas Decker, of the Luxembourg Bar, Antoine de Bruyn, avocat with the right to appear before the Belgian Cour de cassation, and Louis van Bunnan and Michel Mahieu, of the Brussels Bar,

Confédération du commerce luxembourgeois ASBL, the respondent, by Yvette Hamilius, of the Luxembourg Bar,

the Government of the Grand Duchy of Luxembourg by Alain Gross, of the Luxembourg Bar,

the Government of the Federal Republic of Germany by Horst Teske, Martin Seidel and A. von Muehlendahl, acting as Agents,

the Government of the French Republic by G. de Bergues, acting as Agent,

the Commission of the European Communities by Christine Berardis-Kayser, in the written procedure, and E. White and H. Lehmann, acting as Agents,

having regard to the Report for the Hearing and further to the hearing on 23 November 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 10 January 1990,

gives the following

Judgment

1 By judgment of 8 December 1988, which was received at the Court on 14 December 1988, the Cour de cassation of the Grand Duchy of Luxembourg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 30, the first paragraph of Article 31 and Article 36 of the EEC Treaty in order to enable it to assess the compatibility with those provisions of national legislation on advertising.

2 The question was raised in proceedings between the Confédération du commerce luxembourgeois (hereinafter referred to as "CCL "), a non-profit-making association which claims to represent the interests of Luxembourg traders, and GB-INNO-BM, which operates supermarkets in Belgian territory, inter alia in Arlon, near the Belgian-Luxembourg border . The Belgian company had distributed advertising leaflets on Luxembourg territory as well as on Belgian territory and CCL applied to the Luxembourg courts for an injunction against the company to stop the distribution of those advertising leaflets. CCL claimed that the advertising contained in the leaflets was contrary to the Grand-Ducal Regulation of 23 December 1974 on unfair competition (Mémorial A 1974, p . 2392), according to which sales offers involving a temporary price reduction may not state the duration of the offer or refer to previous prices.

3 The presiding judge of the tribunal d' arrondissement (District Court), Luxembourg, competent for commercial matters granted the injunction, taking the view that the distribution of the leaflets in question constituted a sales offer prohibited by the Grand-Ducal Regulation of 1974 and an unfair practice prohibited by the same regulation . The cour d' appel upheld the injunction, whereupon GB-INNO-BM appealed to the Cour de cassation. It argued that the advertising contained in the leaflets complied with the Belgian provisions on unfair competition and that it would thus be contrary to Article 30 of the EEC Treaty to apply to it the prohibitions laid down in the Luxembourg legislation.

4 The Cour de cassation stayed proceedings and submitted the following question to the Court of Justice for a preliminary ruling :

"Is a legislative provision of a Member State whereby the offering of goods for retail sale at a temporarily reduced price, other than in special sales or clearance sales, is permitted only on condition that the offers may not state their duration and that there may be no reference to previous prices contrary to Article 30, the first paragraph of Article 31 and Article 36 of the EEC Treaty, properly construed?"

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court .

6 As a preliminary point, an argument that was raised by CCL and the German and Luxembourg Governments calls for examination. That argument is to the effect that the provisions of Articles 30, 31 and 36 of the Treaty have no relevance to the subject-matter of the main proceedings, which solely concern advertising, not the movement of goods between Member States. Moreover, it is said, GB-INNO-BM sells its wares only on Belgian territory.

7 That argument cannot be accepted. The Court has already held, in its judgment of 15 December 1982 in Case 286/81 *Oosthoek' s Uitgeversmaatschappij* ((1982)) ECR 4575, that legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect trade, be such as to restrict the volume of trade because it affects marketing opportunities.

8 Free movement of goods concerns not only traders but also individuals . It requires, particularly in frontier areas, that consumers resident in one Member State may travel freely to the territory of another Member State to shop under the same conditions as the local population. That freedom for consumers is compromised if they are deprived of access to advertising available in the country where purchases are made. Consequently a prohibition against distributing such advertising must be examined in the light of Articles 30, 31 and 36 of the Treaty.

9 It is therefore clear that the question referred to the Court for a preliminary ruling concerns the compatibility with Article 30 of the Treaty of an obstacle to the free movement of goods resulting from disparities between the applicable national legislation. It is apparent from the documents before the Court that the advertising of sales offers involving a price reduction and stating the duration of the offer and the prices previously charged is prohibited by the Luxembourg legislation but permitted by the provisions in force in Belgium .

10 The Court has consistently held that in the absence of common rules relating to marketing, obstacles to the free movement of goods within the Community resulting from disparities between national laws must be accepted in so far as such rules, applicable to domestic and imported products without distinction, may be justified as being necessary in order to satisfy mandatory requirements relating inter alia to consumer protection or the fairness of commercial transactions (see, in particular, the judgments of 20 February 1979 in Case 120/78 *Rewe* ((1979)) ECR 649, and of 26 June 1980 in Case 788/79 *Gilli and Andres* ((1980)) ECR 2071).

11 According to CCL and the Luxembourg Government, the two prohibitions in question - against stating the duration of a special offer and against specifying the previous price - are justified on the grounds of consumer protection. The purpose of the prohibition concerning the duration of the special offer is to avoid the risk of confusion between special sales and half-yearly clearance sales the timing and duration of which is restricted under Luxembourg legislation . The prohibition against allowing the previous price to appear in the offer is justified, they say, by the fact that the consumer is not normally in a position to check that a previous reference price is genuine.

In addition, the marking of a previous price might exert excessive psychological pressure on the consumer. In substance the German Government shares that point of view.

12 That view is contested by GB-INNO-BM and the Commission, who point out that any normally aware consumer knows that annual sales take place only twice a year. As regards comparison of prices, the Commission has submitted an overview of the relevant legislation in various Member States and concludes that, with the exception of the Luxembourg and German provisions, they all allow both prices to be indicated if the reference price is genuine.

13 The question thus arises whether national legislation which prevents the consumer from having access to certain information may be justified in the interest of consumer protection.

14 It should be observed first of all that Community policy on the subject establishes a close link between protecting the consumer and providing the consumer with information. Thus the "preliminary programme" adopted by the Council in 1975 (Official Journal 1975, C 92, p. 1) provides for the implementation of a "consumer protection and information policy". By a Resolution of 19 May 1981 (Official Journal 1981, C 133, p. 1), the Council approved a "second programme of the European Economic Community for a consumer protection and information policy" the objectives of which were confirmed by the Council Resolution of 23 June 1986 concerning the future orientation of the policy of the Community for the protection and promotion of consumer interests (Official Journal 1986, C 167, p. 1).

15 The existence of a link between protection and information for consumers is explained in the introduction to the second programme. There it is stressed that measures taken or scheduled in accordance with the preliminary programme contribute towards improving the consumer's situation by protecting his health, his safety and his economic interest, by providing him with appropriate information and education, and by giving him a voice in decisions which involve him. It is stated that often those same measures have also resulted in harmonizing the rules of competition by which manufacturers and retailers must abide.

16 The introduction goes on to specify that the purpose of the second programme is to continue and intensify the measures in this field and to help establish conditions for improved consultation between consumers on the one hand and manufacturers and retailers on the other. To that end the programme sets out five basic rights to be enjoyed by the consumer, amongst which appears the right to information and education. One of the measures proposed in the programme is the improvement of consumer education and information (paragraph 9D). The part of the programme which lays down the principles which must govern the protection of the economic interests of consumers includes passages which aim to ensure the accuracy of information provided to the consumer, but without refusing him access to certain information. Thus, according to one of the principles (Paragraph 28(4)), no form of advertising should mislead the buyer; an advertiser must be able to "justify, by appropriate means, the validity of any claims he makes".

17 As the Court has held, a prohibition against importing certain products into a Member State is contrary to Article 30 where the aim of such a prohibition may be attained by appropriate labelling of the products concerned which would provide the consumer with the information he needs and enable him to make his choice in full knowledge of the facts (judgments of 9 December 1981 in Case 193/80 Commission v Italy ((1981)) ECR 3019, and of 12 March 1987 in Case 178/84 Commission v Germany ((1987)) ECR 1227).

18 It follows from the foregoing that under Community law concerning consumer protection the provision of information to the consumer is considered one of the principal requirements. Thus Article 30 cannot be interpreted as meaning that national legislation which denies the consumer access to certain kinds of information may be justified by mandatory requirements concerning consumer protection.

19 In consequence, obstacles to intra-Community trade resulting from national rules of the type at issue in the main proceedings may not be justified by reasons relating to consumer protection. They thus fall under the prohibition laid down in Article 30 of the Treaty. The exceptions to the application of that provision contained in Article 36 are not applicable; indeed, no reliance was placed on them during the proceedings before the Court.

20 Since Article 30 is applicable, there is no need to interpret Article 31 of the Treaty, which was also mentioned in the reference for a preliminary ruling.

21 The reply to the question posed must therefore be that under Articles 30 and 36 of the EEC Treaty, properly interpreted, advertising lawfully distributed in another Member State cannot be made subject to national legislation prohibiting the inclusion, in advertisements relating to a special purchase offer, of a statement showing the duration of the offer or the previous price.

Costs

22 The costs incurred by the Government of the Grand Duchy of Luxembourg, the Government of the Federal Republic of Germany, the Government of the French Republic and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question submitted to it by the Cour de cassation of the Grand Duchy of Luxembourg, by order of 8 December 1988, hereby rules :

Under Articles 30 and 36 of the EEC Treaty, properly interpreted, advertising lawfully distributed in another Member State cannot be made subject to national legislation prohibiting the inclusion, in advertisements relating to a special purchase offer, of a statement showing the duration of the offer or the previous price.

DOCNUM	61988J0362
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1988 ; J ; judgment
PUBREF	European Court reports 1990 Page I-00667 Swedish special edition X Page 00349 Finnish special edition X Page 00367
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JURCIT	11957E030 : N 1 - 21 11957E031-L1 : N 1 4 6 8 20 11957E036 : N 1 - 21 31975Y0425(01) : N 14 61978J0120 : N 10 61979J0788 : N 10 61980J0193 : N 17 31981Y0603(01) : N 14 15 16 61981J0286 : N 7 61984J0178 : N 17 31986Y0705(01) : N 14
CONCERNS	Interprets 11957E030 Interprets 11957E036
SUB	Free movement of goods ; Quantitative restrictions ; Measures having equivalent effect ; Consumer protection
AUTLANG	French
OBSERV	Luxembourg ; Federal Republic of Germany ; France ; Commission ; Member States ; Institutions
NATIONA	Luxembourg
NATCOUR	*A9* Cour de cassation (Grand-Duché de Luxembourg), arrêt du 08/12/1988 (793 19/88) - Pasicrisie luxembourgeoise Vol.28 p.94-95 *P1* Cour de cassation (Grand-Duché de Luxembourg), arrêt du 10/01/1991 (01/91)
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PROCEDU Reference for a preliminary ruling
ADVGEN Lenz
JUDGRAP Koopmans
DATES of document: 07/03/1990
of application: 14/12/1988

**Judgment of the Court
of 26 June 1997**

Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag.

Reference for a preliminary ruling: Handelsgericht Wien - Austria.

Measures having equivalent effect - Distribution of periodicals - Prize competitions - National prohibition.

Case C-368/95.

1 Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Definition - Prohibition on the sale of periodicals containing prize competitions - Treatment as national provisions regulating selling arrangements in a non-discriminatory manner - Precluded - Applicability of Article 30 of the Treaty

(EC Treaty, Art. 30)

2 Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Prohibition on the sale of periodicals containing prize competitions - Restriction justified in order to maintain press diversity - Permissibility conditional on respect for fundamental rights - Reconciliation with freedom of expression - Limits

(EC Treaty, Art. 30)

3 Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Prohibition on the sale of periodicals containing prize competitions - Justification - Maintaining press diversity - Conditions - To be assessed by the national court

(EC Treaty, Art. 30)

4 The application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

That is not the case where the legislation of a Member State prohibits the sale on its territory of periodicals containing games or competitions for prizes. Even though such legislation is directed against a method of sales promotion, it bears on the actual content of the products, in so far as the competitions in question form an integral part of the magazine in which they appear, and cannot be concerned with a selling arrangement. Moreover, since it requires traders established in other Member States to alter the contents of the periodical, the prohibition at issue impairs access of the product concerned to the market of the Member State of importation and consequently hinders free movement of goods. It therefore constitutes in principle a measure having equivalent effect within the meaning of Article 30 of the Treaty.

5 Where a Member State relies on overriding requirements, such as maintaining press diversity, under Article 30 of the Treaty in order to justify rules which are likely to obstruct the exercise of free movement of goods, such justification must also be interpreted in the light of the general principles of law and in particular of fundamental rights. Those rights include freedom of expression, as enshrined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. A prohibition on selling publications which offer the chance to take part in prize competitions may, in that context, detract from freedom of expression. Article 10 does, however, permit derogations from that freedom for the purposes of maintaining press diversity, in so far as they are prescribed by law and necessary in a democratic society.

6 Article 30 of the EC Treaty is to be interpreted as not precluding application of legislation of a Member State the effect of which is to prohibit the distribution on its territory by an undertaking

established in another Member State of a periodical produced in that latter State containing prize puzzles or competitions which are lawfully organized in that State, provided that that prohibition is proportionate to maintenance of press diversity and that that objective cannot be achieved by less restrictive means.

This assumes, *inter alia*, that the newspapers offering the chance of winning a prize in games, puzzles or competitions are in competition with small newspaper publishers who are deemed to be unable to offer comparable prizes and the prospect of winning is liable to bring about a shift in demand.

Furthermore, the national prohibition must not constitute an obstacle to the marketing of newspapers which, albeit containing prize games, puzzles or competitions, do not give readers residing in the Member State concerned the opportunity to win a prize. It is for the national court to determine whether those conditions are satisfied on the basis of a study of the national press market concerned.

In Case [C-368/95](#),

REFERENCE to the Court under Article 177 of the EC Treaty by the *Handelsgericht Wien*, for a preliminary ruling in the proceedings pending before that court between

Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH

and

Heinrich Bauer Verlag

on the interpretation of Article 30 of the EC Treaty,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, G.F. Mancini, J.C. Moitinho de Almeida and L. Sevón (Presidents of Chambers), C.N. Kakouris, P.J.G. Kapteyn, C. Gulmann, P. Jann, H. Ragnemalm, M. Wathelet (Rapporteur) and R. Schintgen, Judges,

Advocate General: G. Tesauro,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Heinrich Bauer Verlag, by Michael Winischhofer, Rechtsanwalt, Vienna,
- the Austrian Government, by Franz Cede, Botschafter in the Federal Ministry of Foreign Affairs, acting as Agent,
- the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Sabine Maass, Regierungsrätin z.A. in the same Ministry, acting as Agents,
- the Belgian Government, by Jan Devadder, Director of Administration in the Legal Department of the Ministry of Foreign Affairs, acting as Agent,
- the Netherlands Government, by J.G. Lammers, Acting Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,
- the Portuguese Government, by Luis Fernandes, Director of the Legal Department in the European Communities General Directorate of the Ministry of Foreign Affairs, Antonio Silva Ferreira, Inspector Geral de Jogos in the Ministry of Economic Affairs, and Angelo Cortesao Seica Neves, Lawyer in the European Communities General Directorate of the Ministry of Foreign Affairs, acting as Agents,

- the Commission of the European Communities, by Claudia Schmidt, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Heinrich Bauer Verlag, represented by Michael Winischhofer, Harald Koppehele, Rechtsanwalt, Hamburg, and Torsten Stein, Professor in the University of Saarbrücken; the Austrian Government, represented by Christine Stix-Hackl, Legationsrätin in the Federal Ministry of Foreign Affairs, acting as Agent; the German Government, represented by Bernd Kloke, Oberregierungsrat in the Federal Ministry of Economic Affairs, acting as Agent; the Netherlands Government, represented by J.S. van den Oosterkamp, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; the Portuguese Government, represented by Angelo Cortesao Seica Neves, and the Commission, represented by Claudia Schmidt, at the hearing on 12 November 1996,

after hearing the Opinion of the Advocate General at the sitting on 13 March 1997,

gives the following

Judgment

1 By order of 15 September 1995, received at the Court on 29 November 1995, the Handelsgericht Wien (Commercial Court, Vienna), referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 30 of that Treaty.

2 That question was raised in proceedings brought by Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH ('Familiapress'), an Austrian newspaper publisher, against Heinrich Bauer Verlag, a newspaper publisher established in Germany, for an order that the latter should cease to sell in Austria publications offering readers the chance to take part in games for prizes, in breach of the Gesetz über unlauteren Wettbewerb 1992 (Austrian Law on Unfair Competition; 'the UWG').

3 Heinrich Bauer Verlag publishes the weekly magazine 'Laura' in Germany, which it also distributes in Austria. The 22 February 1995 issue contained a crossword puzzle. Readers sending in the correct solution were entitled to be entered in a draw for two prizes of DM 500. There were two other puzzles in the same issue, for prizes of DM 1 000 and DM 5 000 respectively, which were also to be awarded by drawing lots among the persons sending in the correct answers. The following issues invited readers to play similar games. Each issue indicated that there would be more puzzles the following week.

4 According to the order for reference, that practice is contrary to Austrian law. Paragraph 9a(1)(1) of the UWG contains a general prohibition on offering consumers free gifts linked to the sale of goods or the supply of services. Paragraph 9a(2)(8) of the UWG authorizes prize competitions and draws for which 'the value of the potential individual entries, obtained by dividing the total number of prizes at stake by the number of entry vouchers (lots) distributed, does not exceed 5 schillings and the total value of the prizes competed for does not exceed 300 000 schillings', this, however, was declared inapplicable to the press by an amending law of 1993. Consequently, there has, since then, no longer been any exception to the prohibition on publishers of periodicals inviting consumers to take part in draws.

5 Since there is no provision to the same effect in the German Gesetz gegen den unlauteren Wettbewerb (Law against Unfair Competition), the Handelsgericht Wien took the view that the prohibition of the sale of periodicals under the UWG potentially affected intra-Community trade. It therefore stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Is Article 30 of the EC Treaty to be interpreted as precluding application of legislation of Member State A prohibiting an undertaking established in Member State B from selling in Member

State A a periodical produced in Member State B, where that periodical contains prize puzzle competitions or games which are lawfully organized in Member State B?'

6 Under Article 30 of the Treaty, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States.

7 The Court has consistently held that any measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade constitutes a measure having an effect equivalent to a quantitative restriction (Case 8/74 Procureur du Roi v Dassonville [1974] ECR 837, paragraph 5).

8 It should also be borne in mind that, in accordance with the case-law beginning with Cassis de Dijon (Case 120/78 Rewe-Zentral v Bundesmonopolverwaltung für Branntwein [1979] ECR 649), in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30, even if those rules apply without distinction to all products, unless their application can be justified by a public-interest objective taking precedence over the free movement of goods (Joined Cases C-267/91 and C-268/91 Keck and Mithouard [1993] ECR I-6097, paragraph 15).

9 By contrast, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (Keck and Mithouard, paragraph 16).

10 The Austrian Government maintains that the prohibition at issue falls outside Article 30 of the Treaty. In its view, the possibility of offering readers of a periodical the chance to take part in prize competitions is merely a method of promoting sales and hence a selling arrangement within the meaning of the judgment in Keck and Mithouard.

11 The Court finds that, even though the relevant national legislation is directed against a method of sales promotion, in this case it bears on the actual content of the products, in so far as the competitions in question form an integral part of the magazine in which they appear. As a result, the national legislation in question as applied to the facts of the case is not concerned with a selling arrangement within the meaning of the judgment in Keck and Mithouard.

12 Moreover, since it requires traders established in other Member States to alter the contents of the periodical, the prohibition at issue impairs access of the product concerned to the market of the Member State of importation and consequently hinders free movement of goods. It therefore constitutes in principle a measure having equivalent effect within the meaning of Article 30 of the Treaty.

13 The Austrian Government and the Commission argue, however, that the aim of the national legislation in question is to maintain press diversity, which is capable of constituting an overriding requirement for the purposes of Article 30.

14 They point out that shortly after the Gesetz über die Deregulierung des Wettbewerbs (Law on the Deregulation of Competition) entered into force in Austria in 1992 and liberalized inter alia the organization of prize competitions, fierce competition set in between periodicals publishers, as a result of their offering larger and larger gifts, in particular the chance to take part in

prize competitions.

15 Fearing that small publishers might not be able to resist that cut-throat competition in the long term, in 1993 the Austrian legislature excluded the press from the application of Paragraph 9a(2)(8) of the UWG which, as mentioned in paragraph 4 of this judgment, authorizes to a certain extent the organization of prize competitions and draws linked to the sale of products or the supply of services.

16 In the explanatory memorandum of the relevant bill, the Austrian Government pointed out in particular that, given the relatively low selling price of periodicals, especially of daily newspapers, there was a risk, in spite of the limits to prizes set by Article 9a(2)(8) of the UWG, that consumers would attach more importance to the chance of winning than to the quality of the publication (explanatory memorandum of the Government bill, RV 365 Blg No 18. GP).

17 The Austrian Government and the Commission also point to the very high degree of concentration of the press in Austria. The Austrian Government states that in the early 1990s the market share of the largest press group was 54.5% in Austria, as compared with only 34.7% in the United Kingdom and 23.9% in Germany.

18 Maintenance of press diversity may constitute an overriding requirement justifying a restriction on free movement of goods. Such diversity helps to safeguard freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order (see Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069, paragraph 30, and Case C-148/91 *Vereiniging Veronica Omroep Organisatie v Commissariaat voor de Media* [1993] ECR I-487, paragraph 10).

19 However, the Court has also consistently held (*Cassis de Dijon*, cited above; Case C-238/89 *Pall* [1990] ECR I-4827, paragraph 12, and Case C-470/93 *Mars* [1995] ECR I-1923, paragraph 15) that the provisions of national law in question must be proportionate to the objective pursued and that objective must not be capable of being achieved by measures which are less restrictive of intra-Community trade.

20 Admittedly, in Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 61, concerning freedom to provide services, the Court held that the special features of lotteries justify allowing national authorities a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes and the allocation of the profits they yield. The Court therefore considered that it was for the national authorities to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.

21 Games such as those at issue in the main proceedings are not, however, comparable to the lotteries the features of which were considered in *Schindler*.

22 The facts on which that judgment was based were concerned exclusively, as the Court expressly pointed out, with large-scale lotteries in respect of which the discretion enjoyed by national authorities was justified because of the high risk of crime or fraud, given the amounts which could be staked and the winnings which could be held out to players (paragraphs 50, 51 and 60).

23 By contrast, such concerns for the maintenance of order in society are not present in this case. The draws in question are organized on a small scale and less is at stake; they do not constitute an economic activity in their own right but are merely one aspect of the editorial content of a magazine; and under Austrian legislation, draws are prohibited only in the press.

24 Furthermore, it is to be noted that where a Member State relies on overriding requirements to justify rules which are likely to obstruct the exercise of free movement of goods, such justification must also be interpreted in the light of the general principles of law and in particular of fundamental rights (see Case C-260/89 ERT [1991] ECR I-2925, paragraph 43).

25 Those fundamental rights include freedom of expression, as enshrined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ERT, paragraph 44).

26 A prohibition on selling publications which offer the chance to take part in prize games competitions may detract from freedom of expression. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms does, however, permit derogations from that freedom for the purposes of maintaining press diversity, in so far as they are prescribed by law and are necessary in a democratic society (see the judgment of the European Court of Human Rights of 24 November 1993 in Informationsverein Lentia and Others v Austria Series A No 276).

27 In the light of the considerations set out in paragraphs 19 to 26 of this judgment, it must therefore be determined whether a national prohibition such as that in issue in the main proceedings is proportionate to the aim of maintaining press diversity and whether that objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression.

28 To that end, it should be determined, first, whether newspapers which offer the chance of winning a prize in games, puzzles or competitions are in competition with those small press publishers who are deemed to be unable to offer comparable prizes and whom the contested legislation is intended to protect and, second, whether such a prospect of winning constitutes an incentive to purchase capable of bringing about a shift in demand.

29 It is for the national court to determine whether those conditions are satisfied on the basis of a study of the Austrian press market.

30 In carrying out that study, it will have to define the market for the product in question and to have regard to the market shares of individual publishers or press groups and the trend thereof.

31 Moreover, the national court will also have to assess the extent to which, from the consumer's standpoint, the product concerned can be replaced by papers which do not offer prizes, taking into account all the circumstances which may influence the decision to purchase, such as the presence of advertising on the title page referring to the chance of winning a prize, the likelihood of winning, the value of the prize or the extent to which winning depends on a test calling for a measure of ingenuity, skill or knowledge.

32 The Belgian and Netherlands Governments consider that the Austrian legislature could have adopted measures less restrictive of free movement of goods than an outright prohibition on the distribution of newspapers which afford the chance of winning a prize, such as blacking out or removing the page on which the prize competition appears in copies intended for Austria or a statement that readers in Austria do not qualify for the chance to win a prize.

33 The documents before the Court suggest that the prohibition in question would not constitute a barrier to the marketing of newspapers where one of the above measures had been taken. If the national court were nevertheless to find that this was the case, the prohibition would be disproportionate.

34 In the light of the foregoing considerations, the answer to be given to the national court's question must be that Article 30 of the EC Treaty is to be interpreted as not precluding application of legislation of a Member State the effect of which is to prohibit the distribution on its territory by an undertaking established in another Member State of a periodical produced in that latter State containing prize puzzles or competitions which are lawfully organized in that State, provided that that prohibition is proportionate to maintenance of press diversity and that that objective cannot

be achieved by less restrictive means. This assumes, inter alia, that the newspapers offering the chance of winning a prize in games, puzzles or competitions are in competition with small newspaper publishers who are deemed to be unable to offer comparable prizes and the prospect of winning is liable to bring about a shift in demand. Furthermore, the national prohibition must not constitute an obstacle to the marketing of newspapers which, albeit containing prize games, puzzles or competitions, do not give readers residing in the Member State concerned the opportunity to win a prize. It is for the national court to determine whether those conditions are satisfied on the basis of a study of the national press market concerned.

Costs

35 The costs incurred by the Austrian, German, Belgian, Netherlands and Portuguese Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Handelsgericht Wien, by order of 15 September 1995, hereby rules:

Article 30 of the EC Treaty is to be interpreted as not precluding application of legislation of a Member State the effect of which is to prohibit the distribution on its territory by an undertaking established in another Member State of a periodical produced in that latter State containing prize puzzles or competitions which are lawfully organized in that State, provided that that prohibition is proportionate to maintenance of press diversity and that that objective cannot be achieved by less restrictive means. This assumes, inter alia, that the newspapers offering the chance of winning a prize in games, puzzles or competitions are in competition with small newspaper publishers who are deemed to be unable to offer comparable prizes and the prospect of winning is liable to bring about a shift in demand. Furthermore, the national prohibition must not constitute an obstacle to the marketing of newspapers which, albeit containing prize games, puzzles or competitions, do not give readers residing in the Member State concerned the opportunity to win a prize. It is for the national court to determine whether those conditions are satisfied on the basis of a study of the national press market concerned.

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NATIONA	Austria
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PROCEDU	Reference for a preliminary ruling

ADVGEN Tesauro
JUDGRAP Wathelet
DATES of document: 26/06/1997
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**Judgment of the Court (Sixth Chamber)
of 8 March 2001**

Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP).

Reference for a preliminary ruling: Stockholms tingsrätt - Sweden.

Free movement of goods - Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC) - Freedom to provide services - Articles 56 and 59 of the EC Treaty (now, after amendment, Articles 46 EC and 49 EC) - Swedish legislation on the advertising of alcoholic beverages - Selling arrangements - Measure having an effect equivalent to a quantitative restriction - Justification in the interest of the protection of health.

Case C-405/98.

1. Free movement of goods Derogations Protection of public health Prohibition on the advertising of alcoholic beverages Whether permissible Condition

(EC Treaty, Arts 30 and 36 (now, after amendment, Arts 28 EC and 30 EC))

2. Freedom to provide services Restrictions Prohibition on the advertising of alcoholic beverages Justified on the grounds of public health Condition

(EC Treaty, Arts 56 and 59 (now, after amendment, Arts 46 EC and 49 EC))

1. Articles 30 and 36 of the Treaty (now, after amendment, Articles 28 EC and 30 EC) do not preclude a prohibition on the advertising of alcoholic beverages provided for under national legislation, unless it is apparent that, in the circumstances of law and of fact which characterise the situation in the Member State concerned, the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on intra-Community trade.

(see para. 34 and operative part)

2. Articles 56 and 59 of the Treaty (now, after amendment, Articles 46 EC and 49 EC) do not preclude a prohibition on the advertising of alcoholic beverages provided for under national legislation, unless it is apparent that, in the circumstances of law and of fact which characterise the situation in the Member State concerned, the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on intra-Community trade.

(see para. 42 and operative part)

In [Case C-405/98](#),

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Stockholms Tingsrätt, Sweden, for a preliminary ruling in the proceedings pending before that court between

Konsumentombudsmannen (KO)

and

Gourmet International Products AB (GIP),

on the interpretation of Articles 30, 36, 56 and 59 of the EC Treaty (now, after amendment, Articles 28 EC, 30 EC, 46 EC and 49 EC),

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, J.-P. Puissechet (Rapporteur), R. Schintgen and F. Macken, Judges,

Advocate General: F.G. Jacobs,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

Konsumentombudsmannen (KO), by M. Åbyhammar, Ställföreträdande Konsumentombudsman,

Gourmet International Products AB (GIP), by U. Djurberg, Advokat,

the Swedish Government, by A. Kruse, acting as Agent,

the French Government, by K. Rispal-Bellanger and R. Loosli-Surrans, acting as Agents,

the Finnish Government, by T. Pynnä, acting as Agent,

the Norwegian Government, by H. Seland, acting as Agent,

the Commission of the European Communities, by L. Ström and K. Banks, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Gourmet International Products AB (GIP), of the Swedish, French and Finnish Governments and of the Commission at the hearing on 19 October 2000,

after hearing the Opinion of the Advocate General at the sitting on 14 December 2000,

gives the following

Judgment

Costs

43 The costs incurred by the Swedish, French, Finnish and Norwegian Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Stockholms Tingsrätt by order of 18 September 1998, hereby rules:

Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC) and Articles 56 and 59 of the EC Treaty (now, after amendment, Articles 46 EC and 49 EC) do not preclude a prohibition on the advertising of alcoholic beverages such as that laid down in Article 2 of Lagen 1978:763 med vissa bestämmelser om marknadsföring av alkoholdrycker (Swedish Law laying down provisions on the Marketing of Alcoholic Beverages), as amended, unless it is apparent that, in the circumstances of law and of fact which characterise the situation in the Member State concerned, the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on intra-Community trade.

1 By order of 18 September 1998, received at the Court on 16 November 1998, the Stockholms Tingsrätt (Stockholm District Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 30, 36, 56 and 59 of the EC Treaty (now, after amendment, Articles 28 EC, 30 EC, 46 EC and 49 EC).

2 The two questions have been raised in the context of an application made by the Konsumentombudsman (the Swedish ombudsman responsible for consumer protection, hereinafter the Consumer Ombudsman) for an injunction restraining Gourmet International Products AB (hereinafter GIP) from placing advertisements for alcoholic beverages in magazines.

National legislation

3 Lagen 1978:763 med vissa bestämmelser om marknadsföring av alkoholdrycker (Swedish Law 1978:763 laying down provisions on the Marketing of Alcoholic Beverages, as amended, hereinafter the Alkoholköklagen), which entered into force on 1 July 1979, is, according to Article 1, applicable to the promotion of alcoholic beverages to consumers by manufacturers and retailers. Pursuant to the Alkoholköklagen 1994:738 (Swedish Law on Alcohol), alcoholic beverages are beverages containing more than 2.25% of alcohol by volume. Those beverages comprise spirits, wines, strong beer (containing more than 3.5% of alcohol by volume) and beer (containing between 2.25% and 3.5% of alcohol by volume).

4 Article 2 of the Alkoholköklagen provides:

In view of the health risks involved in alcohol consumption, alcoholic beverages should be marketed with particular moderation. In particular, advertisements or other marketing measures must not be insistent, involve unsolicited approaches or encourage alcohol consumption.

Advertising may not be used to market alcoholic beverages on radio or television. The same prohibition applies to satellite broadcasts subject to Law 1996:844 on Radio and Television.

Advertising may not be used to market spirits, wines or strong beers either in periodicals or in other publications subject to the Regulation on Press Freedom and comparable to periodicals by reason of their publication schedule. That prohibition does not however apply to publications distributed solely at the point of sale of such beverages. Law 1996:851.

5 It is apparent from the order for reference that, owing to the object of the Alkoholköklagen, which is to restrict the possibilities of marketing alcoholic beverages to consumers, the prohibition on advertisements in periodicals does not apply to advertisements in the specialist press, meaning the press aimed essentially at traders, that is to say, in particular, at manufacturers and restaurateurs.

6 It is also apparent from the order for reference that advertising on the public highway and the direct mailing of advertising material to individuals, in particular, are regarded as contrary to the obligation to exercise moderation laid down by the Alkoholköklagen.

Main proceedings

7 GIP publishes a magazine entitled *Gourmet*. Issue No 4 (August-October 1997) of the edition intended for subscribers contained three pages of advertisements for alcoholic beverages, one for red wine and two for whisky. Those pages did not appear in the edition sold in shops. According to the order for reference, 90% of the magazine's 9 300 subscribers are traders, manufacturers or retailers, and 10% are private individuals.

8 The Consumer Ombudsman applied to the Stockholms Tingsrätt for an injunction, and imposition of a fine in the event of failure to comply therewith, restraining GIP from contributing to the marketing of alcoholic beverages to consumers by means of such advertisements, which were contrary to Article 2 of the Alkoholköklagen.

9 GIP contended that the application should be dismissed. It argued, in particular, that the proceedings brought against it were based on legislation that was contrary to Community law.

10 When examining the application, the Tingsrätt was unsure, in particular, whether national rules imposing an absolute prohibition on certain advertisements might be regarded as having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty and, if so, whether, in view of their object, they might be regarded as lawful under Article 36 of the Treaty. It was also unsure whether such national rules were compatible with the freedom to provide services.

11 The Stockholms Tingsrätt considered that an interpretation of the relevant provisions of the

Treaty seemed necessary. It therefore decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Is Article 30 or Article 59 of the EC Treaty to be interpreted as precluding national legislation entailing a general prohibition of alcohol advertising, such as the prohibition laid down in Article 2 of Alkoholreklamlagen?
2. If so, can such a prohibition be regarded as justified and proportionate for the protection of life and health of humans?

12 The Consumer Ombudsman lodged an appeal against the order for reference before the Marknadsdomstolen, Sweden, which dismissed the appeal by decision of 11 March 1999.

Free movement of goods

13 By the questions referred to the Court, which can be considered together, the national court is asking essentially, first, whether the provisions of the Treaty on the free movement of goods preclude a prohibition on advertisements for alcoholic beverages such as that laid down in Article 2 of the Alkoholreklamlagen.

14 The Consumer Ombudsman and the intervening Governments accept that the prohibition on advertising in Sweden affects sales of alcoholic beverages there, including those imported from other Member States, since the specific purpose of the Swedish legislation is to reduce the consumption of alcohol.

15 However, observing that the Court held in paragraph 16 of its judgment in Joined Cases C-267/91 and C-268/91 Keck and Mithouard [1993] ECR I-6097 that national provisions restricting or prohibiting certain selling arrangements are not liable to hinder intra-Community trade, so long as they apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, the Consumer Ombudsman and the intervening Governments contend that the prohibition on advertising in issue in the main proceedings does not constitute an obstacle to trade between Member States, since it satisfies the criteria laid down by the Court in that judgment.

16 GIP contends that an outright prohibition such as that at issue in the main proceedings does not satisfy those criteria. It argues that such a prohibition is, in particular, liable to have a greater effect on imported goods than on those produced in the Member State concerned.

17 Although the Commission takes the view that the decision as to whether, on the facts of the case, the prohibition does or does not constitute an obstacle to intra-Community trade is a matter for the national court, the Commission expresses similar doubts as to the application in the present case of the criteria referred to in paragraph 15 above.

18 It should be pointed out that, according to paragraph 17 of its judgment in Keck and Mithouard, if national provisions restricting or prohibiting certain selling arrangements are to avoid being caught by Article 30 of the Treaty, they must not be of such a kind as to prevent access to the market by products from another Member State or to impede access any more than they impede the access of domestic products.

19 The Court has also held, in paragraph 42 of its judgment in Joined Cases C-34/95 to C-36/95 De Agostini and TV-Shop [1997] ECR I-3843, that it cannot be excluded that an outright prohibition, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States.

20 It is apparent that a prohibition on advertising such as that at issue in the main proceedings not only prohibits a form of marketing a product but in reality prohibits producers and importers from directing any advertising messages at consumers, with a few insignificant exceptions.

21 Even without its being necessary to carry out a precise analysis of the facts characteristic of the Swedish situation, which it is for the national court to do, the Court is able to conclude that, in the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers in the form of advertisements in the press, on the radio and on television, the direct mailing of unsolicited material or the placing of posters on the public highway is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar.

22 The information provided by the Consumer Ombudsman and the Swedish Government concerning the relative increase in Sweden in the consumption of wine and whisky, which are mainly imported, in comparison with other products such as vodka, which is mainly of Swedish origin, does not alter that conclusion. First, it cannot be precluded that, in the absence of the legislation at issue in the main proceedings, the change indicated would have been greater; second, that information takes into account only some alcoholic beverages and ignores, in particular, beer consumption.

23 Furthermore, although publications containing advertisements may be distributed at points of sale, Systembolaget AB, the company wholly owned by the Swedish State which has a monopoly of retail sales in Sweden, in fact only distributes its own magazine at those points of sale.

24 Last, Swedish legislation does not prohibit editorial advertising, that is to say, the promotion, in articles forming part of the editorial content of the publication, of products in relation to which the insertion of direct advertisements is prohibited. The Commission correctly observes that, for various, principally cultural, reasons, domestic producers have easier access to that means of advertising than their competitors established in other Member States. That circumstance is liable to increase the imbalance inherent in the absolute prohibition on direct advertising.

25 A prohibition on advertising such as that at issue in the main proceedings must therefore be regarded as affecting the marketing of products from other Member States more heavily than the marketing of domestic products and as therefore constituting an obstacle to trade between Member States caught by Article 30 of the Treaty.

26 However, such an obstacle may be justified by the protection of public health, a general interest ground recognised by Article 36 of the Treaty.

27 In that regard, it is accepted that rules restricting the advertising of alcoholic beverages in order to combat alcohol abuse reflects public health concerns (Case 152/78 *Commission v France* [1980] ECR 2299, paragraph 17, and Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivia* [1991] ECR I-4151, paragraph 15).

28 In order for public health concerns to be capable of justifying an obstacle to trade such as that inherent in the prohibition on advertising at issue in the main proceedings, the measure concerned must also be proportionate to the objective to be achieved and must not constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States.

29 The Consumer Ombudsman and the intervening Governments claim that the derogation provided for in Article 36 of the Treaty can cover the prohibition on advertising at issue in the main proceedings. The Consumer Ombudsman and the Swedish Government emphasise in particular that the prohibition is not absolute and does not prevent members of the public from obtaining information, if they wish, in particular in restaurants, on the Internet, in an editorial context or by asking the producer or importer to send advertising material. Furthermore, the Swedish Government observes that the Court of Justice has acknowledged that, in the present state of Community law, Member States are at liberty, within the limits set by the Treaty, to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved (*Aragonesa*

de Publicidad Exterior and Publivía, cited above, paragraph 16). The Swedish Government maintains that the legislation at issue in the main proceedings constitutes an essential component of its alcohol policy.

30 GIP claims that the outright prohibition on advertising laid down by the legislation at issue in the main proceedings is disproportionate, since the protection sought could be obtained by prohibitions of a more limited nature, concerning, for example, certain public places or the press aimed at children and adolescents. It must be borne in mind that the Swedish policy on alcoholism is already catered for by the existence of the monopoly on retail sales, by the prohibition on sales to persons under the age of 20 years and by information campaigns.

31 The Commission submits that the decision as to whether the prohibition on advertising at issue in the main proceedings is or is not proportionate is a matter for the national court. However, it also states that the prohibition does not appear to be particularly effective, owing in particular to the existence of editorial publicity and the abundance of indirect advertising on the Internet, and that requirements as to the form of advertising, such as the obligation to exercise moderation already found in the Alkoholreklamlagen, may suffice to protect the interest in question.

32 It should be pointed out, first, that there is no evidence before the Court to suggest that the public health grounds on which the Swedish authorities rely have been diverted from their purpose and used in such a way as to discriminate against goods originating in other Member States or to protect certain national products indirectly (Case 34/79 Regina v Henn and Darby [1979] ECR 3795, paragraph 21, and Aragonesa de Publicidad Exterior and Publivía, cited above, paragraph 20).

33 Second, the decision as to whether the prohibition on advertising at issue in the main proceedings is proportionate, and in particular as to whether the objective sought might be achieved by less extensive prohibitions or restrictions or by prohibitions or restrictions having less effect on intra-Community trade, calls for an analysis of the circumstances of law and of fact which characterise the situation in the Member State concerned, which the national court is in a better position than the Court of Justice to carry out.

34 The answer to the question must therefore be that, as regards the free movement of goods, Articles 30 and 36 of the Treaty do not preclude a prohibition on the advertising of alcoholic beverages such as that laid down in Article 2 of the Alkoholreklamlagen, unless it is apparent that, in the circumstances of law and of fact which characterise the situation in the Member State concerned, the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on intra-Community trade.

Freedom to provide services

35 By the questions it has referred to the Court, the national court is essentially asking, second, whether the Treaty provisions on freedom to provide services preclude a prohibition on the advertising of alcoholic beverages such as that laid down in Article 2 of the Alkoholreklamlagen.

36 The Consumer Ombudsman, GIP, the Swedish Government and the Commission agree that provision of advertising space may constitute a provision of cross-border services falling within the scope of Article 59 of the Treaty. The other intervening Governments, on the other hand, contend that Article 59 does not apply in the main proceedings.

37 In that regard, as the Court has frequently held, the right to provide services may be relied on by an undertaking as against the Member State in which it is established if the services are provided to persons established in another Member State (see, in particular, Case C-18/93 Corsica Ferries Italia v Corpo dei Piloti del Porto di Genova [1994] ECR I-1783, paragraph 30, and

Case C-384/93 Alpine Investments [1995] ECR I-1141, paragraph 30).

38 That is particularly so where, as in the case before the referring court, the legislation of a Member State restricts the right of press undertakings established in the territory of that Member State to offer advertising space in their publications to potential advertisers established in other Member States.

39 A measure such as the prohibition on advertising at issue in the proceedings before that court, even if it is non-discriminatory, has a particular effect on the cross-border supply of advertising space, given the international nature of the advertising market in the category of products to which the prohibition relates, and thereby constitutes a restriction on the freedom to provide services within the meaning of Article 59 of the Treaty (see, in that regard, Alpine Investments, cited above, paragraph 35).

40 However, such a restriction may be justified by the protection of public health, which is a ground of general interest recognised by Article 56 of the EC Treaty, which is applicable to the provision of services in accordance with Article 66 of the EC Treaty (now Article 55 EC).

41 As observed in paragraph 33 above, in relation to obstacles to the free movement of goods, it is for the national court to determine whether, in the circumstances of law and of fact which characterise the situation in the Member State concerned, the prohibition on advertising at issue in the main proceedings meets the condition of proportionality required in order for the derogation from the freedom to provide services to be justified.

42 The answer to be given must therefore be that, as regards freedom to provide services, Articles 56 and 59 of the Treaty do not preclude a prohibition on the advertising of alcoholic beverages such as that laid down in Article 2 of the Alkoholreklamlagen, unless it is apparent that, in the circumstances of law and of fact which characterise the situation in the Member State concerned, the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on intra-Community trade.

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PROCEDU Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Puissochet

DATES of document: 08/03/2001
 of application: 16/11/1998

**Judgment of the Court
of 9 July 1997**

Generics BV v Smith Kline & French Laboratories Ltd.

Reference for a preliminary ruling: Hoge Raad - Netherlands.

Articles 30 and 36 of the EC Treaty - Patent - Registration of medicinal products - Infringement.

Case C-316/95.

1 Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Use by a third party, with a view to obtaining a marketing authorization, of samples of a medicinal product manufactured in accordance with a patented process - Opposition on the part of the patentee - Circumstances amounting to a measure having equivalent effect - Justification - Protection of industrial and commercial property

(EC Treaty, Arts 30 and 36)

2 Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Use by a third party, with a view to obtaining a marketing authorization, of samples of a medicinal product manufactured in accordance with a patented process - Obtention of authorization - Court order prohibiting marketing of the product for a specified period following expiry of the patent - Circumstances amounting to a measure having equivalent effect - Justification - Protection of industrial and commercial property - Period of prohibition exceeding that provided for in Directives 65/65 and 75/319 - Compatible with Community law

(EC Treaty, Arts 30 and 36; Council Directives 65/65, Art. 7, and 75/319, Art. 4(c))

3 Application of a rule of national law which gives the proprietor of a patent in respect of a manufacturing process for a medicinal product the right to oppose the submission by another person, before the expiry of the patent in question, of samples of medicinal products manufactured in accordance with that process to the authority competent for issuing marketing authorizations constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the Treaty. In the absence of such a provision, it cannot be ruled out that marketing authorization, the issuing of which involves a certain delay, might already be obtained while the patent was still valid or that a medicinal product manufactured in accordance with the same procedure and legally in circulation in another Member State could consequently be imported immediately after the expiry of the patent.

Application of such a rule is none the less justified under Article 36 of the Treaty on grounds relating to the protection of industrial and commercial property. The right which it confers on a patentee relates to the specific subject-matter of the patent - which includes, in particular, allowing the holder a monopoly of first exploitation of his product - and to preclude application of a national rule providing for that right would in fact be to allow an encroachment on that monopoly.

4 When a person other than the patentee has infringed the patent laws of a Member State by submitting, before the expiry of the patent in question, samples of a medicinal product manufactured in accordance with a patented process to the authority competent for issuing marketing authorizations and has thus obtained the authorization sought, an order of a national court prohibiting the infringer from marketing such a product for a specified period following the expiry of the patent in order to prevent him from deriving any unfair profit from his infringement constitutes, in so far as it prohibits the marketing in one Member State of a product lawfully sold in another Member State, a measure having equivalent effect within the meaning of Article 30 of the Treaty.

However, since the patentee, if the infringer had respected his rights, could have continued to market his product without competition throughout the period required to obtain the marketing authorization, a temporary prohibition placed by court order on the infringer, in so far as it seeks to place the proprietor of the patent in the position in which he would, in principle, have been had his rights

been respected, cannot in itself be held to be a disproportionate form of reparation and is thus capable of being justified under Article 36 of the Treaty on grounds relating to the protection of industrial and commercial property.

Community law, and in particular Article 36 of the Treaty, does not preclude such a court order from being imposed for 14 months after the expiry of the patent, when that period, although exceeding the maximum period authorized by Article 7 of Directive 65/65 read in conjunction with Article 4(c) of Directive 75/319, both relating to proprietary medicinal products, corresponds to the actual average duration of such a procedure in the Member State concerned. The effect of such a period of prohibition is to place the proprietor of the patent in the position in which he would in principle have been if his rights had been respected. In addition, the circumstance that the 14-month period exceeds the period provided for in the directives cannot be relied on by an infringer as against the proprietor of the patent without accepting the risk of favouring the infringer over the victim of the infringement.

In [Case C-316/95](#),

REFERENCE to the Court under Article 177 of the EC Treaty by the Hoge Raad der Nederlanden for a preliminary ruling in the proceedings pending before that court between

Generics BV

and

Smith Kline & French Laboratories Ltd

on the interpretation of Articles 30 and 36 of the EC Treaty,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, J.L. Murray and L. Sevón (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann (Rapporteur), D.A.O. Edward, G. Hirsch, P. Jann, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: F.G. Jacobs,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Generics BV, by G. van der Wal, of the Hague Bar,
- Smith Kline & French Laboratories Ltd, by C.J.J.C. van Nispen and D.B. Schutjens, of the Hague Bar, and E.H. Pijnacker Hordijk, of the Amsterdam Bar,
- the German Government, by A. Dittrich, Regierungsdirektor in the Federal Ministry of Justice, and B. Kloke, Oberregierungsrat in the Federal Ministry of the Economy, acting as Agents,
- the Greek Government, by K. Grigoriou, Legal Agent to the State Legal Council, and L. Pneumatikou, Specialist Adviser in the Special Community Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agents,
- the United Kingdom Government, by L. Nicoll, of the Treasury Solicitor's Department, acting as Agent, and
- the Commission of the European Communities, by H. van Lier, Principal Legal Adviser, and B.J. Drijber, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Generics BV, represented by G. van der Wal; of Smith Kline & French Laboratories Ltd, represented by C.J.J.C. van Nispen and E.H. Pijnacker Hordijk; of the Greek Government, represented by K. Grigoriou and V. Kontolaimos, Deputy Legal Adviser to the State Legal Council, acting as Agent; of the United Kingdom Government, represented by L. Nicoll and M. Silverleaf QC; and of the Commission, represented by B.J. Drijber, at the hearing on 7 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 27 February 1997,

gives the following

Judgment

Costs

35 The costs incurred by the German, Greek and United Kingdom Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Hoge Raad der Nederlanden, by judgment of 29 September 1995, hereby rules:

1. Application of a rule of national law which gives the proprietor of a patent in respect of a manufacturing process for a medicinal product the right to oppose the submission by another person of samples of medicinal products manufactured in accordance with that process to the authority competent for issuing marketing authorizations constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the EC Treaty.
2. Application of a rule of national law which gives the proprietor of a patent in respect of a manufacturing process for a medicinal product the right to oppose the submission by another person of samples of medicinal products, manufactured in accordance with that process by a person other than the patentee, to the authority competent for issuing marketing authorizations, is justified under Article 36 of the EC Treaty.
3. When a person other than the patentee has infringed the patent laws of a Member State by submitting samples of a medicinal product manufactured in accordance with a patented process to the authority competent for issuing marketing authorizations and has thus obtained the authorization sought, an order of a national court prohibiting the infringer from marketing such a product for a specified period following the expiry of the patent in order to prevent him from deriving any unfair profit from his infringement constitutes a measure having equivalent effect within the meaning of Article 30 of the EC Treaty capable of being justified under Article 36 of that Treaty.
4. Where the submission of samples of a medicinal product to the competent authority with a view to obtaining a marketing authorization has given rise to a patent infringement, Community law, and in particular Article 36 of the Treaty, does not preclude a national court from prohibiting the infringer from marketing that product for 14 months after the expiry of the patent in question, when that period, although exceeding the maximum period authorized by Article 7 of Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products, read in conjunction with Article 4(c) of Council Directive 75/319/EEC of 20 May 1975 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products, for the

procedure for granting a marketing authorization, corresponds to the actual average duration of such a procedure in the Member State concerned.

1 By judgment of 29 September 1995, received at the Court on 5 October 1995, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty four questions on the interpretation of Articles 30 and 36 of the EC Treaty.

2 Those questions were raised in proceedings between Generics BV ('Generics') and Smith Kline & French Laboratories Ltd ('SKF') concerning infringement of a pharmaceutical patent right.

3 On 19 June 1991, following an application submitted on 4 September 1973, SKF was granted a Netherlands patent in respect of a manufacturing process for a pharmaceutical preparation having the generic name 'cimetidine', which it marketed in the Netherlands under the brand name 'Tagamet'. That patent expired on 4 September 1993.

4 On 22 October 1987 and 10 October 1989, Genfarma BV ('Genfarma') filed three applications with the College ter Beoordeling van Geneesmiddelen (assessment board for medicinal products, 'the CBG') to register 200-mg, 400-mg, and 800-mg cimetidine tablets. Samples of those preparations were submitted to the CBG with the applications. Genfarma was granted registration on 18 January 1990 in respect of the first two applications and on 17 December 1992 in respect of the third.

5 Genfarma subsequently transferred those registrations to Generics and, on 21 June 1993, they were entered under Generics' name in the register of pharmaceutical preparations.

6 On 6 August 1993, SKF applied to the President of the Arrondissementsrechtbank (District Court), The Hague, for an injunction restraining Generics, until 5 November 1994, from offering or supplying cimetidine on the Netherlands market or transferring to third parties the registrations relating to that product.

7 SKF considered that the submission of the samples of cimetidine preparation to the CBG constituted an infringement of its patent as protected by the Rijksoctrooiwet 1910 (Netherlands Law on Patents, 'the ROW'), as it then applied. In particular, SKF referred to the judgment delivered by the Hoge Raad on 18 December 1992 in *Medicopharma v ICI*, in which it was held that submission to the CBG of samples of a medicinal product manufactured in accordance with a patented process, by a person other than the patentee, with a view to placing the product on the market after the expiry of the patent, was not covered by the exemption in Article 30(3) of the ROW. That paragraph provides: 'The exclusive right does not extend to acts undertaken solely for the purposes of an examination of the patented object, which must be taken to include a product directly obtained by means of the application of the patented process.'

8 Taking the view, therefore, that Generics could not have applied for the registrations until after the expiry of the patent on 4 September 1993 and that, given the average actual duration of the registration procedure in the Netherlands, it would not have obtained them for another 14 months, SKF asked for the injunction against Generics to extend until 5 November 1994.

9 That injunction was granted, although the conditions imposed on Generics were limited to a prohibition on offering or supplying cimetidine before 5 November 1994 on the basis of registrations obtained under applications filed before 4 September 1993 and a prohibition on transferring such registrations before 5 November 1994. That decision was upheld by the *Gerechtshof* (Regional Court of Appeal), The Hague, in a judgment which Generics has sought to have quashed and referred back for the matter to be reconsidered.

10 It appears from the order for reference that one of the main grounds on which Generics challenges the *Gerechtshof's* judgment is in relation to the finding that neither the prohibition on providing

the CBG with samples of medicinal products covered by a patent to the CBG during the validity of the patent nor a moratorium imposed with a view to preventing Generics from profiting unfairly from a wrongful act committed against SKF constitutes a barrier to intra-Community trade incompatible with Articles 30 and 36 of the Treaty.

11 Generics further maintains that the moratorium imposed on it is in any event incompatible with Council Directive 65/65/EEC of 26 January 1965 (OJ, English Special Edition 1965, p. 20) and Council Directive 75/319/EEC of 20 May 1975 (OJ 1975 L 147, p. 13), both on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products. That moratorium was, it asserts, fixed on the basis of the average duration of the registration procedure in the Netherlands, and not of the maximum duration authorized by those directives.

12 Article 7 of Directive 65/65 requires national authorities to reach a decision within 120 days of the application and provides that that period may be extended by 90 days in exceptional cases. Article 4(c) of Directive 75/319 provides that where the competent authorities avail themselves of the option of requiring the applicant to supplement certain particulars accompanying the application, the time-limits laid down in Article 7 of Directive 65/65 are to be suspended until such time as the supplementary information required has been provided. Likewise, those time-limits are to be suspended for the time allowed to the applicant, where appropriate, for giving oral or written explanation.

13 The Hoge Raad decided to stay the proceedings and refer the following questions to the Court:

- '(1) Is a rule of national law which confers on the proprietor of a patent in respect of certain medicinal products the right to oppose, during the currency of that patent, the submission by another person of samples of the patented medicinal products (or of medicinal products produced in accordance with the patented process) to the authority responsible for the registration of medicinal products, to be regarded as a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the EC Treaty?
- (2) If so, is that measure covered by the exception laid down in Article 36 of the EC Treaty in respect of restrictions which are justified on the ground of the protection of industrial property?
- (3) Where, during the currency of a patent, an infringement of that patent is committed under national law and there is a danger that the person committing that infringement or a third person may still profit from the infringement following the expiry of the patent, or that the proprietor of the patent may still suffer some disadvantage as a result of the infringement following the expiry of the patent, does a judicial prohibition imposed in order to prevent that potential harm which restrains, for a specified period after the expiry of the patent, the placing on the market of products which were protected by the patent during its currency, constitute a measure which is prohibited by Article 30 of the EC Treaty and which is not covered by the exception contained in Article 36 of the EC Treaty?
- (4) Where the infringement referred to in (3) above consists in the submission of samples with a view to the registration of a medicinal product, as referred to in (1) above, and in consequence thereof a judicial prohibition of the kind referred to in (3) above is imposed for a period which exceeds the maximum period prescribed by Directives 65/65/EEC and 75/319/EEC for the registration of medicinal products, does the fact that the duration of the prohibition exceeds that maximum render the prohibition incompatible to that extent with Community law and, if so, does that mean that the person on whom the prohibition is imposed can invoke that incompatibility, by virtue of Community law, as against the former proprietor of the patent?'

The first question

14 By its first question, the national court seeks, in substance, to ascertain whether application of a rule of national law giving the proprietor of a patent in respect of a manufacturing process for a medicinal product the right to oppose the submission by another person of samples of medicinal products manufactured in accordance with that process to the authority competent for issuing authorizations to place medicinal products on the market ('marketing authorizations') constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the EC Treaty.

15 It has consistently been held that any measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade constitutes a measure having an effect equivalent to a quantitative restriction (Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, paragraph 5, and Case C-412/93 *Leclerc-Siplec v TF1 Publicité and M6 Publicité* [1995] ECR I-179, paragraph 18).

16 In so far as it prohibits competitors from submitting samples of a medicinal product manufactured by a patented process for the purpose of an application for marketing authorization before the expiry of the relevant patent, a provision such as that in issue in the main proceedings has the effect, *inter alia*, of preventing any competitor from obtaining such authorization for that type of product before the end of the period of waiting that follows the filing of an application for that purpose after the expiry of the patent. Thus, it will not in any event be possible for a medicinal product, manufactured by the same process and lawfully in circulation in Member State A while the relevant patent is still in force in Member State B, to be marketed in Member State B as soon as that patent expires. Were it not for the provision in issue, samples of such a product could lawfully be submitted for the purpose of an application for a marketing authorization before the expiry of the patent, so that there would be no obstacle to the issuing of such authorization while the patent was still valid or, consequently, to the importation of the generic medicinal product from Member State A to Member State B immediately after the expiry of the patent.

17 The answer must therefore be that application of a rule of national law which gives the proprietor of a patent in respect of a manufacturing process for a medicinal product the right to oppose the submission by another person of samples of medicinal products manufactured in accordance with that process to the authority competent for issuing marketing authorizations constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the Treaty.

The second question

18 The second question is, in substance, whether application of a rule of national law which gives the proprietor of a patent in respect of a manufacturing process for a medicinal product the right to oppose the submission by another person of samples of medicinal products, manufactured in accordance with that process by a person other than the patentee, to the authority competent for issuing marketing authorizations, is justified under Article 36 of the Treaty.

19 The Court has held that, in providing an exception, on grounds of the protection of industrial and commercial property, to one of the fundamental principles of the common market, Article 36 of the Treaty admits such derogation only in so far as it is justified for the purpose of safeguarding rights constituting the specific subject-matter of that property, and that, as regards patents, includes, in particular, allowing the holder a monopoly of first exploitation of his product (see, to that effect, Case 187/80 *Merck v Stephar and Exler* [1981] ECR 2063, paragraph 10).

20 In the present case, the right of the proprietor of a patent in respect of a manufacturing process for a medicinal product to oppose the use by another person of samples of medicinal products manufactured in accordance with that process for the purpose of obtaining a marketing authorization falls within the specific subject-matter of the patent right in so far as such samples have been used without the direct or indirect consent of the patentee. In that connection, moreover, it may be noted

that both Article 25 of the Community Patent Convention (OJ 1989 L 401, p. 10) and Article 28 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS', OJ 1994 L 336, p. 214) confer the right to prevent third parties not having the consent of the proprietor of the patent from, inter alia, using the product obtained directly by the process which is the subject-matter of the patent. In the present case, to preclude application of a national rule providing for the right indicated above would in fact allow an encroachment on the monopoly of first exploitation of the product as referred to in the preceding paragraph.

21 Furthermore, measures having an effect equivalent to quantitative restrictions justified on grounds relating to the protection of industrial and commercial property are permitted by Article 36 on the express condition that they do not constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States (see, inter alia, Case C-191/90 Generics and Harris Pharmaceuticals v Smith Kline and French [1992] ECR I-5335, paragraph 21).

22 There is, however, nothing in the documents before the Court to suggest that the ROW is discriminatory in nature or that it seeks to favour domestic products over those from other Member States.

23 The answer must therefore be that application of a rule of national law which gives the proprietor of a patent in respect of a manufacturing process for a medicinal product the right to oppose the submission by another person of samples of medicinal products, manufactured in accordance with that process by a person other than the patentee, to the authority competent for issuing marketing authorizations, is justified under Article 36 of the Treaty.

The third question

24 In substance, the national court's third question is whether, when a person other than the patentee has infringed the patent laws of a Member State by submitting samples of a medicinal product manufactured in accordance with a patented process to the authority competent for issuing marketing authorizations and has thus obtained the authorization sought, an order of a national court prohibiting the infringer from marketing such a product for a specified period following expiry of the patent in order to prevent him from deriving any unfair profit from his infringement constitutes a measure having equivalent effect within the meaning of Article 30 of the Treaty capable of being justified under Article 36.

25 Such a measure, inasmuch as it prohibits the marketing in one Member State of a product lawfully sold in another Member State, constitutes a measure having equivalent effect within the meaning of Article 30 of the Treaty.

26 As regards the application of Article 36, Generics submits that, as a way of providing reparation, a prohibition on the sale of products after expiry of the patent is contrary to the principle of proportionality, given the alternative remedies of damages or cancellation of the marketing authorizations.

27 As to that, if Generics had respected SKF's patent right, it could not have submitted the cimetidine samples until that patent had expired. SKF would thus have been able to continue to market its product without competition from the generic product marketed by Generics throughout the period required to obtain the marketing authorization.

28 The moratorium imposed by the court on the infringer of the patent right, in so far as it seeks to place the proprietor of the patent in the position in which it would, in principle, have been had its rights been respected, cannot in itself be held to be a disproportionate form of reparation.

29 The answer must therefore be that, when a person other than the patentee has infringed the patent laws of a Member State by submitting samples of a medicinal product manufactured in accordance with a patented process to the authority competent for issuing marketing authorizations and has thus obtained the authorization sought, an order of a national court prohibiting the infringer from

marketing such a product for a specified period following the expiry of the patent in order to prevent him from deriving any unfair profit from his infringement constitutes a measure having equivalent effect within the meaning of Article 30 of the Treaty capable of being justified under Article 36 of the Treaty.

The fourth question

30 In substance, the national court's fourth question is whether, where the submission of samples of a medicinal product to the competent authority with a view to obtaining a marketing authorization has given rise to a patent infringement, Community law, and in particular Article 36 of the Treaty, precludes a national court from prohibiting the infringer from marketing that product for 14 months after the expiry of the patent in question, when that period, although exceeding the maximum period authorized by Article 7 of Directive 65/65 read in conjunction with Article 4(c) of Directive 75/319 for the procedure for granting a marketing authorization, corresponds to the actual average duration of such a procedure in the Member State concerned.

31 Since the duration of the prohibition imposed by the national court corresponds, as stated in the order for reference, to the actual average duration of the registration procedure in the Member State concerned, its effect is, as has already been made clear in paragraph 28 above, to place the proprietor of the patent in the position in which it would in principle have been if its rights had been respected.

32 It is not disputed that, in the present case, the 14-month period exceeds the maximum period authorized by the abovementioned directives. That circumstance cannot, however, be relied on by an infringer as against the proprietor of the patent in order to obtain a shorter prohibition period. The contrary view would amount, in the present circumstances, to accepting the risk of favouring the infringer over the victim of the infringement.

33 A solution such as that adopted by the national court does not, therefore, appear to give rise, in circumstances such as those of the present case, to any disproportionate consequences for the infringer of the patent right.

34 The answer must therefore be that, where the submission of samples of a medicinal product to the competent authority with a view to obtaining a marketing authorization has given rise to a patent infringement, Community law, and in particular Article 36 of the Treaty, does not preclude a national court from prohibiting the infringer from marketing that product for 14 months after the expiry of the patent in question, when that period, although exceeding the maximum period authorized by Article 7 of Directive 65/65 read in conjunction with Article 4(c) of Directive 75/319 for the procedure for granting a marketing authorization, corresponds to the actual average duration of such a procedure in the Member State concerned.

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PROCEDU

Reference for a preliminary ruling

ADVGEN

Jacobs

JUDGRAP

Gulmann

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**Judgment of the Court
of 11 November 1997**

Frits Loendersloot, trading as F. Loendersloot Internationale Expeditie v George Ballantine & Son Ltd and Others.

Reference for a preliminary ruling: Hoge Raad - Netherlands.

Article 36 of the EC Treaty - Trade mark rights - Relabelling of whisky bottles.

Case C-349/95.

Free movement of goods - Industrial and commercial property - Trade mark rights - Product put on the market in a Member State by the trade mark owner or with his consent - Reaffixing by a third party of the label bearing the trade mark - Opposition by the trade mark owner - Permissible - Conditions

(EC Treaty, Art. 36)

Article 36 must be interpreted as meaning that the owner of trade mark rights may, even if that constitutes a barrier to intra-Community trade, rely on those rights to prevent a third party from removing and then reaffixing or replacing labels bearing the mark which the owner has himself affixed to products he has put on the Community market, unless the following conditions are satisfied:

- it is established that the use of the trade mark rights by the owner to oppose the marketing of the relabelled products under that trade mark would contribute to the artificial partitioning of the markets between Member States. That is the case in particular if the labels are removed and reaffixed for the purpose of removing the identification numbers which the owner has applied to his products in order to be able to reconstruct the itinerary of those products, with the purpose of preventing dealers from supplying persons carrying on parallel trade. However, where identification numbers have been applied to comply with a legal obligation or to attain important objectives which are legitimate from the point of view of Community law, the fact that an owner of trade mark rights makes use of those rights to prevent a third party from removing and then reaffixing or replacing labels bearing his trade mark in order to remove those numbers does not contribute to an artificial partitioning of the markets between Member States;
- it is shown that the relabelling cannot affect the original condition of the product;
- the presentation of the relabelled product is not such as to be liable to damage the reputation of the trade mark and its owner; and
- the person who relabels the products informs the trade mark owner of the relabelling before the relabelled products are put on sale.

In [Case C-349/95](#),

REFERENCE to the Court under Article 177 of the EC Treaty by the Hoge Raad der Nederlanden for a preliminary ruling in the proceedings pending before that court between

Frits Loendersloot, trading as F. Loendersloot Internationale Expeditie,

and

George Ballantine & Son Ltd and Others

on the interpretation of Article 36 of the EC Treaty,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann (Rapporteur), H. Ragnemalm, M. Wathelet (Presidents of Chambers), J.C. Moitinho de Almeida, P.J.G. Kapteyn, J.L. Murray, D.A.O. Edward, G. Hirsch, P. Jann and L. Sevón, Judges,

Advocate General: F.G. Jacobs,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Frits Loendersloot, trading as F. Loendersloot Internationale Expeditie, by G. van der Wal, of the Hague Bar,
- George Ballantine & Son Ltd and Others, by W.A. Hoyng, of the Eindhoven Bar,
- the United Kingdom Government, by S. Braviner, of the Treasury Solicitor's Department, acting as Agent, and M. Silverleaf, Barrister,
- the Commission of the European Communities, by H. van Lier, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Frits Loendersloot, trading as F. Loendersloot Internationale Expeditie, represented by G. van der Wal, of George Ballantine & Son Ltd and others, represented by W.A. Hoyng, of the United Kingdom Government, represented by L. Nicoll, of the Treasury Solicitor's Department, acting as Agent, and M. Silverleaf, and of the Commission, represented by H. van Lier, at the hearing on 7 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 27 February 1997,

gives the following

Judgment

Costs

52 The costs incurred by the United Kingdom Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 3 November 1995, hereby rules:

Article 36 of the EC Treaty must be interpreted as meaning that the owner of trade mark rights may, even if that constitutes a barrier to intra-Community trade, rely on those rights to prevent a third party from removing and then reaffixing or replacing labels bearing the mark which the owner has himself affixed to products he has put on the Community market, unless:

- it is established that the use of the trade mark rights by the owner to oppose the marketing of the relabelled products under that trade mark would contribute to artificial partitioning of the markets between Member States;
- it is shown that the relabelling cannot affect the original condition of the product;
- the presentation of the relabelled product is not such as to be liable to damage the reputation of the trade mark and its owner; and
- the person who relabels the products informs the trade mark owner of the relabelling before the relabelled products are put on sale.

1 By judgment of 3 November 1995, received at the Court on 13 November 1995, the Hoge Raad der

Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty four questions on the interpretation of Article 36 of that Treaty.

2 Those questions were raised in proceedings between Frits Loendersloot, residing in the Netherlands, trading as F. Loendersloot Internationale Expeditie (hereinafter 'Loendersloot'), and George Ballantine & Son Ltd and 14 other companies established in Scotland or England (hereinafter 'Ballantine and others').

3 Ballantine and others produce and market alcoholic drinks, particularly whisky. Their products enjoy a high reputation and are sold in almost all countries of the world.

4 Those drinks are marketed in bottles to which the manufacturers affix labels bearing their respective trade marks. Those marks also appear on the packaging of the bottles. In addition, Ballantine and others place identification numbers both on the labels or elsewhere on the bottles and on the packaging.

5 Loendersloot is a transport and warehousing firm. Its customers include traders who engage in 'parallel' trade. They buy the products of Ballantine and others in countries where prices are relatively low, and resell them in countries where prices are higher.

6 In 1990 Ballantine and others brought proceedings against Loendersloot in the Arrondissementsrechtbank (District Court) Breda seeking an order restraining Loendersloot from doing certain actions which infringed their trade mark rights or were otherwise unlawful, in particular:

- removing the labels bearing their trade marks and reapplying them by reaffixing the original labels or replacing them with copies,
- removing the identification numbers on or underneath the original labels and on the packaging of the bottles,
- removing the English word 'pure' and the name of the importer approved by Ballantine and others from the original labels, and in certain cases replacing that name by the name of another person, and
- exporting the products thus treated to traders in France, Spain, England, the United States and Japan.

7 Loendersloot argued that even if it had carried out those actions, they did not constitute infringements of trade mark rights, nor were they unlawful on other grounds. It submitted in particular that the actions were necessary to allow parallel trade in the products in question on certain markets.

8 The Arrondissementsrechtbank held that the removal of the identification numbers constituted an unlawful act for reasons not connected with trade mark rights, and prohibited Loendersloot from removing them from the bottles and packaging and from exporting the products thus treated. It also found that removing the trade marks from the bottles and packaging and reapplying them constituted infringements of trade mark rights, and therefore ordered Ballantine and others to produce evidence of the trade mark rights they claimed.

9 Loendersloot appealed against that judgment to the Gerechtshof (Regional Court) 's-Hertogenbosch. Ballantine and others cross-appealed.

10 The Gerechtshof set aside the judgment of the Arrondissementsrechtbank in so far as it prohibited the removal of the identification numbers and the export of the products in question. With respect to the alleged infringements of trade mark rights, however, the Gerechtshof held that the Arrondissementsrechtbank had rightly concluded that the removal and reapplication of a trade mark by a third party constituted an unlawful use of that mark. It rejected Loendersloot's argument that Articles 30 and 36 of the EC Treaty precluded the court from ordering the injunctive relief sought by Ballantine and others,

on the ground that the exclusive right of a trade mark owner to affix that mark formed part of the specific subject-matter of trade marks.

11 Loendersloot appealed on a point of law to the Hoge Raad, and Ballantine and others cross-appealed. Loendersloot argued in particular that the possibility for the owner of a trade mark, under his national legislation, to prevent a third party from removing and reapplying his mark did not form part of the specific subject-matter of trade mark rights, and that Ballantine and others were using their trade mark rights in order to be able to maintain a system of identification numbers whose sole purpose was to combat parallel trade by means incompatible with Community law.

12 Ballantine and others argued that the exclusive right they relied on formed part of the specific subject-matter of trade mark rights, and that the identification numbers pursued only legitimate interests such as the recall of defective products and the need to combat counterfeiting.

13 In the judgment making the order for reference, the Hoge Raad held that the removal and reapplication of a trade mark by a third party without the consent of the trade mark owner were prohibited by the relevant national law. Since it considered that it could not rule on the arguments relating to Article 36 of the Treaty without first making a reference to the Court of Justice, the Hoge Raad stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

1. Is the specific subject-matter of the rights attaching to a trade mark to be regarded as including the possibility afforded to the proprietor of a trade mark under national law to oppose, with regard to alcoholic drinks manufactured by him, the removal by a third party of labels affixed by the proprietor on bottles and on the packaging containing them, and bearing his mark, after the drinks have been placed by him on the Community market in that packaging, and the subsequent reapplication of those labels by that third party or their replacement by similar labels, without thereby in any way damaging the original condition of the product?

2. In so far as the labels are replaced by other similar labels, is the position different where the third party omits the indication "pure" appearing on the original labels and/or, as the case may be, replaces the importer's name with another name?

3. If Question 1 falls to be answered in the affirmative, but the proprietor of the trade mark avails himself of the possibility referred to in that question in order to prevent the third party from removing the identification marks which the trade mark proprietor has affixed on or underneath the labels in order to enable the trade mark proprietor to detect shortfalls within his sales organization and thus to combat parallel trade in his products, must such an exercise of the trade mark right be regarded as a "disguised restriction on trade between Member States" aimed at achieving an artificial compartmentalization of the markets?

4. To what extent is the answer to Question 3 affected where the trade mark proprietor has affixed those identification marks either pursuant to a legal obligation or voluntarily, but in any event with a view to making a "product recall" possible and/or in order to limit his product liability and/or to combat counterfeiting, or, as the case may be, solely in order to combat parallel trade?"

Preliminary remarks

14 The national court put its questions on the basis of the following three premisses:

- the removal and reapplication or replacement of the trade marks of Ballantine and others constitute infringements of their trade mark rights under national law;
- the injunctive relief sought by Ballantine and others create barriers to the free movement of goods between Member States, which are contrary in principle to the relevant provisions of the Treaty, and

- such barriers may be permitted under Article 36 of the Treaty if they are justified for reasons of the protection of industrial and commercial property, provided that they constitute neither an arbitrary means of discrimination nor a disguised restriction on trade between Member States.

15 As to the second premiss, Ballantine and others deny that the injunctive relief sought constitutes barriers to intra-Community trade, since there is nothing to prevent Loendersloot from exporting the products in question in their original condition to other Member States.

16 On this point, as the Advocate General has observed in point 25 of his Opinion, there is no reason to question the national court's assessment that prohibitory measures such as those sought by Ballantine and others constitute barriers to the free movement of goods between Member States laid down by Articles 30 and 34 of the EC Treaty.

17 As to the third premiss, it has been suggested that the national court's questions should be answered within the framework not of Article 36 of the Treaty but of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), which was to be transposed into the national laws of the Member States by 31 December 1992 at the latest.

18 On this point, it suffices to note that it is for the national court to determine whether, from the point of view of the national rules applicable to orders such as those sought in the main proceedings, the dispute before it is to be resolved on the basis of Article 36 of the Treaty or of Directive 89/104, Article 7 of which regulates the question of exhaustion of trade mark rights in relation to goods which have been put on the market in the Community. However, Article 7 of that directive, like Article 36 of the Treaty, is intended to reconcile the fundamental interest in protecting trade mark rights with the fundamental interest in the free movement of goods within the common market, so that those two provisions, which aim to achieve the same result, must be interpreted in the same way (Joined Cases C-427/93, C-429/93 and C-436/93 Bristol-Myers Squibb and Others v Paranova [1996] ECR I-3457, paragraph 40; Joined Cases C-71/94, C-72/94 and C-73/94 Eurim-Pharm v Beiersdorf and Others [1996] ECR I-3603, paragraph 27, and Case C-232/94 MPA Pharma v Rhône-Poulenc Pharma [1996] ECR I-3671, paragraph 13).

The questions

19 By its four questions, which should be considered together, the national court essentially asks whether Article 36 of the Treaty is to be interpreted as meaning that the owner of trade mark rights may, even if that constitutes a barrier to intra-Community trade, rely on those rights to prevent a third party from removing and then reaffixing or replacing labels bearing the mark which the owner has himself affixed to products he has put on the Community market, where the original condition of the products is not affected.

20 The questions concern more particularly situations where the relabelling is done for the purpose of

- removing the identification numbers placed by the trade mark owner on or underneath the labels and on the packaging of the bottles, and

- removing the English word 'pure' and the name of the approved importer from the labels, and in certain cases replacing that name with the name of another person.

With respect to the first situation, the Court is asked to rule on whether it is significant, first, that the trade mark owner makes use of his rights in order to prevent a third party from removing the identification numbers which enable him to detect weaknesses in his sales organization and so combat parallel trade and, second, that the identification numbers have other purposes, such as complying with a legal obligation, making it possible to recall the product, limiting the manufacturer's

liability or combating counterfeiting.

The case-law of the Court

21 In answering those questions, it should be noted that, according to the Court's case-law, Article 36 allows derogations from the fundamental principle of the free movement of goods within the common market only in so far as such derogations are justified in order to safeguard the rights which constitute the specific subject-matter of the industrial and commercial property in question.

22 With respect to trade mark rights, the Court has held that they constitute an essential element in the system of undistorted competition which the Treaty is intended to establish. In such a system, undertakings must be able to attract and retain customers by the quality of their products or services, which is made possible only by distinctive signs allowing them to be identified. For the trade mark to be able to fulfil that function, it must constitute a guarantee that all products which bear it have been manufactured under the control of a single undertaking to which responsibility for their quality may be attributed (see, in particular, Case C-10/89 CNL-SUCAL v HAG GF (hereinafter 'HAG II') [1990] ECR I-3711, paragraph 13, and Bristol-Myers Squibb, cited above, paragraph 43). Consequently, the specific subject-matter of a trade mark is in particular to guarantee to the owner that he has the exclusive right to use that mark for the purpose of putting a product on the market for the first time and thus to protect him against competitors wishing to take unfair advantage of the status and reputation of the trade mark by selling products illegally bearing it (see, in particular, Case 102/77 Hoffmann-La Roche v Centrafarm [1978] ECR 1139, paragraph 7; HAG II, paragraph 14; and Bristol-Myers Squibb, paragraph 44).

23 It follows in particular that the owner of a trade mark protected by the legislation of a Member State cannot rely on that legislation in order to oppose the importation or marketing of a product which has been put on the market in another Member State by him or with his consent (see, in particular, Bristol-Myers Squibb, paragraph 45). Trade mark rights are not intended to allow their owners to partition national markets and thus assist the maintenance of price differences which may exist between Member States (see Bristol-Myers Squibb, paragraph 46).

24 With respect more particularly to the question whether a trade mark owner's exclusive right includes the power to oppose the use of the trade mark by a third party after the product has been repackaged, the Court has held that account must be taken of the essential function of the trade mark, which is to guarantee to the consumer or end user the identity of the trade-marked product's origin by enabling him to distinguish it without any risk of confusion from products of different origin. That guarantee of origin means that the consumer or end user can be certain that a trade-marked product offered to him has not been subject at a previous stage of marketing to interference by a third party, without the authorization of the trade mark owner, in such a way as to affect the original condition of the product (see, in particular, Hoffmann-La Roche, paragraph 7, and Bristol-Myers Squibb, paragraph 47).

25 The Court has thus held that the right conferred upon the trade mark owner to oppose any use of the trade mark which is liable to impair the guarantee of origin, as so understood, forms part of the specific subject-matter of the trade mark right, the protection of which may justify derogation from the fundamental principle of the free movement of goods (Hoffmann-La Roche, paragraph 7, Case 1/81 Pfizer v Eurim-Pharm [1981] ECR 2913, paragraph 9, and Bristol-Myers Squibb, paragraph 48).

26 Applying those principles in the context of disputes concerning the repackaging of pharmaceutical products for purposes of parallel trade, the Court has held that Article 36 of the Treaty must be interpreted as meaning that a trade mark owner may in principle legitimately oppose the further marketing of a pharmaceutical product where the importer has repackaged it and reattached the trade

mark (see, in particular, Hoffmann-La Roche, paragraph 8, and, with respect to Article 7(2) of Directive 89/104, Bristol-Myers Squibb, paragraph 50).

27 Contrary to Loendersloot's assertion, that case-law applies also to cases such as that in the main proceedings. The product bearing the trade mark has in the present case likewise been subject to interference by a third party, without the authorization of the trade mark owner, which is liable to impair the guarantee of origin provided by the trade mark.

28 It should be noted, however, that according to the case-law of the Court (see, in particular, Hoffmann-La Roche, paragraph 10, Case 3/78 Centrafarm v American Home Products [1978] ECR 1823, paragraphs 21 and 22, and Bristol-Myers Squibb, paragraphs 49 and 50) Article 36 does not permit the owner of the trade mark to oppose the reaffixing of the mark where such use of his trade mark rights contributes to the artificial partitioning of the markets between Member States and where the reaffixing takes place in such a way that the legitimate interests of the trade mark owner are observed. Protection of those legitimate interests means in particular that the original condition of the product inside the packaging must not be affected, and that the reaffixing is not done in such a way that it may damage the reputation of the trade mark and its owner.

29 It follows that under Article 36 of the Treaty the owner of trade mark rights may rely on those rights to prevent a third party from removing and then reaffixing or replacing labels bearing the trade mark, unless:

- it is established that the use of the trade mark rights by the owner to oppose the marketing of the relabelled products under that trade mark would contribute to the artificial partitioning of the markets between Member States;
- it is shown that the repackaging cannot affect the original condition of the product, and
- the presentation of the relabelled product is not such as to be liable to damage the reputation of the trade mark and its owner.

30 According to the Court's case-law a person who repackages pharmaceutical products is also required to inform the trade mark owner of the repackaging, to supply him, on demand, with a specimen of the repackaged product, and to state on the repackaged product the person responsible for the repackaging (see, in particular, Bristol-Myers Squibb).

31 The application of those conditions to circumstances such as those of the main proceedings must therefore be examined.

32 As to the original condition of the product, the wording of Question 1 indicates that in the national court's opinion the relabelling at issue in the main proceedings has no adverse effect upon it.

33 As to protection of the reputation of the trade mark, a third party who relabels the product must ensure that the reputation of the trade mark - and hence of its owner - does not suffer from an inappropriate presentation of the relabelled product (see, in particular, Bristol-Myers Squibb, paragraphs 75 and 76). To assess whether that is the case in the main proceedings, the national court must take into account in particular the interest of Ballantine and others in protecting the luxury image of their products and the considerable reputation they enjoy.

34 It appears from the case-file that the crux of the dispute is, in particular, application of the condition relative to the owner's use of the trade mark contributing to artificial partitioning of the markets between Member States.

35 On this point, the Court held in Bristol-Myers Squibb, paragraph 52, that use of trade mark rights by their owner in order to oppose the marketing under that trade mark of products repackaged

by a third party would contribute to the partitioning of markets between Member States, in particular where the owner has placed an identical pharmaceutical product on the market in several Member States in various forms of packaging and the product may not, in the condition in which it has been marketed by the trade mark owner in one Member State, be imported and put on the market in another Member State by a parallel importer.

36 The Court went on to hold, in paragraphs 56 and 57 of that judgment, that the possibility for the owner of trade mark rights to oppose the marketing of repackaged products under his trade mark should be limited only in so far as the repackaging undertaken by the importer is necessary in order to market the product in the Member State of importation. It need not be established, on the other hand, that the trade mark owner has deliberately sought to partition the markets between Member States.

37 In the main proceedings Loendersloot submits that the owner's use of trade mark rights to prevent it from carrying out the relabelling at issue contributes to artificial partitioning of the markets between Member States thereby maintaining price differences which are not justified by differences in real costs. It considers that the relabelling is necessary for two reasons. First, it is essential in order to make it possible to remove the identification numbers placed on the bottles by Ballantine and others, that being necessary to preserve the anonymity of the dealers engaged in parallel trade. Without that anonymity Loendersloot would be unable to obtain supplies from traders authorized by Ballantine and others, who fear the imposition of sanctions on them by the producers if they know the identity of the dealers engaged in parallel sales. Second, relabelling is necessary in order to make it possible to remove the word 'pure' or alter the references to the importer, so as to permit marketing in the country of destination.

38 It should be observed that the task of the national courts, who have to assess whether the relabelling is necessary in order to prevent artificial partitioning of the markets between Member States, is different in cases such as that in the main proceedings and cases concerning the repackaging of pharmaceutical products. In the latter the national courts must consider whether circumstances in the markets of their own States make repackaging objectively necessary. In the present case, on the other hand, the national court must assess whether the relabelling is necessary to protect the sources of supply of the parallel trade and to enable the products to be marketed on the various markets of the Member States for which they are intended.

Removal of the identification numbers

39 With respect to the removal and reaffixing or replacing of labels in order to remove the identification numbers, Ballantine and others observe that that removal is not necessary to enable the products in question to be marketed on the markets of the various Member States in accordance with the rules in force there.

40 It should be observed that, while that statement is correct, removal of the identification numbers might nevertheless prove necessary, as Loendersloot has observed, to prevent artificial partitioning of the markets between Member States caused by difficulties for persons involved in parallel trade in obtaining supplies from distributors of Ballantine and others for fear of sanctions being imposed by the producers in the event of sales to such persons. Even if, as Ballantine and others state, such conduct on the part of the producers would be in breach of the Treaty rules on competition, it cannot be excluded that identification numbers have been placed on products by producers to enable them to reconstruct the itinerary of their products, with the purpose of preventing their dealers from supplying persons carrying on parallel trade.

41 It must also be acknowledged, however, that for the producers application of identification numbers may be necessary to comply with a legal obligation, in particular under Council Directive

89/396/EEC of 14 June 1989 on indications or marks identifying the lot to which a foodstuff belongs (OJ 1989 L 186, p. 21), or to realise other important objectives which are legitimate from the point of view of Community law, such as the recall of faulty products and measures to combat counterfeiting.

42 In those circumstances, where identification numbers have been applied for purposes such as those mentioned in the preceding paragraph, the fact that an owner of trade mark rights makes use of those rights to prevent a third party from removing and then reaffixing or replacing labels bearing his trade mark in order to eliminate those numbers does not contribute to artificial partitioning of the markets between Member States. In such situations there is no reason to limit the rights which the trade mark owner may rely on under Article 36 of the Treaty.

43 Where it is established that the identification numbers have been applied for purposes which are legitimate from the point of view of Community law, but are also used by the trade mark owner to enable him to detect weaknesses in his sales organization and thus combat parallel trade in his products, it is under the Treaty provisions on competition that those engaged in parallel trade should seek protection against action of the latter type.

Removal of the word 'pure' and the importer's name on the labels

44 Loendersloot submits that the interest of its customers in removing the word 'pure' and the importer's name from the labels, and in certain cases substituting the parallel importer's name, is bound up with the provisions on labelling in force in the country of destination. By those actions Loendersloot merely makes the product marketable on the markets in question. Loendersloot observes here that some countries prohibit the use of the word 'pure' and that it may be necessary to remove the name of the official importer on the label or substitute for it the name of the parallel importer in order to comply with the rules of the country of destination of the product, even though those rules were harmonized in the Community by Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1).

45 On this point, it must be stated that use by Ballantine and others of their trade mark rights to prevent relabelling for the purposes mentioned by Loendersloot would contribute to artificial partitioning of the markets between Member States if it were established that the use of the English word 'pure' and the name of the approved importer on the original labels would prevent the products in question from being marketed in the Member State of destination because it was contrary to the rules on labelling in force in that State. In such a situation, relabelling would be necessary for the product to be marketed in that State.

46 The person carrying out the relabelling must, however, use means which make parallel trade feasible while causing as little prejudice as possible to the specific subject-matter of the trade mark right. Thus if the statements on the original labels comply with the rules on labelling in force in the Member State of destination, but those rules require additional information to be given, it is not necessary to remove and reattach or replace the original labels, since the mere application to the bottles in question of a sticker with the additional information may suffice.

Other possible requirements

47 Finally, it is necessary to consider the other requirements of the Court's case-law as regards repackaging of pharmaceutical products and referred to in paragraph 30 above, namely that a person who repackages products must inform the trade mark owner of the repackaging, must supply him, on demand, with a specimen of the repackaged product, and must state on the repackaged product the person responsible for the repackaging. Ballantine and others submit that if, in cases such as that in the main proceedings, Community law limits their right in accordance with national rules on trade marks to oppose the reattachment of the trade marks, then those same conditions must apply.

Loendersloot, on the other hand, considers that those conditions apply only to the repackaging of pharmaceutical products.

48 On this point, the Court has considered that the imposition of such conditions on the person carrying out repackaging is justified by the fact that the essential requirements of the free movement of goods mean that that person is recognized as having certain rights which, in normal circumstances, are reserved for the trade mark owner himself (see Bristol-Myers Squibb, paragraph 68). In formulating those conditions, account was taken of the legitimate interests of the trade mark owner with regard to the particular nature of pharmaceutical products.

49 However, in circumstances such as those in the main proceedings, having regard to the nature of the action of the person carrying out the relabelling, the interests of the trade mark owner, and in particular his need to combat counterfeiting, are given sufficient weight if that person gives him prior notice that the relabelled products are to be put on sale.

50 In the light of the foregoing, the answer to the national court's questions must be that Article 36 of the Treaty is to be interpreted as meaning that the owner of trade mark rights may, even if that constitutes a barrier to intra-Community trade, rely on those rights to prevent a third party from removing and then reaffixing or replacing labels bearing the mark which the owner has himself affixed to products he has put on the Community market, unless:

- it is established that the use of the trade mark rights by the owner to oppose the marketing of the relabelled products under that trade mark would contribute to artificial partitioning of the markets between Member States;
- it is shown that the relabelling cannot affect the original condition of the product;
- the presentation of the relabelled product is not such as to be liable to damage the reputation of the trade mark and its owner; and
- the person who relabels the products informs the trade mark owner of the relabelling before the relabelled products are put on sale.

51 It is for the national court to assess whether those conditions are satisfied in the case before it, taking account of the considerations mentioned above.

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CONCERNS	Interprets 11992E036
SUB	Free movement of goods ; Industrial and commercial property
AUTLANG	Dutch
OBSERV	United Kingdom ; Commission ; Member States ; Institutions
NATIONA	Netherlands
NATCOUR	*A9* Hoge Raad, 1e kamer, arrest van 03/11/1995 (15.737) - Nederlands juristenblad 1995 Bijl. p.573-574 - Rechtspraak van de week 1995 no 226 - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1999 no 215 - European Intellectual Property Review 1996 p.D105 - Gielen, Charles: European Intellectual Property Review 1996 p.D106 *P1* Hoge Raad, 1e kamer, arrest van 26/03/1999 (15.737 ; C94/162 HR) - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken

1999 no 481

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PROCEDU

Reference for a preliminary ruling

ADVGEN

Jacobs

JUDGRAP

Gulmann

DATES

of document: 11/11/1997

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**Judgment of the Court
of 22 September 1998**

Foreningen af danske Videogramdistributører, acting for Egmont Film A/S, Buena Vista Home Entertainment A/S, Scanbox Danmark A/S, Metronome Video A/S, Polygram Records A/S, Nordisk Film Video A/S, Irish Video A/S and Warner Home Video Inc. v Laserdisken.

Reference for a preliminary ruling: Retten i Ålborg - Denmark.

Copyright and related rights - Videodisc rental.

Case C-61/97.

1 Free movement of goods - Industrial and commercial property - Copyright and related rights - National legislation giving the holder of the copyright in a film the right to oppose its renting out - Rental of copies of a film in a Member State with the consent of the copyright holder - Opposition by the rightholder to rental in another Member State - Whether permissible

(EC Treaty, Arts 30 and 36)

2 Approximation of laws - Copyright and related rights - Directive 92/100 - Business of renting and lending originals and copies of works protected by copyright - Exclusive rental right introduced by the directive - That right not exhausted by sale or any other act of distribution

(Council Directive 92/100, Art. 1)

1 It is not contrary to Articles 30 and 36 of the EC Treaty for the holder of an exclusive rental right to prohibit copies of a film from being offered for rental in a Member State even where the offering of those copies for rental has been authorised in the territory of another Member State.

The principle of exhaustion of distribution rights where copyright works are offered for sale by the rightholder or with his consent is expressed in the settled case-law of the Court according to which the exclusive right guaranteed by the legislation of a Member State on industrial and commercial property is exhausted when a product has been lawfully distributed on the market in another Member State by the actual proprietor of the right or with his consent. However, literary and artistic works may be the subject of commercial exploitation, whether by way of public performance or of the reproduction and marketing of the recordings made of them.

By authorising the collection of royalties only on sales to private individuals and to persons hiring out video cassettes, it is impossible to guarantee to makers of films a remuneration which reflects the number of occasions on which the video cassettes are actually hired out and which secures for them a satisfactory share of the rental market. The release into circulation of a picture and sound recording cannot therefore, by definition, render lawful other acts of exploitation of the protected work, such as rental, which are of a different nature from sale or any other lawful act of distribution. Just like the right to present a work by means of public performance, rental right remains one of the prerogatives of the author and producer notwithstanding sale of the physical recording. The same reasoning must be followed as regards the effects produced by the offer for rental. The specific right to authorise or prohibit rental would be rendered meaningless if it were held to be exhausted as soon as the object was first offered for rental.

2 It is not contrary to Directive 92/100 on rental right and lending right and on certain rights related to copyright in the field of intellectual property for the holder of an exclusive rental right to prohibit copies of a film from being offered for rental in a Member State even where the offering of those copies for rental has been authorised in the territory of another Member State.

In [Case C-61/97](#),

REFERENCE to the Court under Article 177 of the EC Treaty by Retten i Ålborg (Denmark) for a preliminary ruling in the proceedings pending before that court between

Foreningen af danske Videogramdistributører, acting for Egmont Film A/S, Buena Vista Home Entertainment

A/S, Scanbox Danmark A/S, Metronome Video A/S, Polygram Records A/S, Nordisk Film Video A/S, Irish Video A/S, Warner Home Video Inc.,

and

Laserdisken, in the person of Hans Kristian Pedersen,

supported by:

Sammenslutningen af Danske Filminstruktører, Michael Viuf Christiansen, Pioneer Electronics Denmark A/S, Videoforhandler Ove Jensen,

on the interpretation of Articles 30, 36, 85 and 86 of the EC Treaty and of 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),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, M. Wathelet and R. Schintgen (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, J.L. Murray, J.-P. Puissochet (Rapporteur), G. Hirsch, L. Sevón and K.M. Ioannou, Judges,

Advocate General: A. La Pergola,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Foreningen af danske Videogramdistributører, acting for Egmont Film A/S and Others, by Johan Schlüter, of the Copenhagen Bar,

- Warner Home Video Inc., by Stephen Kon, Solicitor in the firm of S.J. Berwin & Co., and Strange Beck, of the Copenhagen Bar,

- Laserdisken, by its owner, Hans Kristian Pedersen,

- Sammenslutningen af Danske Filminstruktører and Michael Viuf Christiansen, by Anders Hjulmand, of the Ålborg Bar,

- Pioneer Electronics Denmark A/S, by Leif Hansen, 'administrerende direktør',

- Videoforhandler Ove Jensen, by Per Mogensen, of the Åbybro Bar,

- the Danish Government, by Pieter Biering, Head of Department in the Ministry of Foreign Affairs, acting as Agent,

- the French Government, by Kareen Rispal-Bellanger, Assistant Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Philippe Martinet, Secretary of Foreign Affairs in the same Directorate, acting as Agents,

- the Finnish Government, by Holger Rotkirch, Head of Legal Affairs at the Ministry of Foreign Affairs, acting as Agent,

- the United Kingdom Government, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and Daniel Alexander, Barrister,

- the Commission of the European Communities, by Berend Jan Drijber and Hans Støvlbæk, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Foreningen af danske Videogramdistributører, acting for

Egmont Film A/S and Others, Warner Home Video Inc., Laserdisken, the Danish Government and the Commission at the hearing on 31 March 1998,

after hearing the Opinion of the Advocate General at the sitting on 26 May 1998,

gives the following

Judgment

1 By order of 7 February 1997, received at the Court on 12 February 1997, Retten i Ålborg (Court of First Instance, Ålborg) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 30, 36, 85 and 86 of the EC Treaty and of 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, 'the Directive').

2 Those questions were raised in proceedings between Foreningen af danske Videogramdistributører (Association of Danish Video Distributors, 'the FDV'), acting for Egmont Film A/S and Others, and the Danish undertaking Laserdisken, which specialises in marketing films on laser discs ('videodiscs'), concerning the offer of such products imported from the United Kingdom for rental in Denmark.

3 Under Danish law the offer of films for rental is conditional on the consent of the copyright holder (Paragraph 23(3) of the Law on Copyright, as supplemented in 1989). A similar provision was introduced into the laws of England and Wales with effect from 1 August 1989 (the Intellectual Property Law on Copyright, Designs and Patents 1988, sections 16 to 18).

4 Article 1(1) of the Directive requires the Member States to provide a right to authorise or prohibit the rental and lending of originals and copies of copyright works and other subject-matter. In accordance with Article 1(4), the rights so referred to are not exhausted by any sale or other act of distribution. Furthermore, Article 9 of the Directive provides that, without prejudice to the specific provisions concerning rental and lending right, and in particular to Article 1(4), distribution right, which is an exclusive right to make available to the public by sale or otherwise one of the objects referred to, is not to be exhausted except where the first sale in the Community of that object is made by the rightholder or with his consent.

5 Laserdisken, which has since 1985 been selling videodiscs imported from the United Kingdom in Denmark, began to offer those films for rental from 1987 as a measure intended to promote the sales of those products, which are significantly more expensive than films on videocassette and which are bought mainly by customers who are already familiar with the work. It is apparent from the order for reference that although the copyright holders had implicitly accepted those videodiscs being offered for rental in the United Kingdom, they had not authorised their being offered for rental outside that Member State.

6 In 1992 an action was brought against Laserdisken for unlawful rental contrary to Paragraph 23(3) of the Law on Copyright and an injunction was issued prohibiting the defendant, subject to FDV's providing security for any damage which might be caused by the injunction, from renting out films in which the manufacturing and distribution rights in Denmark belonged to members of the association. The injunction was issued by the Fogedret (Bailiff's Court, with jurisdiction to give interlocutory judgments in this matter) and upheld by the Vestre Landsret (Western Regional Court).

7 Retten i Ålborg, considering that the outcome of the dispute in the proceedings justifying the injunction depended on interpretation of Community law, decided to refer questions to the Court for a preliminary ruling, a decision confirmed on appeal by the Vestre Landsret which, however, slightly altered the wording of those questions. In the final version, those questions are worded

as follows:

'Do Article 30, in conjunction with Article 36, or Articles 85 to 86, of the EC Treaty preclude a person to whom the holder of the exclusive rights to a film has transferred an exclusive manufacturing and distribution right in respect of copies of the film in one Member State from giving consent to the rental of his own releases while at the same time preventing the rental of imported releases which have been placed on the market in another Member State, where the holder of exclusive manufacturing and distribution rights in copies of the film has transferred ownership of copies with tacit acceptance that the copies will be rented out in that latter Member State?

In view of the fact that Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights relating to copyright in the field of intellectual property has entered into force, the same question is repeated on the basis that the directive is applicable to the reply.'

8 By those two questions, the national court is asking the Court of Justice whether it is contrary to the articles of the Treaty referred to or to the Directive for the holder of an exclusive rental right to prohibit copies of a film from being offered for rental in a Member State even where offering those copies for rental has been authorised within another Member State.

9 It should be noted at the outset that, while the order for reference includes Articles 85 and 86 of the Treaty among the Community provisions interpretation of which is requested by the national court, it gives no explanation of the reasons for which it raised the question of the effect of those articles in connection with the matters of fact and law in the main proceedings. In the absence of such information the national court, as the Advocate General pointed out at point 17 of his Opinion, has failed to put the Court in a position to give an interpretation of those articles which could be of use to it.

10 In those circumstances, according to settled case-law whose requirements are of particular importance in the area of competition, which is characterised by complex factual and legal situations (see, *inter alia*, the judgment in *Joined Cases C-320/90, C-321/90 and C-322/90 Telemarsicabruzzo and Others* [1993] ECR I-393, paragraphs 6 and 7, and the order in *Case C-157/92 Pretore di Genova v Banchero* [1993] ECR I-1085, paragraphs 4 and 5), the questions referred by the national court must be regarded as inadmissible in so far as they concern the interpretation of Articles 85 and 86 of the Treaty. As a result, those questions can be considered only with regard to the interpretation of Articles 30 and 36 of the Treaty and the Directive.

11 In this regard, FDV, Warner Home Video Inc., the Danish, French, Finnish and United Kingdom Governments and the Commission propose that the Court should answer the national court's questions in the negative. Their argument is, essentially, that it follows from the Court's case-law (*Case 158/86 Warner Brothers and Another v Christiansen* [1988] ECR 2605) and the Directive that the right to authorise or prohibit the rental of a film is comparable to the right of public performance and, unlike the right of distribution, is not exhausted as soon as it has first been exercised.

12 On the other hand, Laserdisken and the parties intervening in its support in the main proceedings consider that the result of giving consent for rental is exhaustion of the exclusive right to prohibit copies of a film from being rented and that the exercise of such a right in the circumstances described is incompatible with Articles 30 and 36 of the Treaty and with the Directive's particular objective of introducing an area without internal frontiers.

13 As the Court pointed out in paragraph 14 of its judgment in *Case C-200/96 Metronome Musik v Music Point Hokamp* [1998] ECR I-1953, the principle of exhaustion of distribution rights where copyright works are offered for sale by the rightholder or with his consent is expressed in the settled case-law according to which, whilst Article 36 of the EC Treaty allows derogations from

the fundamental principle of the free movement of goods on grounds of the protection of industrial and commercial property, such derogations are allowed only to the extent to which they are justified by the fact that they safeguard the rights which constitute the specific subject-matter of that property. However, the exclusive right guaranteed by the legislation of a Member State on industrial and commercial property is exhausted when a product has been lawfully distributed on the market in another Member State by the actual proprietor of the right or with his consent (see in particular Joined Cases 55/80 and 57/80 *Musik-Vertrieb Membran and K-tel International v GEMA* [1981] ECR 147, paragraphs 10 and 15, and Case 58/80 *Dansk Supermarked v Imerco* [1981] ECR 181, paragraph 11).

14 However, as the Court also pointed out in *Warner Brothers and Another v Christiansen*, literary and artistic works may be the subject of commercial exploitation, whether by way of public performance or of the reproduction and marketing of the recordings made of them. That applies, for example, to the rental of video-cassettes, which involves a public distinct from the one for the sale of those products and constitutes an important potential source of revenue for makers of films.

15 In that connection, the Court pointed out that, by authorising the collection of royalties only on sales to private individuals and to persons hiring out video-cassettes, it is impossible to guarantee to makers of films a remuneration which reflects the number of occasions on which the video-cassettes are actually hired out and which secures for them a satisfactory share of the rental market. Laws which provide specific protection of the right to hire out video-cassettes are therefore clearly justified on grounds of the protection of industrial and commercial property pursuant to Article 36 of the Treaty (*Warner Brothers and Another v Christiansen*, cited above, paragraphs 15 and 16).

16 In the same judgment, the Court also rejected the argument that a maker of a film who has offered the video-cassette of that film for sale in a Member State whose legislation confers on him no exclusive right of hiring it out must accept the consequences of his choice and the exhaustion of his right to restrain the hiring-out of that video-cassette in any other Member State. Where national legislation confers on authors a specific right to hire out video-cassettes, that right would be rendered worthless if its owner were not in a position to authorise the operations for doing so (paragraphs 17 and 18).

17 The release into circulation of a picture and sound recording cannot therefore, by definition, render lawful other acts of exploitation of the protected work, such as rental, which are of a different nature from sale or any other lawful act of distribution. Just like the right to present a work by means of public performance (see, in that connection, Case 395/87 *Ministère Public v Tournier* [1989] ECR 2521, paragraphs 12 and 13), rental right remains one of the prerogatives of the author and producer notwithstanding sale of the physical recording (*Metronome Musik*, paragraph 18).

18 The same reasoning must be followed as regards the effects produced by the offer for rental. As the Advocate General pointed out in point 15 of his Opinion, the exclusive right to hire out various copies of the work contained in a video film can, by its very nature, be exploited by repeated and potentially unlimited transactions, each of which involves the right to remuneration. The specific right to authorise or prohibit rental would be rendered meaningless if it were held to be exhausted as soon as the object was first offered for rental.

19 As for the Directive, it should be noted that the facts which gave rise to the dispute in the main proceedings predate its adoption. Nevertheless, since the proceedings before the national court were still in progress after the Directive began to produce legal effects in the Member States concerned and as that court has specifically questioned the Court in that regard, the answer to its request for interpretation must also have regard to the Directive.

20 While the third recital in the preamble to the Directive refers, in order to justify eliminating the differences between national laws, to the objective set out in Article 8a of the Treaty, namely to introduce an area without internal frontiers, the object of the Directive is, as the Court found in paragraph 22 of *Metronome Musik*, to establish harmonised legal protection in the Community for rental and lending right and certain rights related to copyright in the field of intellectual property. Here it draws a distinction between the specific rental and lending right, referred to in Article 1, and the distribution right, governed by Article 9 and defined as an exclusive right to make one of the objects in question available to the public, principally by way of sale. Whereas lending right is not exhausted by the sale or any other act of distribution of the object, distribution right, by contrast, is exhausted upon the first sale in the Community by the rightholder or with his consent (*Metronome Musik*, paragraph 19).

21 Thus the Directive expressly precludes the possibility that lending right, unlike distribution right, can be exhausted by any act of distribution of the object in question. As stated at paragraph 18 of this judgment, such exclusion is justified by the very nature of rental right, which would be rendered worthless if it were held to be exhausted as soon as the object was first offered for rental.

22 Accordingly, contrary to the submissions of the defendant and interveners in the main proceedings, it follows both from the interpretation of Articles 30 and 36 of the Treaty, as regards the protection of copyright, and from the interpretation of the Directive that the exclusive right to authorise or prohibit the rental of a film is not exhausted when it is first exercised in one of the Member States of the Community.

The exercise of such a right in circumstances such as those described in the order for reference is therefore not contrary to those provisions.

23 The answer to be given to the national court must therefore be that it is not contrary to Articles 30 and 36 of the Treaty or to the Directive for the holder of an exclusive rental right to prohibit copies of a film from being offered for rental in a Member State even where the offering of those copies for rental has been authorised in the territory of another Member State.

Costs

24 The costs incurred by the Danish, Finnish, French and United Kingdom Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by Retten i Ålborg by order of 7 February 1997, hereby rules:

It is not contrary to Articles 30 and 36 of the EC Treaty or to 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 for the holder of an exclusive rental right to prohibit copies of a film from being offered for rental in a Member State even where the offering of those copies for rental has been authorised in the territory of another Member State.

AUTHOR Court of Justice of the European Communities

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**Judgment of the Court
of 18 December 1997
Inter-Environnement Wallonie ASBL v Région wallonne.
Reference for a preliminary ruling: Conseil d'Etat - Belgium.
Directive 91/156/EEC - Period for transposition - Effects - Definition of waste.
Case C-129/96.**

In Case C-129/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Belgian Conseil d'Etat for a preliminary ruling in the proceedings pending before that court between

Inter-Environnement Wallonie ASBL

and

Région Wallonne

on the interpretation of Articles 5 and 189 of the EEC Treaty and Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm and R. Schintgen (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, P.J.G. Kapteyn, J.L. Murray, D.A.O. Edward, J.-P. Puissechot, G. Hirsch, P. Jann and L. Sevon (Rapporteur), Judges,

Advocate General: F.G. Jacobs,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Inter-Environnement Wallonie ASBL, by Jacques Sambon, of the Brussels Bar,
- the Belgian Government, by Jan Devadder, Senior Adviser in the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,
- the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat in the same ministry, acting as Agents,
- the French Government, by Jean-François Dobelle, Deputy Director in the Legal Directorate of the Ministry of Foreign Affairs, and Romain Nadal, Assistant Foreign Affairs Secretary in that directorate, acting as Agents,
- the Netherlands Government, by Adriaan Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent;
- the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Derrick Wyatt QC, and
- the Commission of the European Communities, by Maria Condou-Durande, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Inter-Environnement Wallonie ASBL, represented by Jacques Sambon; the French Government, represented by Jean-François Dobelle and Romain Nadal; the Netherlands Government, represented by Johannes Steven van den Oosterkamp, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; the United Kingdom Government, represented by Derrick Wyatt QC; and the Commission, represented by Maria Condou Durande, at the hearing on 5 February 1997,

after hearing the Opinion of the Advocate General at the sitting on 24 April 1997,
gives the following

Judgment

Costs

51 The costs incurred by the Belgian, German, French, Netherlands and United Kingdom Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Belgian Conseil d'Etat by judgment of 29 March 1996, hereby rules:

1. A substance is not excluded from the definition of waste in Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, merely because it directly or indirectly forms an integral part of an industrial production process.

2. The second paragraph of Article 5 and the third paragraph of Article 189 of the EEC Treaty, and Directive 91/156, require the Member States to which that directive is addressed to refrain, during the period laid down therein for its implementation, from adopting measures liable seriously to compromise the result prescribed.

1 By judgment of 29 March 1996, received at the Court on 23 April 1996, the Belgian Conseil d'Etat referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 5 and 189 of the EEC Treaty and Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32).

2 Those questions were raised in proceedings brought by Inter-Environnement Wallonie, a non-profit-making association, for annulment of the Order of the Walloon Regional Executive of 9 April 1992 on toxic or hazardous waste ('the Order').

The relevant Community provisions

3 The object of Directive 75/442 is to approximate the laws of the Member States on the disposal of waste. It has been amended by Directive 91/156.

4 Directive 75/442, as amended by Directive 91/156, defines waste in Article 1(a) as follows:

'For the purposes of this Directive:

(a) "waste" shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.

The Commission, acting in accordance with the procedure laid down in Article 18, will draw up, not later than 1 April 1993, a list of wastes belonging to the categories listed in Annex I. This list will be periodically reviewed and, if necessary, revised by the same procedure.'

5 The list mentioned in that last provision was laid down in Commission Decision 94/3/EC of 20 December 1993 establishing a list of wastes pursuant to Article 1(a) of Directive 75/442 (OJ

1994 L 5, p. 15). Paragraph 3 of the introductory note to that list states, first, that the list is not exhaustive and, second, that the fact that a material appears in it is only relevant when the definition of waste has been satisfied.

6 Articles 9(1) and 10 of Directive 75/442, as amended, provide that any establishment or undertaking which carries out the operations specified in Annex IIA or Annex IIB must obtain a permit from the competent authority. Annex IIA concerns disposal operations whilst Annex IIB lists the operations which may lead to recovery.

7 Article 11 of Directive 75/442, as amended, provides an exception to the requirement of a permit:

'1. Without prejudice to Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste [OJ 1978 L 84, p. 43], as last amended by the Act of Accession of Spain and Portugal, the following may be exempted from the permit requirement imposed in Article 9 or Article 10:

(a) establishments or undertakings carrying out their own waste disposal at the place of production;

and

(b) establishments or undertakings that carry out waste recovery.

This exemption may apply only:

- if the competent authorities have adopted general rules for each type of activity laying down the types and quantities of waste and the conditions under which the activity in question may be exempted from the permit requirements,

and

- if the types or quantities of waste and methods of disposal or recovery are such that the conditions imposed in Article 4 are complied with.

2. The establishments or undertakings referred to in paragraph 1 shall be registered with the competent authorities.

(...)'

8 Article 4 of Directive 75/442, as amended, provides:

'Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:

- without risk to water, air, soil and plants and animals,

- without causing a nuisance through noise or odours,

- without adversely affecting the countryside or places of special interest.

...'

9 According to the first indent of Article 2(1) of Directive 91/156, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive not later than 1 April 1993 and forthwith to inform the Commission thereof. The second indent provides: 'When Member States adopt these measures, the measures 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 a reference shall be laid down by the Member States.'

10 Article 1(3) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20) refers, for the definition of waste, to Directive 75/442. Article 1(4) defines

'hazardous waste'.

11 Article 3 of Directive 91/689 provides:

'1. The derogation referred to in Article 11(1)(a) of Directive 75/442/EEC from the permit requirement for establishments or undertakings which carry out their own waste disposal shall not apply to hazardous waste covered by this Directive.

2. In accordance with Article 11(1)(b) of Directive 75/442/EEC, a Member State may waive Article 10 of that Directive for establishments or undertakings which recover waste covered by this Directive:

- if the Member State adopts general rules listing the type and quantity of waste and laying down specific conditions (limit values for the content of hazardous substances in the waste, emission limit values, type of activity) and other necessary requirements for carrying out different forms of recovery, and

- if the types or quantities of waste and methods of recovery are such that the conditions laid down in Article 4 of Directive 75/442/EEC are complied with.'

12 Article 11 of Directive 91/689 repealed Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste (OJ 1978 L 84, p. 43) with effect from 12 December 1993. However, Article 1 of Council Directive 94/31/EC of 27 June 1994 amending Directive 91/689 (OJ 1994 L 168, p. 28) deferred the repeal of Directive 78/319 until 27 June 1995.

The relevant national provisions

13 The Decree of the Walloon Regional Council of 5 July 1985 on waste, as amended by the Decree of 25 July 1991 ('the Decree'), defines waste at Article 3(1) as follows:

'waste: all substances or objects in the categories set out in Annex I which the holder discards or intends or is required to discard'.

14 Article 5(1) of the Order provides:

'Authorization is required for the setting-up and running of an installation intended specifically for the collection, pre-treatment, disposal or recovery of toxic or dangerous waste which is not an integral part of an industrial production process...'

15 The preamble to the Order makes particular reference to the Decree, Directive 75/442, as amended, and to Directives 78/319 and 91/689. Article 86 of the Order states that it is to come into force on the day of its publication in the *Moniteur Belge*. Publication took place on 23 June 1992.

Facts of the case in the main proceedings

16 By application lodged on 21 August 1992, Inter-Environnement Wallonie requested the Belgian Conseil d'Etat to annul the Order in its entirety or, in the alternative, certain of its provisions.

17 In its order for reference, the Conseil d'Etat has already ruled on five of the six pleas raised by Inter-Environnement Wallonie and has annulled various provisions in the Order.

18 In its remaining plea, Inter-Environnement Wallonie maintains that Article 5(1) of the Order infringes, in particular, Article 11 of Directive 75/442, as amended, and Article 3 of Directive 91/689, inasmuch as it excludes from the permit system the operations of setting up and running an installation intended specifically for the collection, pre-treatment, disposal or recovery of toxic or dangerous waste, where that installation forms 'an integral part of an industrial production process'.

19 In the first part of that plea, Inter-Environnement Wallonie claims that Article 11 of Directive 75/442, as amended, in conjunction with Article 3 of Directive 91/689, allows exemptions from the

permit requirement for undertakings carrying out waste recovery only on the conditions laid down by those provisions and only where those undertakings are registered with the competent authorities.

20 On that point, the Conseil d'Etat considers that Article 5(1) of the Order is indeed contrary to Article 11 of Directive 75/442, as amended, in conjunction with Article 3 of Directive 91/689.

21 Finding that the Order was adopted at a time when the period allowed by the directive for its transposition had not yet expired, the Conseil d'Etat questions to what extent a Member State may, during that period, adopt a measure contrary to the directive. It adds that a negative reply to that question, as proposed by Inter-Environnement Wallonie, would be incompatible with the rule that the validity of a measure is to be assessed at the time of its adoption.

22 In the second part of its plea, Inter-Environnement Wallonie claims that the exception in Article 5(1) of the Order is contrary to the Decree which, it states, does not provide for any derogation for operations forming part of an industrial process.

23 On that point, the Conseil d'Etat finds that Article 3(1) of the Decree and the annex to which it refers are intended to be a faithful transposition of Directive 75/442, as amended. While the case-law of the Court makes it clear that waste means any substances and objects which the holder discards or is required to discard without intending thereby to exclude their economic reutilization by other persons, it does not make it possible to establish whether a substance or object referred to in Article 1 of Directive 75/442, as amended, which directly or indirectly forms an integral part of an industrial production process is waste within the meaning of Article 1(a) of that directive.

24 In those circumstances, the Conseil d'Etat has referred the following questions to the Court for a preliminary ruling:

`(1) Do Articles 5 and 189 of the EEC Treaty preclude Member States from adopting a provision contrary to Directive 75/442/EEC of 15 July 1975 on waste, as amended by Directive 91/156/EEC of 18 March 1991, before the period for transposing the latter has expired?

Do those same Treaty articles preclude Member States from adopting and bringing into force legislation which purports to transpose the abovementioned directive but whose provisions appear to be contrary to the requirements of that directive?

(2) Is a substance referred to in Annex I to Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste and which directly or indirectly forms an integral part of an industrial production process to be considered "waste" within the meaning of Article 1(a) of that directive?"

Question 2

25 By its second question, which it is appropriate to consider first, the national court is in essence asking whether a substance is excluded from the definition of waste in Article 1(a) of Directive 75/442, as amended, merely because it directly or indirectly forms an integral part of an industrial production process.

26 First of all, it follows from the wording of Article 1(a) of Directive 75/442, as amended, that the scope of the term 'waste' turns on the meaning of the term 'discard'.

27 It is also clear from the provisions of Directive 75/442, as amended, in particular from Article 4, Articles 8 to 12 and Annexes IIA and IIB, that the term 'discard' covers both disposal and recovery of a substance or object.

28 As the Advocate General has pointed out in paragraphs 58 to 61 of his Opinion, the list of categories of waste in Annex I to Directive 75/442, as amended, and the disposal and recovery operations listed in Annexes IIA and IIB to that directive demonstrate that the concept of waste

does not in principle exclude any kind of residue, industrial by-product or other substance arising from production processes. This finding is further supported by the list of waste drawn up by the Commission in Decision 94/3.

29 First, Directive 75/442, as amended, applies, as is apparent in particular from Articles 9 to 11, not only to disposal and recovery of waste by specialist undertakings, but also to disposal and recovery of waste by the undertaking which produced them, at the place of production.

30 Second, while Article 4 of Directive 75/442, as amended, provides that waste is to be recovered or disposed of without endangering human health or using processes or methods which could harm the environment, there is nothing in that directive to indicate that it does not apply to disposal or recovery operations forming part of an industrial process where they do not appear to constitute a danger to human health or the environment.

31 Finally, it should be borne in mind that the Court has already held that the definition of waste in Article 1 of Directive 75/442, as amended, is not to be understood as excluding substances and objects which were capable of economic reutilization (Case C-359/88 *Zanetti and Others* [1990] ECR I-1509, paragraphs 12 and 13; C-422/92 *Commission v Germany* [1995] ECR I-1097, paragraphs 22 and 23, and Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561, paragraphs 47 and 48).

32 It follows from all those considerations that substances forming part of an industrial process may constitute waste within the meaning of Article 1(a) of Directive 75/442, as amended.

33 That conclusion does not undermine the distinction which must be drawn, as the Belgian, German, Netherlands and United Kingdom Governments have correctly submitted, between waste recovery within the meaning of Directive 75/442, as amended, and normal industrial treatment of products which are not waste, no matter how difficult that distinction may be.

34 The answer to the second question must therefore be that a substance is not excluded from the definition of waste in Article 1(a) of Council Directive 75/442, as amended, by the mere fact that it directly or indirectly forms an integral part of an industrial production process.

Question 1

35 By its first question, the national court is in substance asking whether Articles 5 and 189 of the EEC Treaty preclude the Member States from adopting measures contrary to Directive 91/156 during the period prescribed for its transposition.

36 According to *Inter-Environnement Wallonie*, it follows from the primacy of Community law and from Article 5 of the Treaty that, even where a Member State decides to transpose a Community directive before the end of the period prescribed therein, such transposition must be consistent with the directive. Consequently, since it chose to transpose Directive 91/156 on 9 April 1992, the *Région Wallonne* should have complied with that directive.

37 The Commission endorses that position and maintains that Articles 5 and 189 of the Treaty preclude Member States from adopting a provision contrary to Directive 91/156 during the period prescribed for its transposition. It states that in this respect it is irrelevant whether or not a particular measure is specifically intended to transpose the directive.

38 On the other hand, the Belgian, French and United Kingdom Governments consider that until the period prescribed for transposition of a directive has expired, the Member States remain free to adopt national rules which are at variance with it. The United Kingdom Government adds, however, that it would be contrary to Articles 5 and 189 of the Treaty for a Member State to adopt measures which would have the effect of making it impossible or excessively difficult for that State to transpose the directive correctly into national law.

39 The Netherlands Government is of the opinion that the adoption of a directive means that the Member States are no longer free to undertake anything which might make it more difficult to achieve the result prescribed. None the less, it considers that a Member State cannot be regarded as being in breach of Articles 5 and 189 of the Treaty where, as in the present case, it is not certain that the national provisions are inconsistent with the directive concerned.

40 It should be recalled at the outset that the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 189 of the Treaty and by the directive itself (Case 51/76 *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113, paragraph 22; Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, paragraph 48, and Case 72/95 *Kraaijeveld and Others v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paragraph 55). That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (see Case C-106/89 *Marleasing v Comercial Internacional de Alimentacion* [1990] ECR I-4135, paragraph 8, and *Kraaijeveld*, cited above, paragraph 55).

41 The next point to note is that, in accordance with the second paragraph of Article 191 of the EEC Treaty, applicable at the material time, '[d]irectives and decisions shall be notified to those to whom they are addressed and shall take effect upon such notification'. It follows from that provision that a directive has legal effect with respect to the Member State to which it is addressed from the moment of its notification.

42 Here, and in accordance with current practice, Directive 91/156 itself laid down a period by the end of which the laws, regulations and administrative provisions necessary for compliance are to have been brought into force.

43 Since the purpose of such a period is, in particular, to give Member States the necessary time to adopt transposition measures, they cannot be faulted for not having transposed the directive into their internal legal order before expiry of that period.

44 Nevertheless, it is during the transposition period that the Member States must take the measures necessary to ensure that the result prescribed by the directive is achieved at the end of that period.

45 Although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 in conjunction with the third paragraph of Article 189 of the Treaty and from the directive itself that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed.

46 It is for the national court to assess whether that is the case as regards the national provisions whose legality it is called upon to consider.

47 In making that assessment, the national court must consider, in particular, whether the provisions in issue purport to constitute full transposition of the directive, as well as the effects in practice of applying those incompatible provisions and of their duration in time.

48 For example, if the provisions in issue are intended to constitute full and definitive transposition of the directive, their incompatibility with the directive might give rise to the presumption that the result prescribed by the directive will not be achieved within the period prescribed if it is impossible to amend them in time.

49 Conversely, the national court could take into account the right of a Member State to adopt transitional measures or to implement the directive in stages. In such cases, the incompatibility of the transitional national measures with the directive, or the non-transposition of certain of

its provisions, would not necessarily compromise the result prescribed.

50 The answer to the first question must therefore be that the second paragraph of Article 5 and the third paragraph of Article 189 of the EEC Treaty, and Directive 91/156, require the Member States to which that directive is addressed to refrain, during the period laid down therein for its implementation, from adopting measures liable seriously to compromise the result prescribed.

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**Judgment of the Court (Fifth Chamber)
of 27 February 2003**

**Commission of the European Communities v Federal Republic of Germany.
Failure to fulfil obligations - Articles 23 and 25 EC - Charge having an equivalent effect- Export of
waste - Basle Convention - Regulation No 259/93 - Contribution to a solidarity fund.
Case C-389/00.**

In [Case C-389/00](#),

Commission of the European Communities, represented by J.C. Schieferer, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by B. Muttelsee-Schön, acting as Agent, assisted by H.-J. Koch, Professor,

defendant,

"APPLICATION for a declaration that, by enacting the Gesetz über die Überwachung und Kontrolle der grenzüberschreitenden Verbringung von Abfällen (Abfallverbringungsgesetz) (Act on the supervision and control of transboundary shipments of waste; 'the waste shipment act') of 30 September 1994, BGBl. 1994 I, p. 2771), establishing a solidarity fund for the return of waste and requiring exporters of waste, including those exporting to other Member States, to contribute to that fund, the Federal Republic of Germany has failed to fulfil its obligations under Articles 23 EC and 25 EC,

THE COURT

(Fifth Chamber),

composed of: D.A.O. Edward, acting for the President of the Chamber, A. La Pergola, P. Jann, S. von Bahr and A. Rosas (Rapporteur), Judges,

Advocate General: A. Tizzano,

Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 27 June 2002, at which the Commission was represented by J.C. Schieferer and the Federal Republic of Germany by W.-D. Plessing, acting as Agent, assisted by H.-J. Koch,

after hearing the Opinion of the Advocate General at the sitting on 14 November 2002,

gives the following

Judgment

Costs

52 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Commission has so applied and the Federal Republic of Germany has failed in its submissions, the latter must be ordered to pay the costs.

On those grounds,

THE COURT

(Fifth Chamber)

hereby:

1. Declares that, by subjecting shipments of waste to other Member States to a mandatory contribution to the solidarity fund for the return of waste established by the Gesetz über die Überwachung und Kontrolle der grenzüberschreitenden Verbringung von Abfällen (Abfallverbringungsgesetz) of 30 September 1994, the Federal Republic of Germany has failed to fulfil its obligations under Articles 23 EC and 25 EC;

2. Orders the Federal Republic of Germany to pay the costs.

1 By an application lodged at the Court Registry on 20 October 2000, the Commission brought an action under Article 226 EC for a declaration that, by enacting the Gesetz über die Überwachung und Kontrolle der grenzüberschreitenden Verbringung von Abfällen (Abfallverbringungsgesetz) (Act on the supervision and control of transboundary shipments of waste; 'the waste shipment act') of 30 September 1994, BGBl. 1994 I, p. 2771, ('the AbfVerbrG') establishing a solidarity fund for the return of waste and requiring exporters of waste, including those exporting to other Member States, to contribute to that fund, the Federal Republic of Germany has failed to fulfil its obligations under Articles 23 and 25 EC.

Legal framework

The Basle Convention and Community law

2 Under Articles 23 EC and 25 EC, the Community is based upon a customs union which is to cover all trade in goods and which is to involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect.

3 Shipments of waste within, into and out of the Community are subject to Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1). Shipments of waste which are excluded from the scope of application of that regulation are laid down in Article 1(2) and (3).

4 Regulation No 259/93 implements inter alia the obligations undertaken by the Community and the Member States in their capacity as parties to the Basle Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal ('the Basle Convention'). That convention was approved on behalf of the Community by Council Decision 93/98/EEC of 1 February 1993 (OJ 1993 L 39, p. 1). In addition to the Community, all of the Member States are parties to the Basle Convention.

5 Under Article 4(5) of the Basle Convention, the parties thereto are not to permit hazardous wastes or other wastes to be exported to a non-party State or to be imported from a non-party State. Exceptions to this rule are nevertheless provided for in Article 11 of the convention, subject to certain conditions.

6 Article 8 of the Basle Convention lays down an obligation for the State of export to ensure that, when a transboundary movement of hazardous wastes or other wastes to which the consent of the States concerned has been given cannot be completed in accordance with the terms of the contract, the wastes in question are taken back into the State of export by the exporter if alternative arrangements cannot be made for their disposal in an environmentally sound manner within 90 days.

7 Article 9(2)(a) of the Basle Convention provides that, in case of a transboundary movement of hazardous wastes or other wastes deemed to be illegal traffic as the result of conduct on the part

of the exporter or generator, the State of export is to ensure that the wastes in question are taken back by the exporter or the generator or, if necessary, by itself into its territory.

8 The obligation to return laid down in Article 8 of the Basle Convention has been implemented in the Community legal order by Article 25(1) of Regulation No 259/93, which reads as follows:

'Where a shipment of waste to which the competent authorities concerned have consented cannot be completed in accordance with the terms of the consignment note or the contract referred to in Articles 3 and 6, the competent authority of dispatch shall, within 90 days after it has been informed thereof, ensure that the notifier returns the waste to its area of jurisdiction or elsewhere within the State of dispatch unless it is satisfied that the waste can be disposed of or recovered in an alternative and environmentally sound manner.'

9 Article 26(2)(a) of Regulation No 259/93 transposes in the following terms the obligation to return waste as laid down in Article 9(2) of the Basle Convention:

'If such illegal traffic is the responsibility of the notifier of the waste, the competent authority of dispatch shall ensure that the waste in question is:

(a) taken back by the notifier or, if necessary, by the competent authority itself...'

10 In addition, Article 27(1) of Regulation No 259/93 provides:

'All shipments of waste covered within the scope of this Regulation shall be subject to the provision of a financial guarantee or equivalent insurance covering costs for shipment, including cases referred to in Articles 25 and 26, and for disposal or recovery.'

11 As regards the allocation of administrative costs and costs associated with shipments, disposal or recovery of waste, Article 33 of Regulation No 259/93 states:

'1. Appropriate administrative costs of implementing the notification and supervision procedure and usual costs of appropriate analyses and inspections may be charged to the notifier.

2. Costs arising from the return of waste, including shipment, disposal or recovery of the waste in an alternative and environmentally sound manner pursuant to Articles 25(1) and 26(2), shall be charged to the notifier or, if impracticable, to the Member States concerned.

3. Costs arising from disposal or recovery in an alternative and environmentally sound manner pursuant to Article 26(3) shall be charged to the consignee.

4. Costs arising from disposal or recovery, including possible shipment pursuant to Article 26(4), shall be charged to the notifier and/or the consignee depending upon the decision by the competent authorities involved.'

National rules

12 Paragraph 8(1) of the AbfVerbrG establishes a solidarity fund for the return of waste (Solidarfonds Abfallrückführung; 'the solidarity fund').

13 The sixth and seventh sentences of that provision read as follows:

'In order to cover the payments and administrative costs of the solidarity fund, notifiers within the meaning of Regulation [No 259/93] are required to contribute to this fund proportionally to the type and quantity of waste to be shipped. Contributions which have not yet been used at the end of a three-year period shall be repaid pro rata to the contributors after prior payment of the additional cover under Paragraph 8(2).'

14 The first sentence of Paragraph 8(2) of the AbfVerbrG reads as follows:

'In so far as the means which the solidarity fund must provide... are insufficient to cover the costs incurred for the return and non-harmful recovery or disposal in a manner in keeping with the general interest, the Länder shall be required, following deduction of a federal portion to be determined by regulation... to complete the cover according to an allocation formula established on the basis of population and tax revenues (Königstein formula) or according to another formula agreed to by the Länder.'

15 The obligation to contribute to the solidarity fund is in addition to the obligation imposed on the notifier by Paragraph 7(1) of the AbfVerbrG to provide a financial guarantee or proof of equivalent insurance covering costs for shipment, in accordance with Article 27 of Regulation No 259/93.

16 Paragraph 17 of the Verordnung über die Anstalt Solidarfonds Abfallrückführung (regulation on the solidarity fund for the return of waste) of 20 May 1996, BGBl. 1996 I, p. 694, ('the solidarity fund regulation') provides that the obligation to contribute arises at the same time as the duty to give notice of waste to be shipped out of the Federal Republic of Germany. Article 18 of the same regulation lays down the methods for calculating the contributions which amount to DEM 0.30, DEM 3.00, DEM 10.00 or DEM 15.00 per tonne, depending on the type of waste involved.

Pre-litigation procedure

17 By letter of formal notice of 25 May 1998, the Commission informed the German authorities that it was of the view that the contributions to the solidarity fund collected pursuant to the AbfVerbrG constituted a charge having equivalent effect to an export customs duty prohibited by Articles 9 and 12 of the EC Treaty (now, after amendment, Articles 23 EC and 25 EC). It added that such a contribution was not provided for by Regulation No 259/93.

18 In their response dated 11 September 1998, the German authorities maintained that the contribution to the solidarity fund was proportionate payment for a definite and/or specific benefit conferred on economic operators and therefore not a charge having equivalent effect to a customs duty. The German Government added that the specific characteristics of waste justified certain restrictions on the free movement of goods of that type.

19 On 16 August 1999, the Commission sent a reasoned opinion to the Federal Republic of Germany in which it dismissed the arguments of the German authorities, stating, however, that it did not object to the contribution paid in respect of exports of waste from Germany to third countries. It invited Germany to comply with the reasoned opinion within two months of its notification.

20 In a letter of 21 January 2000, the German Government continued to maintain that it had not infringed the Treaty, whereupon the Commission decided to bring the present action.

Infringement

21 The Commission claims that the obligation imposed by the AbfVerbrG on all exporters of waste to contribute to a solidarity fund is partially incompatible with Community law. It submits that, since the contribution must be paid when waste is shipped to other Member States, it constitutes a charge having effect equivalent to an export customs duty prohibited by Articles 23 EC and 25 EC.

22 As the Court has held on a number of occasions, the justification for the prohibition of customs duties and any charges having an equivalent effect lies in the fact that any pecuniary charge, however small, imposed on goods by reason of the fact that they cross a frontier, constitutes an obstacle to the movement of goods which is aggravated by the resulting administrative formalities. It follows that any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier and is not a customs duty in the strict

sense constitutes a charge having an equivalent effect to a customs duty within the meaning of Articles 23 EC and 25 EC, even if it is not imposed on behalf of the State (see, inter alia, Case 158/82 Commission v Denmark [1983] ECR 3573, paragraph 18; and Case 18/87 Commission v Germany [1988] ECR 5427, paragraph 5).

23 However, the Court has also held that such a charge escapes that classification if it relates to a general system of internal dues applied systematically and in accordance with the same criteria to domestic products and imported products alike, if it constitutes payment for a service in fact rendered to the economic operator of a sum in proportion to the service, or again, subject to certain conditions, if it attaches to inspections carried out to fulfil obligations imposed by Community law (see Commission v Germany, cited above, paragraph 6, and case-law cited).

24 It is common ground that, in the present case, the mandatory contribution to the solidarity fund constitutes a pecuniary charge, the amount of which is determined according to the nature and quantity of waste to be shipped, in accordance with the sixth sentence of Paragraph 8(1) of the AbfVerbrG. Under that provision, read together with section 17 of the solidarity fund regulation, any person required to notify of a shipment of waste within the meaning of Regulation No 259/93 must contribute to the fund and that obligation arises at the same time as the duty to notify of a shipment of waste outside the territory of the Federal Republic of Germany.

25 The German Government acknowledges that the disputed contribution appears to be a 'charge having equivalent effect' within the meaning of the Court's case-law. It denies, however, that the contribution is a charge prohibited by Articles 23 EC and 25 EC.

26 According to the German Government, the contribution to the solidarity fund is, first, adequate payment for the services actually provided to specific economic operators. Second, it is a lawful charge because it is compensation for a measure required of Member States by Community law with a view to promoting the free movement of goods. In this light and in two ways, the disputed charge thus comes within the exceptions allowed in the case-law of the Court which allow for certain pecuniary charges not to be charges having equivalent effect to a customs duty.

The contribution to the solidarity fund as payment for a service provided to economic operators

27 The German Government essentially submits that the State provides a financial service to the economic operators by agreeing, in accordance with the relevant provisions of the Basle Convention and Regulation No 259/93, to guarantee the financing of the return of waste into its territory in the event of illegal or incomplete exports, when the party responsible is not in a position to bear the costs thereof or cannot be identified. This service confers a real benefit on operators which export waste from the territory of the Federal Republic of Germany, since the subsidiary guarantee taken on by the State allows them to penetrate the markets of the other Member States of the Community and also the other States-Parties to the Basle Convention.

28 According to the German Government, although the money from the solidarity fund is used for the return of illegally exported waste, only those operators who export waste legally and contribute to the fund derive a benefit from the State's guarantee for the return. This service provided by the State confers a specific benefit on each exporter of waste, which can avail itself of the export possibilities created by the guarantee for each legal operation notified in accordance with Regulation No 259/93. In addition, the amount of the contribution collected for each given export, determined according to the nature and quantity of waste to be shipped, is itself proportional, within the meaning of that term as held by the Court in its case-law, to the actual service provided to the operator. Each notifier's contribution is thus collected by way of payment for its making use of the export opportunity created by the guarantee for the return of the waste.

29 The German Government stresses that the contribution provided for in Paragraph 8 of the AbfVerbrG

is aimed precisely at covering the costs incurred in providing the financing guarantee which makes each shipment of waste out of Germany possible. Consequently, it is proper that the actual cost of this service be passed on in an equitable and proportional manner to the economic operators which benefit from it.

30 The Court notes that the argument of the German Government is based on the hypothesis that the opportunities economic operators established in Germany have to export waste may be largely attributed to the State's agreeing to provide a subsidiary guarantee for the financing of waste return operations, when they become necessary.

31 The Court finds, however, that the opportunities those economic operators have are no different from those enjoyed by their competitors established in other Member States.

32 Waste shipments out of Germany must comply with the same rules and are subject to the same conditions as those applicable to shipments out of other Member States, since those rules and conditions are provided for *inter alia* in Regulation No 259/93. Even for exports to other States which are party to the Basle Convention (although the contributions for those exports are not directly concerned by these proceedings), the opportunities for operators established in Germany are identical to those enjoyed by other Community exporters, since the Community and all the Member States are party to that convention and the obligations flowing therefrom are implemented in the Community legal order through Regulation No 259/93.

33 It is, moreover, not disputed that, in agreeing to bear the costs associated with the return of waste, including shipment and disposal or recovery when those costs cannot be charged to a given operator, the Federal Republic of Germany is merely complying with an obligation imposed uniformly on all Member States by Article 33(2) of Regulation No 259/93.

34 As pointed out by the Advocate General in paragraph 37 of his Opinion, compliance with that obligation helps to ensure that no transboundary movement of waste is undertaken without adequate guarantees in place for protection of the environment and health. The same objective is pursued by many other obligations imposed on the States of export by various provisions of international law and Community law governing the circulation of waste. It is, moreover, evident that the proper functioning of the specific system for the circulation of waste thereby established presupposes that each State complies with the obligations imposed on it.

35 In those circumstances, compliance by the Federal Republic of Germany with an obligation which Community law imposes on all the Member States in pursuit of a general interest, namely protection of health and the environment, does not confer on exporters of waste established in its territory any specific or definite benefit (see, to this effect, *Commission v Germany*, cited above, paragraph 7).

36 That finding is supported by the fact that the obligation to contribute to the solidarity fund arises at the same time as the obligation to notify a shipment of waste for outside Germany and that, in reality, the pecuniary charge borne by exporters is determined solely according to the type and quantity of the waste to be shipped. There is thus nothing given in return for any service actually provided to them, either as a category of operators or in an individual capacity.

37 It follows that the disputed contribution cannot be considered as payment for a service actually provided specifically to the economic operators in question.

The contribution paid by way of compensation for a measure imposed by Community law with a view to promoting the free movement of goods

38 In the light of the foregoing, it is appropriate to examine whether the contribution to the solidarity fund can be viewed as a lawful charge in the form of compensation for a measure imposed

by Community law with a view to promoting the free movement of goods.

39 It should be recalled in this connection that, since the pecuniary charge in question is intended solely as financially and economically justified compensation for an obligation imposed in equal measure on all the Member States by Community law, it cannot be regarded as equivalent to a customs duty; nor, consequently, can it fall within the ambit of the prohibition laid down in Articles 23 EC and 25 EC (Case 46/76 *Bauhuis* [1977] ECR 5, paragraphs 34 to 36; and *Commission v Germany*, cited above, paragraph 14). This finding is not, in principle, precluded by the mere fact that other Member States themselves agree to finance the return of waste, including shipment and disposal or recovery, through their own budgets (see, to that effect, Case 89/76 *Commission v Netherlands* [1977] ECR 1355, paragraph 18; Case 1/83 *IGF* [1984] ECR 349, paragraphs 21 and 22; and *Commission v Germany*, cited above, paragraph 15).

40 It is, however, settled case-law of the Court that the pecuniary charge imposed on economic operators must be economically justified in that there must be a direct link between the amount and the actual cost of the operation it is intended to finance, in this case the possible return of the waste shipped, including shipment and disposal or recovery thereof (see, to that effect, Case C-111/89 *Bakker Hillegom* [1990] ECR I-1735, paragraphs 11 and 12).

41 The German Government argues in that respect that the contributions to the solidarity fund provided for in Germany do not exceed the costs incurred by the State and that each fee, considered by itself, is proportional to the actual benefit conferred on each specific operator. The German Government adds that Article 33(2) of Regulation No 259/93 allows the Member States some discretion in determining the methods of financing the costs they incur as guarantors of the return of waste, inter alia through collection of fees.

42 The Court notes, however, that Article 33(2) of Regulation No 259/93 already provides that the costs arising from the return of waste, including shipment, disposal or recovery of the waste in an alternative and environmentally sound manner are to be charged to the notifier. The costs are borne by the Member States concerned only if that is not possible.

43 It should also be recalled that, under Articles 25(1) and 26(2)(a) of Regulation No 259/93, notifiers who have notified shipments of waste which cannot be completed or which turn out to be illegal are required to proceed with the return of that waste themselves.

44 In addition, under Article 27(1) of Regulation No 259/93, all shipments of waste covered within the scope of that regulation are to be subject to the provision of a financial guarantee or equivalent insurance covering costs for the possible return of waste, including shipment and disposal or recovery.

45 It has therefore not been established that the contribution collected when each shipment of waste is carried out, when it is notified pursuant to the provisions of Regulation No 259/93, is in any way related to the actual costs that operation is likely to generate for the State in the event that it becomes necessary to return the waste shipped and to dispose of or recover it. Given the provisions of that regulation, discussed in paragraphs 42 to 44 of this judgment, it appears, moreover, that the scenarios in which the State will most frequently have to bear the costs associated with returning waste, including shipment, disposal or recovery, will be precisely where, in the absence of notification, the guarantee or equivalent insurance has not been provided and nor, therefore, has the contribution been paid.

46 The lack of correlation between the amount of the contribution and the actual cost of the operation it is intended to finance is clear, notwithstanding the fact that, pursuant to the seventh sentence of Paragraph 8(1) of the *AbfVerbrG*, contributions from the solidarity fund not used at the end of a three-year period are repaid to the operators proportionally to the amounts they have paid in. Even on the supposition that this periodic repayment system is intended to adjust the individual

contributions to reflect the actual costs incurred by the State, as contended by the German Government, it should be remembered that the portion of those contributions used to cover the administrative costs of the solidarity fund is not repaid. Likewise, the financial loss resulting from the forfeiture of the amounts in question for three years - a loss not compensated for by interest - is, in any event, borne by the operators concerned. Neither does the progressive reduction of the overall volume of the solidarity fund, which was initially established at DEM 75 million and was under DEM 16 million at the time the present proceedings were brought, shed light on the costs actually incurred by the State to meet its obligation to return waste or establish that the individual contributions are set at a level which is adequate in relation to those costs.

47 With respect to the issue of whether each contribution is proportional to the alleged benefit for each operator, it should be recalled that, as the Court has found in paragraphs 35 to 37 above, the economic operators called upon to pay the contributions to the solidarity fund do not derive any actual definite specific benefit from the activities financed by the fund.

48 As for the possible discretion the Member States may have under Article 33(2) of Regulation No 259/93, it cannot, in any event, be used to levy additional, unjustified charges on notifiers.

49 The Court notes that appropriate administrative costs of implementing the notification and supervision procedure and usual costs of appropriate analyses and inspections may be charged to the notifier, as provided for in Article 33(1) of Regulation No 259/93.

50 Consequently, the Court finds that the contribution to the solidarity fund is a charge having equivalent effect to a customs duty, which is prohibited by Articles 23 EC and 25 EC.

51 The Court thus finds that, by subjecting shipments of waste to other Member States to a mandatory contribution to the solidarity fund established by the AbfVerbrG, the Federal Republic of Germany has failed to fulfil its obligations under Articles 23 EC and 25 EC.

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SUB Free movement of goods ; Customs Union ; Charges having an equivalent effect

AUTLANG German

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NATIONA Federal Republic of Germany

PROCEDU Proceedings concerning failure by Member State - successful

ADVGEN Tizzano

JUDGRAP Rosas

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**Judgment of the Court
of 2 April 1998
Outokumpu Oy.**

Reference for a preliminary ruling: Uudenmaan Lääninoikeus - Finland.

Excise duty on electricity - Rates of duty varying according to the method of producing electricity of domestic origin - Flat rate for imported electricity.

Case C-213/96.

1 Tax provisions - Internal taxation - Excise duty on electricity - System of taxation applying rates varying according to the method of production to electricity of domestic origin and a flat rate to imported electricity - Classified as internal taxation and not as a charge having equivalent effect to a customs duty

(EC Treaty, Arts 9, 12 and 95)

2 Tax provisions - Internal taxation - Differentiated system of taxation - Permissible - Conditions - Differentiated system of taxation on electricity - Rate applicable varying according to the method of production - Differentiation based on considerations of protection of the environment - Permissible

(EC Treaty, Art. 95)

3 Tax provisions - Internal taxation - Excise duty on electricity - System of taxation applying rates varying according to the method of production to electricity of domestic origin and a flat rate to imported electricity - Not permissible

(EC Treaty, Art. 95)

4 An excise duty which is charged on electricity of domestic origin at rates which vary according to its method of production, while being levied on imported electricity at a flat rate which is higher than the lowest rate but lower than the highest rate applicable to electricity of domestic origin, constitutes internal taxation within the meaning of Article 95 of the Treaty, not a charge having equivalent effect to a customs duty within the meaning of Articles 9 and 12, where it forms part of a general system of taxation which is levied not only on electrical energy as such but also on several primary energy sources, and where both imported electricity and electricity of domestic origin form part of the same tax system and the duty is levied by the same authorities under the same procedures, whatever the origin of the electricity.

The fact that imported electricity is taxed at the moment of import and electricity of domestic origin at the moment of production makes no difference for the classification of such a duty, since in view of the characteristics of electricity those two moments correspond to the same marketing stage, namely that when the electricity enters the national distribution network.

5 Community law does not, at its present stage of development, restrict the freedom of each Member State to establish a tax system which differentiates between certain products, even products which are similar within the meaning of the first paragraph of Article 95 of the Treaty, on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed. Such differentiation is compatible with Community law, however, only if it pursues objectives which are themselves compatible with the requirements of the Treaty and its secondary legislation, and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, against imports from other Member States or any form of protection of competing domestic products.

Article 95 of the Treaty therefore does not preclude the rate of an internal duty on electricity from varying according to the manner in which the electricity is produced and the raw materials used, in so far as that differentiation is based on environmental considerations. Protection of the environment constitutes one of the essential objectives of the Community. The Community's task includes the promotion of sustainable and non-inflationary growth respecting the environment

and its activities include a policy in the sphere of the environment. Furthermore, compatibility with the environment of methods of producing electrical energy is an important objective of the Community's energy policy.

6 The first paragraph of Article 95 of the Treaty precludes an excise duty which forms part of a national system of taxation on sources of energy from being levied on electricity of domestic origin at rates which vary according to its method of production while being levied on imported electricity, whatever its method of production, at a flat rate which, although lower than the highest rate applicable to electricity of domestic origin, leads, if only in certain cases, to higher taxation being imposed on imported electricity.

Article 95 of the Treaty is infringed by a system of internal taxation where the taxation on the imported product and that on the similar domestic product are calculated in a different manner on the basis of different criteria which lead, if only in certain cases, to higher taxation being imposed on the imported product.

The fact that, because of the characteristics of electricity, it may prove extremely difficult to determine precisely the method of production of imported electricity and hence the primary energy sources used for its production cannot justify such a system of taxation, since practical difficulties cannot justify the application of internal taxation which discriminates against products from other Member States. Although in principle Article 95 of the Treaty does not require Member States to abolish objectively justified differences which national legislation establishes between internal taxes on domestic products, it is otherwise where such abolition is the only way of avoiding direct or indirect discrimination against the imported products.

In [Case C-213/96](#),

REFERENCE to the Court under Article 177 of the EC Treaty by the Uudenmaan Lääninoikeus (Finland) for a preliminary ruling in the proceedings pending before that court brought by

Outokumpu Oy,

on the interpretation of Articles 9, 12 and 95 of the EC Treaty,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm and R. Schintgen (Rapporteur) (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, P.J.G. Kapteyn, J.L. Murray, D.A.O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón, Judges,

Advocate General: F.G. Jacobs,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Outokumpu Oy, by Arto Kukkonen, of the Helsinki Bar,
- the Finnish Government, by Holger Rotkirch, Ambassador, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent,
- the French Government, by Catherine de Salins, Deputy Director in the Legal Directorate of the Ministry of Foreign Affairs, and Jean-Marc Belorgey, Chargé de Mission in that directorate, acting as Agents,
- the Commission of the European Communities, by Allan Rosas, Principal Legal Adviser, and Enrico Traversa, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Outokumpu Oy, the Finnish Government and the Commission at the hearing on 24 June 1997,

after hearing the Opinion of the Advocate General at the sitting on 13 November 1997,

gives the following

Judgment

Costs

42 The costs incurred by the Finnish and French Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Uudenmaan Lääninoikeus by order of 30 May 1996, hereby rules:

The first paragraph of Article 95 of the EC Treaty precludes an excise duty which forms part of a national system of taxation on sources of energy from being levied on electricity of domestic origin at rates which vary according to its method of production while being levied on imported electricity, whatever its method of production, at a flat rate which, although lower than the highest rate applicable to electricity of domestic origin, leads, if only in certain cases, to higher taxation being imposed on imported electricity.

1 By order of 30 May 1996, received at the Court on 25 June 1996, the Uudenmaan Lääninoikeus (Uusimaa Provincial Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 9, 12 and 95 of that Treaty.

2 Those questions were raised in proceedings brought by Outokumpu Oy (hereinafter 'Outokumpu'), the parent company of the Finnish Outokumpu group, against the decision of the Piiritullikamari (District Customs Office), Helsinki, assessing duty on electricity imported from Sweden by Outokumpu during September 1995.

3 In Finland, Paragraph 1 of the Eräiden energialähteiden valmisteverosta annettu laki (Law No 1473/94 of 29 December 1994 on excise duty on certain sources of energy) prescribes that coal, peat, natural gas, electricity and pine oil are subject to basic duty and additional duty payable to the State. Paragraph 2(4) of that Law defines electricity as meaning electrical energy within customs tariff heading 2716.

4 Under Paragraph 3 of Law No 1473/94, the customs authorities are responsible for levying and supervising the taxes on the products specified in the Law.

5 Under Paragraph 4 of Law No 1473/94, duty is payable according to the following tax table, annexed to the Law (p = penni = 0.01 FMK):

Product

Product

group

Basic

duty

Additional

duty

Coal, coal briquettes, solid fuels processed from coal; lignite

1

-

116.1 FMK/tonne

Peat

2

-

3.5 FMK/MWh

Natural gas, gas products

3

-

11.2 p/nm³*

Electrical energy

- produced by nuclear power

- produced by water power

- imported

4

5

6

1.5 p/kWh

-

1.3 p/kWh

0.9 p/kWh

0.4 p/kWh

0.9 p/kWh

Pine oil

7

18.55 p/kg

-

* The duty payable on natural gas for the period from 1 January 1995 to 31 December 1997 is reduced by 50%.

6 Under the first subparagraph of Paragraph 14 of Law No 1473/94, persons who

- (1) produce electricity in Finland by nuclear or water power;
- (2) in the course of business receive electricity from the Community or import it from outside the Community,

are liable to pay electricity duty.

7 The duty does not apply, however, to electrical energy produced in a generator with an output of less than two megavolt-amperes (second subparagraph of Paragraph 14 of Law No 1473/94).

8 Also exempted from the duty are:

- peat used for producing electricity, if production does not exceed 25 000 MWh per calendar year (Paragraph 7);

- electricity produced by nuclear or water power in Finland which the producer himself exports outside the Community or supplies for consumption in a part of the Community other than Finland (Paragraph 16).

9 Finally, according to the documents in the case, electricity produced from certain industrial waste falls outside the scope of Law No 1473/94.

10 Under Paragraph 17 of Law No 1473/94, all persons liable to pay duty under point 2 of the first subparagraph of Paragraph 14 are obliged to comply with the provisions of the Valmisteverotuslaki (Law No 1469/94 on excise duty).

11 It appears from the legislative proposal presented to the Finnish Parliament that the taxation of coal, electricity, natural gas, milled peat and sod peat, and crude pine oil is based on ecological considerations. Moreover, the flat rate of duty on imported electricity was calculated so as to correspond to the average rate levied on electricity produced in Finland, but without taking into account the reduction of duty on peat and natural gas.

12 Law No 1473/94 entered into force on 1 January 1995.

13 Outokumpu has imported electricity from Sweden since 1 November 1995 under a contract with the Swedish company Vattenfall AB.

14 The first supplies were delivered, on an experimental basis, from 18 September to 9 October 1995. For that trial supply, Outokumpu submitted on 17 October 1995 a tax declaration for September 1995 to the District Customs Office. In a covering letter with that declaration, Outokumpu stated that in its opinion the levying of electricity duty on those imports was contrary to Articles 12 and 13 of the EC Treaty, with the result that no duty was payable.

15 On 23 October 1995 the District Customs Office decided that under Paragraph 4 of Law No 1473/94 Outokumpu was liable to pay electricity duty of 1.3 p/kWh + 0.9 p/kWh, in accordance with the tax table for imported electricity.

16 Outokumpu instituted proceedings before the Uudenmaan Lääninoikeus for annulment of the decision of the Helsinki District Customs Office on the ground that the excise duty on electricity was a charge having equivalent effect to a customs duty, prohibited by Articles 9 and 12 of the Treaty. Outokumpu submitted, in the alternative, that a duty of that kind was discriminatory under Article 95 of the Treaty, and asked for it to be reduced to the lowest level of duty on electricity produced in Finland, namely 0 p/kWh, the rate applicable to exempted electricity or electricity falling outside the scope of Law No 1473/94.

17 Since it considered that the outcome of the case before it depended on the interpretation of Articles 9, 12 and 95 of the Treaty, the national court stayed proceedings and referred the following questions to the Court for a preliminary ruling:

Under Finnish national legislation on the taxation of energy, excise duty on electricity is levied in Finland on electrical energy produced there, the amount of the duty depending on the method of production of the electricity. On electricity produced by nuclear power, the excise duty charged is a basic duty of 1.5 p/kWh and an additional duty of 0.9 p/kWh. On electricity produced by water power, the excise duty charged is only an additional duty of 0.4 p/kWh. On electricity produced by other methods, for example from coal, excise duty is charged on the basis of the amount of input materials used to produce the electricity. On electrical energy produced by some methods, for example in a generator with an output below two megavolt-amperes, no excise duty at all is charged. On imported electricity, the excise duty charged, regardless of the method of production of the electricity, is a basic duty of 1.3 p/kWh and an additional duty of 0.9 p/kWh. The excise duty on electricity is thus determined with respect to imported electricity on a different basis from that applied to electricity produced in Finland. The levying of excise duties determined on the basis of the method of production of the energy is founded on environmental grounds in the drafting history of the law. The amount of duty chargeable on imported electricity is not, however, determined on the basis of the method of production of the electricity. The excise duty chargeable on imported electricity is higher than the lowest excise duty chargeable on electricity produced in Finland, but lower than the highest excise duty chargeable on electricity produced in Finland. The excise duty on imported electricity is levied on the importer, whereas the excise duty relating to electricity produced in Finland is levied on the electricity producer.

1. Is excise duty on electricity, determined for imported electricity in the manner described above, to be regarded as a charge having equivalent effect to a customs duty, within the meaning of Articles 9 and 12 of the EC Treaty?

2. If it is not a charge having equivalent effect to a customs duty, is excise duty on electricity, determined for imported electricity in the manner described above, to be regarded as a tax which discriminates against imports from other Member States, within the meaning of Article 95 of the EC Treaty?

18 By those questions, which should be examined together, the national court seeks a ruling from the Court on the classification from the point of view of Articles 9, 12 and 95 of the Treaty, and if appropriate on the compatibility with those provisions, of an excise duty which is levied on electricity of domestic origin at rates which vary according to its method of production, while being levied on imported electricity at a flat rate which is higher than the lowest rate but lower than the highest rate applicable to electricity of domestic origin.

19 As regards classification, the Court has consistently held (see, *inter alia*, Case C-90/94 Haahr Petroleum v benrå Havn and Others [1997] ECR I-4085, paragraph 19) that provisions relating to charges having equivalent effect and those relating to discriminatory internal taxation cannot be applied together, so that under the system established by the Treaty the same charge cannot belong to both categories at the same time.

20 The Court has also consistently held (see, *inter alia*, Haahr Petroleum, paragraph 20) that any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 9, 12, 13 and 16 of the EC Treaty. However, such a charge may not be so characterised if it forms part of a general system of internal dues applying systematically to categories of products according to objective criteria applied without regard to the origin of the products, in which case it falls within the scope of Article 95 of the Treaty.

21 The first point to note is that a duty of the kind at issue in the main proceedings forms part of a general system of taxation which is levied not only on electrical energy as such but also on

several primary energy sources such as coal products, peat, natural gas and pine oil.

22 Second, both imported electricity and electricity of domestic origin form part of the same tax system and the duty is levied by the same authorities, whatever the origin of the electricity, under procedures governed by the general legislation on excise duties.

23 Third, with the exception of electricity of domestic origin produced in generators with an output below two megavolt-amperes and of that produced in small quantities from peat, the duty is levied on electricity, whatever its origin, whether domestic or imported. In those circumstances, the fact that in the case of imported electricity the duty is payable by the importer on importation does not provide a sufficient basis for the conclusion that it is imposed on the goods concerned by reason of the fact that they cross the frontier.

24 Outokumpu observes, however, that according to the Court's case-law (see, in particular, Case 132/78 *Denkavit Loire v France* [1979] ECR 1923, paragraph 8), in order to form part of a general system of internal dues, the charge imposed on imported products must be imposed on domestic products and imported products at the same marketing stage and the chargeable event must be identical for both classes of products.

25 On this point, it must be stated that, in circumstances such as those of this case, no difference may be discerned in the fact that imported electricity is taxed at the time of importation and electricity of domestic origin at the time of production, since in view of the characteristics of electricity the marketing stage is the same for both operations, namely the stage when the electricity enters the national distribution network (see, to that effect, Joined Cases C-149/91 and C-150/91 *Sanders Adour and Guyomarc'h Orthez Nutrition Animale v Directeur des Services Fiscaux des Pyrénées-Atlantiques* [1992] ECR I-3899, paragraph 18).

26 Outokumpu further submits that the duty at issue is not imposed on imported and domestic products according to the same criteria and without reference to their origin. Duty is levied on electricity of domestic origin at different rates depending on whether it is produced by nuclear or water power, or is taxed only at the level of the raw materials used or is exempted, whereas imported electricity is taxed, as an end product exclusively, at a flat rate whatever its method of production. The taxable amounts and rates of tax thus differ depending on whether the electricity is of domestic origin or imported.

27 The Court has already held that a charge in the form of an internal tax may not be regarded as a charge having equivalent effect to a customs duty unless the detailed rules governing the levying of the charge are such that it is imposed solely on imported products to the exclusion of domestic products (Case 32/80 *Officier van Justitie v Kortmann* [1981] ECR 251, paragraph 18). As may be seen from paragraph 23 above, that is not the case of the duty at issue in the main proceedings.

28 The Court has also held that the fact that the origin of the goods determines the amount of the duty to be levied cannot remove it from the scope of Article 95 of the Treaty (*Haahr Petroleum*, paragraph 25).

29 Consequently, an excise duty of the kind at issue in the main proceedings constitutes internal taxation within the meaning of Article 95 of the Treaty, not a charge having equivalent effect to a customs duty within the meaning of Articles 9 and 12.

30 As regards the compatibility of such a duty with Article 95 of the Treaty, it is settled case-law, first, that in its present state of development Community law does not restrict the freedom of each Member State to establish a tax system which differentiates between certain products, even products which are similar within the meaning of the first paragraph of Article 95 of the Treaty, on the basis of objective criteria, such as the nature of the raw materials used or the production

processes employed. Such differentiation is compatible with Community law, however, only if it pursues objectives which are themselves compatible with the requirements of the Treaty and its secondary legislation, and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, against imports from other Member States or any form of protection of competing domestic products.

31 Article 95 of the Treaty therefore does not preclude the rate of an internal tax on electricity from varying according to the manner in which the electricity is produced and the raw materials used for its production, in so far as that differentiation is based, as is clear from the actual wording of the national court's questions, on environmental considerations.

32 As the Court stated in Case 302/86 *Commission v Denmark* [1988] ECR 4607, paragraph 8, protection of the environment constitutes one of the essential objectives of the Community. Moreover, since the entry into force of the Treaty on European Union, the Community's task includes the promotion of sustainable and non-inflationary growth respecting the environment (Article 2 of the EC Treaty) and its activities include a policy in the sphere of the environment (Article 3(k) of the EC Treaty).

33 Furthermore, as the Advocate General observes in paragraph 58 of the Opinion, compatibility with the environment, particularly of methods of producing electrical energy, is an important objective of the Community's energy policy.

34 However, on the question whether differentiation such as that which characterises the tax system at issue in the main proceedings is compatible with the prohibition of discrimination in Article 95 of the Treaty, the Court has consistently held that that provision is infringed where the taxation on the imported product and that on the similar domestic product are calculated in a different manner on the basis of different criteria which lead, if only in certain cases, to higher taxation being imposed on the imported product (see, in particular, Case C-152/89 *Commission v Luxembourg* [1991] ECR I-3141, paragraph 20).

35 That is the case where, under a system of differential taxation of the kind at issue in the main proceedings, imported electricity distributed via the national network is subject, whatever its method of production, to a flat-rate duty which is higher than the lowest duty charged on electricity of domestic origin distributed via the national network.

36 The fact that electricity of domestic origin is in some cases taxed more heavily than imported electricity is immaterial in this connection since, in order to ascertain whether the system in question is compatible with Article 95 of the Treaty, the tax burden imposed on imported electricity must be compared with the lowest tax burden imposed on electricity of domestic origin (see, to that effect, *Commission v Luxembourg*, paragraphs 21 and 22).

37 The Finnish Government raises the objection that in view of the characteristics of electricity, the origin and consequently the method of production of which cannot be determined once it has entered the distribution network, the differential rates applicable to electricity of domestic origin cannot be applied to imported electricity. It submits that in those circumstances application of a flat rate, calculated so as to correspond to the average rate levied on electricity of domestic origin, is the only logical way of treating imported electricity in an equitable manner.

38 The Court has already had occasion to point out that practical difficulties cannot justify the application of internal taxation which discriminates against products from other Member States (see, *inter alia*, Case C-375/95 *Commission v Greece* [1997] ECR I-5981, paragraph 47).

39 While the characteristics of electricity may indeed make it extremely difficult to determine precisely the method of production of imported electricity and hence the primary energy sources used for that purpose, the Finnish legislation at issue does not even give the importer the opportunity

of demonstrating that the electricity imported by him has been produced by a particular method in order to qualify for the rate applicable to electricity of domestic origin produced by the same method.

40 Moreover, the Court has already held that although in principle Article 95 of the Treaty does not require Member States to abolish differences which are objectively justified and which national legislation establishes between internal taxes on domestic products, it is otherwise where such abolition is the only way of avoiding direct or indirect discrimination against the imported products (Case 21/79 Commission v Italy [1980] ECR I, paragraph 16).

41 In the light of the foregoing considerations, the answer must be that the first paragraph of Article 95 of the EC Treaty precludes an excise duty which forms part of a national system of taxation on sources of energy from being levied on electricity of domestic origin at rates which vary according to its method of production while being levied on imported electricity, whatever its method of production, at a flat rate which, although lower than the highest rate applicable to electricity of domestic origin, leads, if only in certain cases, to higher taxation being imposed on imported electricity.

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TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1996 ; J ; judgment
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	11992E013 : N 20
	11992E016 : N 20
	11992E095 : N 20 28 29 - 31 34 36 40-41
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NATCOUR	*A9* Uudenmaan lääninoikeus, välipäätös 30/05/1996 (540/6400/96) *P1* Uudenmaan lääninoikeus, päätös 05/06/1998 (540/6400/96) *P2* Helsingin hallinto-oikeus, päätös 28/02/2000 (10599/99/9400 ; 00/0257/7)
NOTES	Novak, Meinhard: European Law Reporter 1998 p.241 Lagondet, F.: Europe 1998 Juin Comm. no 207 p.17 Lukes, Rudolf: Recht der internationalen Wirtschaft 1998 p.640-642 Denys, Christine: European Environmental Law Review 1998 p.282-288 Priess, Hans-Joachim: International Trade Law & Regulation 1998 N78-N79 Barents, R.: S.E.W. ; Sociaal-economische wetgeving 1999 p.111-112 Aalto, Pekka: Defensor Legis 1999 no 2 p.380-381 Martín Jiménez, Adolfo J.: Revista española de Derecho Financiero 1999 p.374-376 De Wit, W.: Milieu en recht 2000 Jur. p.83
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ADVGEN	Jacobs
JUDGRAP	Schintgen
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**Judgment of the Court
of 30 November 1995**

Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano.

Reference for a preliminary ruling: Consiglio Nazionale Forense - Italy.

**Directive 77/249/EEC - Freedom to provide services - Lawyers - Possibility of opening chambers -
Articles 52 and 59 of the EC Treaty.**

Case C-55/94.

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1. Freedom of movement for persons ° Freedom of establishment ° Treaty provisions ° Scope ° Pursuit on a stable and continuous basis from a professional base in a Member State other than the State of origin of an activity directed towards, among others, nationals of the host State ° Included

(EC Treaty, Art. 52)

2. Freedom to provide services ° Treaty provisions ° Scope ° Temporary nature of the activities pursued ° Criteria ° Installation of infrastructure for professional purposes in the host Member State ° Permissibility ° Conditions

(EC Treaty, Art. 60, third para.)

3. Freedom of movement for persons ° Freedom of establishment ° Restrictions resulting from the obligation to comply in the host Member State with rules relating to the pursuit of certain activities ° Permissibility ° Conditions ° Requirement for a diploma ° Obligation of the national authorities to take account of the equivalence of diplomas or training

(EC Treaty, Art. 52)

1. A national of a Member State who pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State comes under the chapter relating to the right of establishment and not the chapter relating to services.

2. As appears from the third paragraph of Article 60 of the Treaty, the rules on freedom to provide services cover ° at least where the provider moves in order to provide his services ° the situation in which a person moves from one Member State to another, not for the purposes of establishment there, but in order to pursue his activity there on a temporary basis.

The temporary nature of the activities in question has to be determined in the light of its duration, regularity, periodicity and continuity. This does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question.

3. The possibility for a national of a Member State to exercise his right of establishment, and the conditions for his exercise of that right, must be determined in the light of the activities which he intends to pursue on the territory of the host Member State.

Where the taking-up of a specific activity is not subject to any rules in the host State, a national of any other Member State will be entitled to establish himself and pursue that activity there. On the other hand, where the taking-up or the pursuit of a specific activity is subject to certain conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with them.

Such conditions, which may consist in particular of an obligation to hold particular diplomas, to belong to a professional body or to comply with certain rules of professional conduct or with

rules relating to the use of professional titles, must fulfil certain requirements where they are liable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the Treaty, such as freedom of establishment. There are four such requirements: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.

As far as conditions relating to the possession of a qualification are concerned, Member States must take account of the equivalence of diplomas and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned.

In [Case C-55/94](#),

REFERENCE to the Court under Article 177 of the EC Treaty by the Consiglio Nazionale Forense (Italy) for a preliminary ruling in the proceedings pending before that court between

Reinhard Gebhard

and

Consiglio dell' Ordine degli Avvocati e Procuratori di Milano,

on the interpretation of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C.N. Kakouris, D.A.O. Edward (Rapporteur) and G. Hirsch (Presidents of Chambers), G.F. Mancini, F.A. Schockweiler, J.C. Moitinho de Almeida, P.J.G. Kapteyn, C. Gulmann, J.L. Murray, P. Jann, H. Ragnemalm and L. Sevón, Judges,

Advocate General: P. Léger,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

° the applicant in the main proceedings, by Reinhard Gebhard, Rechtsanwalt, Massimo Burghignoli, of the Milan Bar, Jim Penning, of the Luxembourg Bar, and Fabrizio Massoni, of the Brussels Bar,

° Consiglio dell' Ordine degli Avvocati e Procuratori di Milano, by Professor Bruno Nascimbene, Avvocato,

° the Greek Government, by Evi Skandalou, of the Special Community Legal Affairs Department of the Ministry of Foreign Affairs, and Stamatina Vodina, Jurist, researcher in that department, acting as Agents,

° the Spanish Government, by Alberto José Navarro Gonzalez, Director-General for Community Legal and Institutional Coordination, and Miguel Bravo-Ferrer Delgado, Abogado del Estado in the Community Legal Affairs Department, acting as Agents,

° the French Government, by Philippe Martinet, Foreign Affairs Secretary in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Catherine de Salins, Deputy Director in that directorate, acting as Agents,

° the United Kingdom, by Stephen Braviner, of the Treasury Solicitor's Department, acting as Agent, and Daniel Bethlehem, Barrister,

° the Commission of the European Communities, by Marie-José Jonczy, Legal Adviser, and Enrico Traversa, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Reinhard Gebhard, represented by Massimo Burghignoli; Consiglio dell' Ordine degli Avvocati e Procuratori di Milano, represented by Bruno Nascimbene; the Greek Government, represented by Evi Skandalou and Stamatina Vodina; the Spanish Government, represented by Miguel Bravo-Ferrer Delgado; the French Government, represented by Marc Perrin de Brichambaut, Legal Affairs Director in the Ministry of Foreign Affairs, acting as Agent, and Philippe Martinet; the Italian Government, represented by Pier Giorgio Ferri, Avvocato dello Stato; the United Kingdom, represented by Stephen Braviner and Daniel Bethlehem, and the Commission of the European Communities, represented by Marie-José Jonczy and Enrico Traversa, at the hearing on 10 May 1995,

after hearing the Opinion of the Advocate General at the sitting on 20 June 1995,

gives the following

Judgment

Costs

40 The costs incurred by the Italian, Greek, Spanish and French Governments, the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Consiglio Nazionale Forense, by order of 16 December 1993, hereby rules:

1. The temporary nature of the provision of services, envisaged in the third paragraph of Article 60 of the EC Treaty, is to be determined in the light of its duration, regularity, periodicity and continuity.
2. The provider of services, within the meaning of the Treaty, may equip himself in the host Member State with the infrastructure necessary for the purposes of performing the services in question.
3. A national of a Member State who pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State comes under the provisions of the chapter relating to the right of establishment and not those of the chapter relating to services.
4. The possibility for a national of a Member State to exercise his right of establishment, and the conditions for the exercise of that right, must be determined in the light of the activities which he intends to pursue on the territory of the host Member State.
5. Where the taking-up of a specific activity is not subject to any rules in the host State, a national of any other Member State will be entitled to establish himself on the territory of the first State and pursue that activity there. On the other hand, where the taking-up or the pursuit of a specific activity is subject to certain conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with them.

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

7. Member States must take account of the equivalence of diplomas and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned.

1 By order of 16 December 1993, received at the Court on 8 February 1994, the Consiglio Nazionale Forense (National Council of the Bar) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17).

2 The questions have been raised in the course of disciplinary proceedings opened by the Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (Council of the Order of Advocates and Procurators of Milan, hereinafter "the Milan Bar Council") against Mr Gebhard, who is accused of contravening his obligations under Law No 31 of 9 February 1982 on freedom for lawyers who are nationals of a Member State of the European Community to provide services (GURI No 42 of 12 February 1982) on the ground that he pursued a professional activity in Italy on a permanent basis in chambers set up by himself whilst using the title *avvocato*.

3 According to the case-file and information provided in answer to the written questions put by the Court, Mr Gebhard, a German national, has been authorized to practise as a *Rechtsanwalt* in Germany since 3 August 1977. He is a member of the Bar of Stuttgart, where he is an "independent collaborator" in a set of chambers (*Buerogemeinschaft*) although he does not have chambers of his own in Germany.

4 Mr Gebhard has resided since March 1978 in Italy, where he lives with his wife, an Italian national, and his three children. His income is taxed entirely in Italy, his country of residence.

5 Mr Gebhard has pursued a professional activity in Italy since 1 March 1978, initially as a collaborator (*con un rapporto di libera collaborazione*) in a set of chambers of lawyers practising in association in Milan, and subsequently, from 1 January 1980 until the beginning of 1989, as an associate member (*associato*) of those chambers. No criticism has been made of him in relation to his activities in those chambers.

6 On 30 July 1989, Mr Gebhard opened his own chambers in Milan in which Italian *avvocati* and *procuratori* work in collaboration with him. In response to a written question from the Court, Mr Gebhard stated that he instructed them from time to time to act in judicial proceedings involving Italian clients in Italy.

7 Mr Gebhard avers that his activity in Italy is essentially non-contentious, assisting and representing German-speakers (65% of his turnover) and representing Italian-speakers in Germany and Austria (30% of his turnover). The remaining 5% is accounted for by assistance to Italian practitioners whose clients are faced with problems of German law.

8 A number of Italian practitioners, including the Italian *avvocati* with whom Mr Gebhard was associated until 1989, lodged a complaint with the Milan Bar Council. They complained of his use of the title *avvocato* on the letterhead of notepaper which he used for professional purposes, of his having appeared using the title *avvocato* directly before the Pretura and the Tribunale di Milano and of his having practised professionally from "Studio Legale Gebhard".

9 The Milan Bar Council prohibited Mr Gebhard from using the title *avvocato*. Thereafter, on 19 September 1991, it decided to open disciplinary proceedings against him on the ground that he had contravened his obligations under Law No 31/82 by pursuing a professional activity in Italy on a permanent basis in chambers set up by himself whilst using the title *avvocato*.

10 On 14 October 1991 Mr Gebhard applied to the Milan Bar Council to be entered on the roll of members of the Bar. His application was based on Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16) and on his having completed a ten-year training period in Italy. It does not appear that the Bar Council has taken any formal decision on that application.

11 The disciplinary proceedings opened on 19 September 1991 were completed by a decision of 30 December 1992 by which the Milan Bar Council imposed on Mr Gebhard the sanction of suspension from pursuing his professional activity (*sospensione dell' esercizio dell' attività professionale*) for six months.

12 Mr Gebhard appealed against that decision to the Consiglio Nazionale Forense, making it clear, however, that he was also appealing against the implied rejection of his application to be entered on the roll. In particular, he argued in his appeal that Directive 77/249 entitled him to pursue his professional activities from his own chambers in Milan.

13 Directive 77/249 applies to the activities of lawyers pursued by way of provision of services. It states that a lawyer providing services is to adopt the professional title used in the Member State from which he comes, expressed in the language or one of the languages of that State, with an indication of the professional organization by which he is authorized to practise or the court of law before which he is entitled to practise pursuant to the laws of that State (Article 3).

14 The directive draws a distinction between (a) activities relating to the representation of a client in legal proceedings or before public authorities and (b) all other activities.

15 In pursuing activities relating to representation, the lawyer must observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes (Article 4(2)). As far as the pursuit of all other activities is concerned, the lawyer remains subject to the conditions and rules of professional conduct of the Member State from which he comes, without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and secrecy (Article 4(4)).

16 Article 4(1) of Directive 77/249 provides that "Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State."

17 Directive 77/249 was implemented in Italy by Law No 31/82, Article 2 of which provides as follows:

"[Nationals of Member States authorized to practise as lawyers in the Member State from which they come] shall be permitted to pursue lawyers' professional activities on a temporary basis (*con carattere di temporaneità*) in contentious and non-contentious matters in accordance with the detailed rules laid down in this title.

For the purpose of the pursuit of the professional activities referred to in the preceding paragraph, the establishment on the territory of the Republic either of chambers or of a principal or branch office is not permitted."

18 In those circumstances, the Consiglio Nazionale Forense stayed the proceedings and referred questions to the Court for a preliminary ruling:

"(a) as to whether Article 2 of Law No 31 of 9 February 1982 on freedom for lawyers who are nationals of the Member States of the European Community to provide services (enacted in implementation of Council Directive 77/249/EEC of 22 March 1977) which prohibits 'the establishment on the territory of the Republic either of chambers or of a principal or branch office' , is compatible with the rules laid down by that directive, given that in the directive there is no reference to the fact that the possibility of opening an office could be interpreted as reflecting a practitioner's intention to carry on his activities, not on a temporary or occasional basis, but on a regular basis;

(b) as to the criteria to be applied in assessing whether activities are of a temporary nature, with respect to the continuous and repetitive nature of the services provided by lawyers practising under the system referred to in the abovementioned directive of 22 March 1977."

19 In view of the wording of the preliminary questions, it should be remembered that the Court has consistently held that it does not have jurisdiction to rule on the compatibility of a national measure with Community law. However, the Court is competent to provide the national court with all criteria for the interpretation of Community law which may enable it to determine the issue of compatibility for the purposes of the decision in the case before it (see in particular Case C-63/94 *Groupement National des Négoçiants en Pommes de Terre de Belgique (Belgapom)* [1995] ECR I-0000, paragraph 7).

20 The situation of a Community national who moves to another Member State of the Community in order there to pursue an economic activity is governed by the chapter of the Treaty on the free movement of workers, or the chapter on the right of establishment or the chapter on services, these being mutually exclusive.

21 Since the questions referred are concerned essentially with the concepts of "establishment" and "provision of services", the chapter on workers can be disregarded as having no bearing on those questions.

22 The provisions of the chapter on services are subordinate to those of the chapter on the right of establishment in so far, first, as the wording of the first paragraph of Article 59 assumes that the provider and the recipient of the service concerned are "established" in two different Member States and, second, as the first paragraph of Article 60 specifies that the provisions relating to services apply only if those relating to the right of establishment do not apply. It is therefore necessary to consider the scope of the concept of "establishment".

23 The right of establishment, provided for in Articles 52 to 58 of the Treaty, is granted both to legal persons within the meaning of Article 58 and to natural persons who are nationals of a Member State of the Community. Subject to the exceptions and conditions laid down, it allows all types of self-employed activity to be taken up and pursued on the territory of any other Member State, undertakings to be formed and operated, and agencies, branches or subsidiaries to be set up.

24 It follows that a person may be established, within the meaning of the Treaty, in more than one Member State ° in particular, in the case of companies, through the setting-up of agencies, branches or subsidiaries (Article 52) and, as the Court has held, in the case of members of the

professions, by establishing a second professional base (see Case 107/83 *Ordre des Avocats au Barreau de Paris v Klopp* [1984] ECR 2971, paragraph 19).

25 The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons (see, to this effect, Case 2/74 *Reyners v Belgium* [1974] ECR 631, paragraph 21).

26 In contrast, where the provider of services moves to another Member State, the provisions of the chapter on services, in particular the third paragraph of Article 60, envisage that he is to pursue his activity there on a temporary basis.

27 As the Advocate General has pointed out, the temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity. The fact that the provision of services is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question.

28 However, that situation is to be distinguished from that of Mr Gebhard who, as a national of a Member State, pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State. Such a national comes under the provisions of the chapter relating to the right of establishment and not those of the chapter relating to services.

29 The Milan Bar Council has argued that a person such as Mr Gebhard cannot be regarded for the purposes of the Treaty as being "established" in a Member State ° in his case, Italy ° unless he belongs to the professional body of that State or, at least, pursues his activity in collaboration or in association with persons belonging to that body.

30 That argument cannot be accepted.

31 The provisions relating to the right of establishment cover the taking-up and pursuit of activities (see, in particular, the judgment in *Reyners*, paragraphs 46 and 47). Membership of a professional body may be a condition of taking up and pursuit of particular activities. It cannot itself be constitutive of establishment.

32 It follows that the question whether it is possible for a national of a Member State to exercise his right of establishment and the conditions for exercise of that right must be determined in the light of the activities which he intends to pursue on the territory of the host Member State.

33 Under the terms of the second paragraph of Article 52, freedom of establishment is to be exercised under the conditions laid down for its own nationals by the law of the country where establishment is effected.

34 In the event that the specific activities in question are not subject to any rules in the host State, so that a national of that Member State does not have to have any specific qualification in order to pursue them, a national of any other Member State is entitled to establish himself on the territory of the first State and pursue those activities there.

35 However, the taking-up and pursuit of certain self-employed activities may be conditional on complying with certain provisions laid down by law, regulation or administrative action justified by the general good, such as rules relating to organization, qualifications, professional ethics, supervision and liability (see Case C-71/76 *Thieffry v Conseil de l' Ordre des Avocats à la Cour*

de Paris [1977] ECR 765, paragraph 12). Such provisions may stipulate in particular that pursuit of a particular activity is restricted to holders of a diploma, certificate or other evidence of formal qualifications, to persons belonging to a professional body or to persons subject to particular rules or supervision, as the case may be. They may also lay down the conditions for the use of professional titles, such as *avvocato*.

36 Where the taking-up or pursuit of a specific activity is subject to such conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with them. It is for this reason that Article 57 provides that the Council is to issue directives, such as Directive 89/48, for the mutual recognition of diplomas, certificates and other evidence of formal qualifications or, as the case may be, for the coordination of national provisions concerning the taking-up and pursuit of activities as self-employed persons.

37 It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it (see Case C-19/92 *Kraus v Land Baden-Wuerttemberg* [1993] ECR I-1663, paragraph 32).

38 Likewise, in applying their national provisions, Member States may not ignore the knowledge and qualifications already acquired by the person concerned in another Member State (see Case C-340/89 *Vlassopoulou v Ministerium fuer Justiz, Bundes- und Europaangelegenheiten Baden-Wuerttemberg* [1991] ECR I-2357, paragraph 15). Consequently, they must take account of the equivalence of diplomas (see the judgment in *Thieffry*, paragraphs 19 and 27) and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned (see the judgment in *Vlassopoulou*, paragraph 16).

39 Accordingly, it should be stated in reply to the questions from the Consiglio Nazionale Forense that:

- the temporary nature of the provision of services, envisaged in the third paragraph of Article 60 of the EC Treaty, is to be determined in the light of its duration, regularity, periodicity and continuity;
- the provider of services, within the meaning of the Treaty, may equip himself in the host Member State with the infrastructure necessary for the purposes of performing the services in question;
- a national of a Member State who pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State comes under the provisions of the chapter relating to the right of establishment and not those of the chapter relating to services;
- the possibility for a national of a Member State to exercise his right of establishment, and the conditions for his exercise of that right, must be determined in the light of the activities which he intends to pursue on the territory of the host Member State;
- where the taking-up of a specific activity is not subject to any rules in the host State, a national of any other Member State will be entitled to establish himself on the territory of the first State and pursue that activity there. On the other hand, where the taking-up or the pursuit of a specific activity is subject to certain conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with them;
- however, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory

manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it;

° likewise, Member States must take account of the equivalence of diplomas and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned.

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61976J0071-N27 : N 38
31977L0249 : N 13 - 17
61983J0107-N19 : N 24
31989L0048 : N 36
61989J0340-N15 : N 37
61989J0340-N16 : N 38
11992E052-L2 : N 33
11992E052 : N 23 - 39
11992E057 : N 36
11992E059-L1 : N 22
11992E060-L1 : N 22
11992E060-L3 : N 26 39
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NATIONA	Italy
NATCOUR	<p>*A9* Consiglio Nazionale Forense, ordinanza del 16/12/1993 (RG 83/93)</p> <p>*P1* Consiglio Nazionale Forense, decisione del 23/02/1996 12/05/1997 (83/93 RG)</p> <p>*P2* Corte di Cassazione, Sezioni unite civili, sentenza del 24/09/1998 18/03/1999 (146/99/SU)</p> <ul style="list-style-type: none"> - Il massimario del Foro italiano 1999 Col.240-241 (résumé) - Il Consiglio di Stato 1999 II p.1321 (résumé) - Il Corriere giuridico 1999 p.1519-1522 - Rivista italiana di diritto pubblico comunitario 1999 p.1135-1141 - Rivista di diritto internazionale privato e processuale 2000 p.135-144 - Carbone, Vincenzo: Giurisprudenza italiana 1999 Supplemento no 4 p.71-72 - Bastianon, Stefano: Il Corriere giuridico 1999 p.1522-1528
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PROCEDU Reference for a preliminary ruling
ADVGEN Léger
JUDGRAP Edward
DATES of document: 30/11/1995
of application: 08/02/1994

**Judgment of the Court
of 23 November 1999**

**Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and
Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96).**

References for a preliminary ruling: Tribunal correctionnel de Huy - Belgium.

**Freedom to provide services - Temporary deployment of workers for the purposes of performing a
contract - Restrictions.**

Joined cases C-369/96 and C-376/96.

1 Freedom to provide services - Restrictions - Whether undertakings in the construction sector supplying a service may be required to pay minimum remuneration fixed by collective agreement applicable in the host Member State - Conditions

(EC Treaty, Art. 59 (now, after amendment, Art. 49 EC) and Art. 60 (now Art. 50 EC))

2 Freedom to provide services - Restrictions - Whether undertakings in the construction sector supplying a service may be required to pay employers' contributions at the same time as comparable contributions in the place of establishment - Not permissible

(EC Treaty, Art. 59 (now, after amendment, Art. 49 EC) and Art. 60 (now Art. 50 EC))

3 Freedom to provide services - Restrictions - Whether undertakings in the construction sector supplying a service may be required to draw up social or labour documents at the same time as comparable documents held in the place of establishment - Not permissible

(EC Treaty, Art. 59 (now, after amendment, Art. 49 EC) and Art. 60 (now Art. 50 EC))

4 Freedom to provide services - Restrictions - Whether undertakings in the construction sector supplying a service may be required to keep social and labour documents available in the territory of the host Member State - Conditions

(EC Treaty, Art. 59 (now, after amendment, Art. 49 EC) and Art. 60 (now Art. 50 EC))

5 Freedom to provide services - Restrictions - Whether undertakings in the construction sector supplying a service may be required to retain, after termination of activities in the host Member State, social documents at the address within that Member State of a natural person - Not permissible

(EC Treaty, Art. 59 (now, after amendment, Art. 49 EC) and Art. 60 (now Art. 50 EC))

1 Articles 59 of the Treaty (now, after amendment, Article 49 EC) and 60 of the Treaty (now Article 50 EC) do not preclude a Member State from requiring an undertaking established in another Member State, operating in the construction sector and temporarily carrying out work in the first State, to pay the workers deployed by it the minimum remuneration fixed by the collective labour agreement applicable in the first Member State, provided that the provisions in question are sufficiently precise and accessible, and that they do not render it impossible or excessively difficult in practice for such an employer to determine the obligations with which he is required to comply.

2 Articles 59 of the Treaty (now, after amendment, Article 49 EC) and 60 of the Treaty (now Article 50 EC) preclude a Member State from requiring - even by way of public-order legislation - an undertaking established in another Member State, operating in the construction sector and temporarily carrying out work in the first State, to pay, in respect of each worker deployed, employers' contributions to schemes such as the 'timbres-intempéries' and 'timbres-fidélité' schemes, and to issue to each of such workers an individual record, where the undertaking in question is already subject, in the Member State in which it is established, to obligations which are essentially comparable, as regards their objective of safeguarding the interests of workers, and which relate to the same workers and the same periods of activity.

3 Articles 59 of the Treaty (now, after amendment, Article 49 EC) and 60 of the Treaty (now Article 50 EC) preclude a Member State from requiring - even by way of public-order legislation - an undertaking established in another Member State, operating in the construction sector and temporarily carrying out work in the first State, to draw up social or labour documents such as labour rules, a special staff register and an individual account for each worker in the form prescribed by the rules of the first State, where the social protection of workers which may justify those requirements is already safeguarded by the production of social and labour documents kept by the undertaking in question in accordance with the rules applying in the Member State in which it is established.

That is the position where, as regards the keeping of social and labour documents, the undertaking is already subject, in the Member State in which it is established, to obligations which are comparable, as regards their objective of safeguarding the interests of workers, to those imposed by the legislation of the host Member State, and which relate to the same workers and the same periods of activity.

4 Articles 59 of the Treaty (now, after amendment, Article 49 EC) and 60 of the Treaty (now Article 50 EC) do not preclude a Member State from requiring an undertaking established in another Member State, operating in the construction sector and temporarily carrying out work in the first State, to keep social and labour documents available, throughout the period of activity within the territory of the first Member State, on site or in an accessible and clearly identified place within the territory of that State, where such a measure is necessary in order to enable it effectively to monitor compliance with legislation of that State which is justified by the need to safeguard the social protection of workers.

5 Articles 59 of the Treaty (now, after amendment, Article 49 EC) and 60 of the Treaty (now Article 50 EC) preclude a Member State from requiring - even by way of public-order legislation - an undertaking established in another Member State, operating in the construction sector and temporarily carrying out work in the first State, to retain, for a period of five years after the undertaking in question has ceased to employ workers in the first Member State, social documents such as a staff register and individual accounts, at the address within that Member State of a natural person who holds those documents as an agent or servant. Such requirements cannot be justified, since the monitoring of compliance with rules concerning the social protection of workers in the construction industry can be achieved by less restrictive measures.

In [Joined Cases C-369/96](#) and [C-376/96](#),

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunal Correctionnel de Huy (Belgium) for a preliminary ruling in the criminal proceedings pending before that court against

Jean-Claude Arblade,

Arblade & Fils SARL, as the party civilly liable (C-369/96),

and

Bernard Leloup,

Serge Leloup,

Sofrage SARL, as the party civilly liable (C-376/96),

on the interpretation of Articles 59 of the EC Treaty (now, after amendment, Article 49 EC) and 60 of the EC Treaty (now Article 50 EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward (Rapporteur),

R. Schintgen (Presidents of Chambers), J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- J.-C. Arblade and Arblade & Fils SARL (C-369/96) and B. and S. Leloup and Sofrage SARL (C-376/96), by D. Ketchedjian and E. Jakhian, respectively of the Paris and Brussels Bars,

- the Belgian Government (C-369/96 and C-376/96), by J. Devadder, General Adviser in the Ministry of Foreign Affairs, External Trade and Development Aid, acting as Agent, assisted by B. van de Walle de Ghelcke, of the Brussels Bar,

- the German Government (C-369/96 and C-376/96), by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and B. Kloke, Oberregierungsrat in that Ministry, acting as Agents,

- the Austrian Government (C-369/96 and C-376/96), by M. Potacs, of the Federal Ministry of Foreign Affairs, acting as Agent,

- the Finnish Government (C-369/96), by T. Pynnä, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

- the Commission of the European Communities (C-369/96 and C-376/96), by A. Caeiro, Legal Adviser, and M. Patakia, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of J.-C. Arblade and Arblade & Fils SARL and B. and S. Leloup and Sofrage SARL, represented by D. Ketchedjian, of the Belgian Government, represented by B. van de Walle de Ghelcke, assisted by J.-C. Heirman, social inspector, acting as an expert, of the German Government, represented by E. Röder, of the Netherlands Government, represented by J.S. van den Oosterkamp, Assistant Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, of the Finnish Government, represented by T. Pynnä, of the United Kingdom Government, represented by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by D. Wyatt QC, and of the Commission, represented by A. Caeiro and M. Patakia, at the hearing on 19 May 1998,

after hearing the Opinion of the Advocate General at the sitting on 25 June 1998,

gives the following

Judgment

Costs

81 The costs incurred by the Belgian, German, Netherlands, Austrian, Finnish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal Correctionnel de Huy by two judgments of 29 October 1996, hereby rules:

1. Articles 59 of the EC Treaty (now, after amendment, Article 49 EC) and 60 of the EC Treaty (now Article 50 EC) do not preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation to pay the workers deployed by it the minimum remuneration fixed by the collective labour agreement applicable in the first Member State, provided that the provisions in question are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an employer to determine the obligations with which he is required to comply.

2. Articles 59 and 60 of the Treaty preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation - even if laid down in public-order legislation - to pay, in respect of each worker deployed, employers' contributions to schemes such as the Belgian 'timbres-intempéries' and 'timbres-fidélité' schemes, and to issue to each of such workers an individual record, where the undertaking in question is already subject, in the Member State in which it is established, to obligations which are essentially comparable, as regards their objective of safeguarding the interests of workers, and which relate to the same workers and the same periods of activity.

3. Articles 59 and 60 of the Treaty preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation - even if laid down in public-order legislation - to draw up social or labour documents such as labour regulations, a special staff register and an individual account for each worker in the form prescribed by the rules of the first State, where the social protection of workers which may justify those requirements is already safeguarded by the production of social and labour documents kept by the undertaking in question in accordance with the rules applying in the Member State in which it is established.

That is the position where, as regards the keeping of social and labour documents, the undertaking is already subject, in the Member State in which it is established, to obligations which are comparable, as regards their objective of safeguarding the interests of workers, to those imposed by the legislation of the host Member State, and which relate to the same workers and the same periods of activity.

4. Articles 59 and 60 of the Treaty do not preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation to keep social and labour documents available, throughout the period of activity within the territory of the first Member State, on site or in an accessible and clearly identified place within the territory of that State, where such a measure is necessary in order to enable it effectively to monitor compliance with legislation of that State which is justified by the need to safeguard the social protection of workers.

5. Articles 59 and 60 of the Treaty preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation - even if laid down in public-order legislation - to retain, for a period of five years after the undertaking in question has ceased to employ workers in the first Member State, social documents such as a staff register and individual accounts, at the address within that Member State of a natural person who holds those documents as an agent or servant.

1 By two judgments of 29 October 1996, received at the Court on 25 November 1996 (C-369/96) and 26 November 1996 (C-376/96) respectively, the Tribunal Correctionnel de Huy (Huy Criminal Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC), in each of those cases, two questions on the interpretation of Articles 59 of the EC Treaty (now, after amendment, Article 49 EC) and 60 of the EC Treaty (now Article 50 EC).

2 Those questions were raised in the course of two prosecutions brought against, first, Jean-Claude

Arblade, in his capacity as manager of the French company Arblade & Fils SARL, and Arblade & Fils SARL itself, as the civilly liable party (hereinafter together referred to as 'Arblade') (C-369/96), and, second, Serge and Bernard Leloup, in their capacity as managers of the French company Sofrage SARL, and Sofrage SARL itself, as the civilly liable party (hereinafter together referred to as 'Leloup') (C-376/96), for failure to comply with various social obligations provided for by Belgian legislation, an offence punishable by penalties under Belgian public-order legislation.

The national legislation

3 The obligations concerning the drawing-up, keeping and retention of social and labour documents, minimum remuneration in the construction industry and the systems of 'timbres-intempéries' (bad weather stamps) and 'timbres-fidélité' (loyalty stamps), and the monitoring of compliance with those obligations, are imposed by the following legislation:

- the Law of 8 April 1965 introducing labour regulations (Moniteur belge of 5 May 1965),
- the Law of 16 November 1972 concerning the Labour Inspectorate (Moniteur belge of 8 December 1972),
- Royal Decree No 5 of 23 October 1978 concerning the keeping of social documents (Moniteur belge of 2 December 1978),
- the Royal Decree of 8 August 1980 concerning the keeping of social documents (Moniteur belge of 27 August 1980, as rectified in Moniteur belge of 10 and 16 June 1981),
- the Collective Labour Agreement of 28 April 1988, concluded under the aegis of the Construction Sector Joint Committee, concerning the award of 'timbres-fidélité' and 'timbres-intempéries' ('the CLA of 28 April 1988') and rendered compulsory by the Royal Decree of 15 June 1988 (Moniteur belge of 7 July 1988, p. 9897),
- the Royal Decree of 8 March 1990 concerning the keeping of individual records for workers (Moniteur belge of 27 March 1990), and
- the Collective Labour Agreement of 28 March 1991 concluded under the aegis of the Construction Sector Joint Committee, concerning working conditions ('the CLA of 28 March 1991') and rendered compulsory by the Royal Decree of 22 June 1992 (Moniteur belge of 14 March 1992, p. 17968).

4 Various aspects of that legislation are relevant for the purposes of the present judgment.

5 First, a system has been organised for monitoring compliance with the legislation relating to the keeping of social documents, hygiene and medical care in the workplace, employment protection, labour rules and employment relationships, safety in the workplace, social security and social assistance. Employers are under an obligation not to hinder such surveillance (Royal Decree No 5 of 23 October 1978 and the Law of 16 November 1972).

6 Second, in view of the compulsory effect given to the CLA of 28 March 1991 by royal decree, construction undertakings carrying out work in Belgium are required, whether or not they are established in that State, to pay their workers the minimum remuneration fixed by that agreement.

7 Third, under the CLA of 28 April 1988, which has been given compulsory effect by royal decree, such undertakings are required to pay, in relation to their workers, contributions to the 'timbres-intempéries' and 'timbres-fidélité' schemes.

8 In that connection, the employer is required to issue to each worker an 'individual record' (Article 4(3) of Royal Decree No 5 of 23 October 1978). That record, which may be provisional or definitive, must contain the information listed in the Royal Decree of 8 March 1990. It must be validated by the Construction Workers' Subsistence Protection Fund, which will do so only if the employer

has paid, in particular, all the contributions due in respect of 'timbres-intempéries' and 'timbres-fidélité', together with the sum of BEF 250 for each record submitted.

9 Fourth, the employer is required to draw up labour regulations which are binding on him vis-à-vis his workers and to keep a copy of those regulations in each place where he employs workers (Law of 8 April 1965).

10 Fifth, the employer is required to keep a 'staff register' in respect of all his workers (Article 3(1) of the Royal Decree of 8 August 1980); this must contain various items of compulsory information (Articles 4 to 7 of that decree).

11 In addition, an employer who employs workers in more than one workplace must keep a 'special staff register' in each of those places apart from the place in which he keeps the 'staff register' (Article 10 of the Royal Decree of 8 August 1980). In certain circumstances, employers who employ workers to carry out construction works are exempt from the obligation to keep the special register in each workplace, provided that they maintain, in respect of each employee working there, an 'individual document' containing the same information as that contained in the special register (Article 11 of that decree).

12 The employer is also required to draw up, in relation to each worker, an 'individual account' (Article 3(2) of the Royal Decree of 8 August 1980). That document must contain various items of compulsory information concerning, in particular, the worker's remuneration (Articles 13 to 21 of the Royal Decree of 8 August 1980).

13 Sixth, the staff register and the individual accounts must be kept either at one of the workplaces, or at the address in Belgium at which the employer is registered in the records of a body responsible for the collection of social security contributions, or at the place of residence or registered office of the employer in Belgium, or, in the absence thereof, at the place of residence in Belgium of a natural person who, as the employer's agent or servant, keeps the staff register and the individual accounts. In addition, the employer is required to give advance notice, by registered letter, to the Chief District Inspector of the Social Law Inspectorate of the Ministry of Employment and Labour for the district in which those documents are to be kept (Articles 8, 9 and 18 of the Royal Decree of 8 August 1980).

14 According to the information supplied to the Court by the Belgian Government at the hearing, an employer established in another Member State who employs workers in Belgium is required in any event to appoint an agent or servant to keep the relevant documents either at one of the workplaces or at his place of residence in Belgium.

15 Seventh, the employer is required to retain, for a period of five years, the social documents comprising the staff register and the individual accounts, in the form of originals or copies thereof, either at the address in Belgium at which he is registered in the records of a body responsible for the collection of social security contributions, or at the seat of the approved employers' social secretariat to which he is affiliated, or at the place of residence or registered office of the employer in Belgium, or, in the absence thereof, at the place of residence in Belgium of a natural person who, as the employer's agent or servant, keeps the staff register and the individual accounts. However, if the employer ceases to employ workers in Belgium, he is required to keep those documents at his place of residence or registered office in Belgium or, failing that, at the place of residence of a natural person in Belgium. The employer is required to give advance notice to the Chief District Inspector of the Social Law Inspectorate of the Ministry of Employment and Labour for the district in which the documents are to be kept (Articles 22 to 25 of the Royal Decree of 8 August 1980).

16 The abovementioned obligations concerning the retention of social documents become applicable

only where an employer established in another Member State ceases to employ workers in Belgium.

17 Eighth, criminal penalties for infringement of the aforesaid provisions are laid down in Article 11 of Royal Decree No 5 of 23 October 1978, Article 25(1) of the Law of 8 April 1965, Article 15(2) of the Law of 16 November 1972, Articles 56 and 57 of the Law of 5 December 1968 on agreements and joint committees and Article 16(1) of the Law of 7 January 1958, as amended by the Law of 18 December 1968 concerning subsistence protection funds.

18 Lastly, all legislation providing for the protection of workers constitutes public-order legislation within the meaning of the first paragraph of Article 3 of the Belgian Civil Code, to which all persons within the territory of Belgium are therefore subject.

The main proceedings

19 Arblade and Leloup carried out works in connection with the construction of a complex of silos, with a capacity of 40 000 tonnes, for the storage of white crystallised sugar on the site belonging to Sucrerie Tirlemontoise at Wanze in Belgium.

20 To that end, Arblade deployed a total of 17 workers on that site from 1 January to 31 May 1992 and from 26 April to 15 October 1993. Leloup likewise deployed nine workers from 1 January to 31 December 1991, from 1 March to 31 July 1992 and from 1 March to 31 October 1993.

21 In the course of checks carried out on the site in 1993, the representatives of the Belgian Social Law Inspectorate requested Arblade and Leloup to produce various social documents provided for under the Belgian legislation.

22 Arblade and Leloup considered that they were not obliged to produce the documents requested. They maintained, first, that they had complied with all the French legislation and, second, that the Belgian legislation and rules in issue were contrary to Articles 59 and 60 of the Treaty. Leloup did produce, on 2 December 1993, the staff register kept pursuant to French law.

23 Arblade and Leloup were prosecuted before the Tribunal Correctionnel de Huy for non-compliance with the abovementioned obligations imposed by the Belgian legislation.

24 The Tribunal Correctionnel de Huy considered that an interpretation of Community law was needed in the two cases; it therefore decided to stay proceedings and, in Case C-369/96, to refer the following questions to the Court:

1. Must Articles 59 and 60 of the Treaty be interpreted as meaning that they preclude a Member State from requiring an undertaking established in another Member State and temporarily carrying out work in the first State:

- (a) to keep social documents (staff register and individual account) at the Belgian residence of a natural person who is to keep those documents in his capacity as agent or servant of that undertaking;
- (b) to pay to its workers the minimum remuneration fixed by collective labour agreement;
- (c) to keep a special staff register;
- (d) to issue an individual record for each worker;
- (e) to appoint an agent or servant responsible for keeping the individual accounts of employees;
- (f) to pay "timbres-intempéries" and "timbres-fidélité" contributions for each worker,

where that undertaking is already subject to requirements which, while not identical, are at least comparable as regards their objective, in respect of the same workers and for the same periods of activity, in the State in which it is established?

2. Can Articles 59 and 60 of the Treaty of 25 March 1957 establishing the European Community render inoperative the first paragraph of Article 3 of the Civil Code relating to Belgian public-order legislation?

25 Similarly, in Case C-376/96, the national court decided to stay proceedings and to refer the following questions to the Court:

1. Must Articles 59 and 60 of the Treaty be interpreted as meaning that they preclude a Member State from requiring an undertaking established in another Member State and temporarily carrying out work in the first State:

- (a) to appoint an agent or servant responsible for keeping the individual accounts of employees who provide services there;
- (b) not to obstruct inspections organised pursuant to the legislation of that State relating to the keeping of social documents;
- (c) not to obstruct inspections organised pursuant to the legislation of that State concerning the Social Inspectorate;
- (d) to draw up an individual account for each worker;
- (e) to keep a special staff register;
- (f) to draw up working regulations;
- (g) to keep social documents (staff register and individual account) at the Belgian residence of a natural person who is to keep those documents in his capacity as agent or servant of the undertaking concerned;
- (h) to issue an individual record for each worker,

where that undertaking is already subject to requirements which, while not identical, are at least comparable as regards their objective, in respect of the same workers and for the same periods of activity, in the State in which it is established?

2. Can Articles 59 and 60 of the Treaty of 25 March 1957 establishing the European Community render inoperative the first paragraph of Article 3 of the Civil Code relating to Belgian public-order legislation?

26 By order of the President of the Court of 6 June 1997 the two cases were joined for the purposes of the oral procedure and the judgment.

27 By its questions, which may appropriately be considered together, the national court is asking, in essence, whether Articles 59 and 60 of the Treaty preclude a Member State from imposing, inter alia by means of public-order legislation, obligations on an undertaking established in another Member State and temporarily carrying out works in the first State which require it:

- to pay its workers the minimum remuneration applicable to their activities fixed by the collective labour agreement in force in the host Member State, to pay in relation to each worker employers' contributions in respect of "timbres-intempéries" and "timbres-fidélité", and to issue each worker with an individual record;
- to draw up labour regulations, a special staff register and, in respect of each worker deployed, an individual account;
- to arrange for the social documents (staff register and individual accounts) relating to the workers deployed in the host Member State where the works are carried out to be kept and retained at the residence, in that host Member State, of a natural person who is to keep those documents as its

agent or servant,

in circumstances where that undertaking is already subject, in the Member State in which it is established, to requirements which are comparable as regards their objective and which relate to the same workers and the same periods of activity.

Preliminary observations

28 The Belgian Government submits that Articles 59 and 60 of the Treaty should be interpreted in the light of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1), inasmuch as that directive gives concrete expression to, and codifies, the current state of Community law relating to mandatory rules for the provision of minimum protection.

29 Directive 96/71 was not in force at the time when the matters in the main proceedings took place. However, Community law does not prevent the national court from taking account, in accordance with a principle of its criminal law, of the more favourable provisions of Directive 96/71 for the purposes of the application of national law, even though Community law imposes no obligation to that effect (see Case C-230/97 *Awoyemi* [1998] ECR I-6781, paragraph 38).

30 As regards the second question referred in each of the two cases, concerning the classification of the provisions at issue as public-order legislation under Belgian law, that term must be understood as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.

31 The fact that national rules are categorised as public-order legislation does not mean that they are exempt from compliance with the provisions of the Treaty; if it did, the primacy and uniform application of Community law would be undermined. The considerations underlying such national legislation can be taken into account by Community law only in terms of the exceptions to Community freedoms expressly provided for by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest.

The questions referred

32 It is common ground, first, that *Arblade* and *Leloup*, who are established in France, moved, within the meaning of Articles 59 and 60 of the Treaty, to another Member State, namely Belgium, in order to carry on activities of a temporary nature there and, second, that their activities are not wholly or principally directed towards the latter State with a view to avoiding the rules which would apply to them if they were established within its territory.

33 It is settled case-law that Article 59 of the Treaty requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services (see Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, Case C-43/93 *Vander Elst v Office des Migrations Internationales* [1994] ECR I-3803, paragraph 14, Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 10, Case C-3/95 *Reisebüro Broede v Sandker* [1996] ECR I-6511, paragraph 25, and Case C-222/95 *Parodi v Banque H. Albert de Bary* [1997] ECR I-3899, paragraph 18).

34 Even if there is no harmonisation in the field, the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by rules justified by overriding requirements

relating to the public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established (see, in particular, Case 279/80 Webb [1981] ECR 3305, paragraph 17, Case C-180/89 Commission v Italy [1991] ECR I-709, paragraph 17, Case C-198/89 Commission v Greece [1991] ECR I-727, paragraph 18, Säger, cited above, paragraph 15, Vander Elst, cited above, paragraph 16, and Guiot, cited above, paragraph 11).

35 The application of national rules to providers of services established in other Member States must be appropriate for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it (see, in particular, Säger, paragraph 15, Case C-19/92 Kraus v Land Baden-Württemberg [1993] ECR I-1663, paragraph 32, Case C-55/94 Gebhard v Consiglio dell'Ordine degli Avvocati e Procurati di Milano [1995] ECR I-4165, paragraph 37, and Guiot, cited above, paragraphs 11 and 13).

36 The overriding reasons relating to the public interest which have been acknowledged by the Court include the protection of workers (see Webb, cited above, paragraph 19, Joined Cases 62/81 and 63/81 Seco v EVI [1982] ECR 223, paragraph 14, and Case C-113/89 Rush Portuguesa [1990] ECR I-1417, paragraph 18), and in particular the social protection of workers in the construction industry (Guiot, paragraph 16).

37 By contrast, considerations of a purely administrative nature cannot justify derogation by a Member State from the rules of Community law, especially where the derogation in question amounts to preventing or restricting the exercise of one of the fundamental freedoms of Community law (see, in particular, Case C-18/95 Terhoeve [1999] ECR I-345, paragraph 45).

38 However, overriding reasons relating to the public interest which justify the substantive provisions of a set of rules may also justify the control measures needed to ensure compliance with them (see, to that effect, Rush Portuguesa, cited above, paragraph 18).

39 It is therefore necessary to consider, in turn, whether the requirements imposed by national rules such as those at issue in the main proceedings have a restrictive effect on freedom to provide services, and, if so, whether, in the sector under consideration, such restrictions on freedom to provide services are justified by overriding reasons relating to the public interest. If they are, it is necessary, in addition, to establish whether that interest is already protected by the rules of the Member State in which the service provider is established and whether the same result can be achieved by less restrictive rules (see, in particular, Säger, paragraph 15, Kraus, cited above, paragraph 32, Gebhard, cited above, paragraph 37, Guiot, cited above, paragraph 13, and Reisebüro Broede, cited above, paragraph 28).

40 It is appropriate in that context to examine the various obligations mentioned in the questions referred, in the following order:

- payment of the minimum remuneration,
- payment of contributions to the 'timbres-intempéries' and 'timbres-fidélité' schemes and the drawing-up of individual records,
- the keeping of social documents, and
- the retention of social documents.

Payment of the minimum remuneration

41 As regards the obligation on an employer providing services to pay his workers the minimum remuneration fixed by a collective labour agreement applying in the host Member State to the activities carried

on, it must be recalled that Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, relating to minimum wages, to any person who is employed, even temporarily, within their territory, regardless of the country in which the employer is established, and, moreover, that Community law does not prohibit Member States from enforcing those rules by appropriate means (Seco, cited above, paragraph 14, Rush Portuguesa, paragraph 18, and Guiot, paragraph 12).

42 It follows that the provisions of a Member State's legislation or collective labour agreements which guarantee minimum wages may in principle be applied to employers providing services within the territory of that State, regardless of the country in which the employer is established.

43 However, in order for infringement of the provisions in question to justify the criminal prosecution of an employer established in another Member State, those provisions must be sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an employer to determine the obligations with which he is required to comply. It is for the competent authority - in the present case, the Belgian Social Law Inspectorate -, when laying an information before the criminal courts, to state unequivocally the obligations with which the employer is accused of having failed to comply.

44 Thus, it is for the national court to determine, in the light of those considerations, which of the relevant provisions of its national law are applicable to an employer established in another Member State and, where appropriate, the amount of the minimum wage prescribed by them.

45 The Belgian and Austrian Governments consider that the advantages guaranteed to workers by the 'timbres-intempéries' and 'timbres-fidélité' schemes, as provided for by the CLA of 28 April 1988, constitute part of the minimum annual income of a construction worker within the meaning of the Belgian legislation.

46 However, it is apparent from the documents before the Court, first, that it was only Arblade that was prosecuted for failure to pay its workers the minimum wage provided for by the CLA of 28 March 1991 and, second, that Article 4(1) of the CLA of 28 April 1988 fixes the contribution payable in respect of 'timbres-intempéries' and 'timbres-fidélité' on the basis of 100% of the worker's gross remuneration. Since the amount due under the 'timbres-intempéries' and 'timbres-fidélité' schemes is calculated by reference to the gross minimum wage, it cannot form an integral part of that wage.

47 In those circumstances, it would appear - though this is a point for the national court to confirm - that the advantages guaranteed to workers by the 'timbres-intempéries' and 'timbres-fidélité' schemes cannot constitute an element to be taken into account when determining the minimum wage which Arblade is accused of having failed to pay.

Payment of the contribution to the 'timbres-intempéries' and 'timbres-fidélité' schemes and the drawing-up of individual records

48 As regards the obligation to pay employers' contributions to the Belgian 'timbres-intempéries' and 'timbres-fidélité' schemes, it is apparent from the judgment of the national court, and in particular from the wording of the first question referred in each of the two cases, that Arblade and Leloup are already subject, in the Member State in which they are established, to obligations which, while not identical, are at least comparable as regards their objective, and which relate to the same workers and the same periods of activity.

49 The Belgian Government submits that the referring court has not determined the existence of such obligations in the Member State of establishment. However, the Court is bound to accept the national court's finding that the undertaking providing the services is already subject, in

the Member State in which it is established, to obligations which, because of their objective, are comparable.

50 National rules which require an employer, as a provider of services within the meaning of the Treaty, to pay employers' contributions to the host Member State's fund, in addition to those which he has already paid to the fund of the Member State in which he is established, constitute a restriction on freedom to provide services. Such an obligation gives rise to additional expenses and administrative and economic burdens for undertakings established in another Member State, with the result that such undertakings are not on an equal footing, from the standpoint of competition, with employers established in the host Member State, and may thus be deterred from providing services in the host Member State.

51 It must be acknowledged that the public interest relating to the social protection of workers in the construction industry and the monitoring of compliance with the relevant rules may constitute an overriding requirement justifying the imposition on an employer established in another Member State who provides services in the host Member State of obligations capable of constituting restrictions on freedom to provide services. However, that is not the case where the workers employed by the employer in question are temporarily engaged in carrying out works in the host Member State and enjoy the same protection, or essentially similar protection, by virtue of the obligations to which the employer is already subject in the Member State in which he is established (see, to that effect, *Guiot*, paragraphs 16 and 17).

52 Moreover, an obligation requiring a provider of services to pay employers' contributions to the host Member State's fund cannot be justified where those contributions confer no social advantage on the workers in question (*Seco*, paragraph 15).

53 It is therefore for the national court to establish, first, whether the contributions payable in the host Member State give rise to any social advantage for the workers concerned and, second, whether, in the Member State of establishment, those workers enjoy, by virtue of the contributions already paid by the employer in that State, protection which is essentially similar to that afforded by the rules of the Member State in which the services are provided.

54 Only if the employer's contributions to the host Member State's fund confer on workers an advantage capable of providing them with real additional protection which they would not otherwise enjoy will it be possible to justify the payment of the contributions in question, and, even then, those contributions will be justifiable only if they are payable by all providers of services operating within the national territory in the industry concerned.

55 Lastly, it is clear that the obligation under the Belgian legislation to issue an individual record to each worker is inextricably linked to the obligation to pay the 'timbres-intempéries' and 'timbres-fidélité' contributions provided for in the CLA of 28 April 1988. If an undertaking is already subject, in the Member State in which it is established, to obligations which are essentially similar, by reason of their objective, to those imposed under the 'timbres-intempéries' and 'timbres-fidélité' schemes, and which relate to the same workers and the same periods of activity, that undertaking is only obliged to issue its workers with the equivalent documents which it is required to issue pursuant to the legislation of the Member State in which it is established. If the system applying in the latter State did not provide for the issue of documents to employees, the undertaking in question would be required only to justify to the authorities of the host Member State that it is up to date with the payment of the contributions required under the rules of the Member State of establishment, by producing the documents prescribed for that purpose by those rules.

The principle of keeping social and labour documents

56 As regards the obligation to draw up labour regulations and to keep a special staff register

and an individual account for each worker, it is likewise apparent from the judgment of the national court, and in particular from the wording of the first question referred in each of the two cases, that Arblade and Leloup are already subject, in the Member State in which they are established, to obligations which, while not identical, are at least comparable as regards their objective, and which relate to the same workers and the same periods of activity.

57 As stated in paragraph 49 of this judgment, and despite the objections raised by the Belgian Government, the Court is bound to base its ruling on the facts as stated by the national court.

58 An obligation of the kind imposed by the Belgian legislation, requiring certain additional documents to be drawn up and kept in the host Member State, gives rise to additional expenses and administrative and economic burdens for undertakings established in another Member State, with the result that such undertakings are not on an equal footing, from the standpoint of competition, with employers established in the host Member State.

59 Consequently, the imposition of such an obligation constitutes a restriction on freedom to provide services within the meaning of Article 59 of the Treaty.

60 Such a restriction is justifiable only if it is necessary in order to safeguard, effectively and by appropriate means, the overriding public interest which the social protection of workers represents.

61 The effective protection of workers in the construction industry, particularly as regards health and safety matters and working hours, may require that certain documents are kept on site, or at least in an accessible and clearly identified place in the territory of the host Member State, so that they are available to the authorities of that State responsible for carrying out checks, particularly where there exists no organised system for cooperation or exchanges of information between Member States as provided for in Article 4 of Directive 96/71.

62 Furthermore, in the absence of an organised system for cooperation or exchanges of information of the kind referred to in the preceding paragraph, the obligation to draw up and keep on site, or at least in an accessible and clearly identified place in the territory of the host Member State, certain of the documents required by the rules of that State may constitute the only appropriate means of control, having regard to the objective pursued by those rules.

63 The items of information respectively required by the rules of the Member State of establishment and by those of the host Member State concerning, in particular, the employer, the worker, working conditions and remuneration may differ to such an extent that the monitoring required under the rules of the host Member State cannot be carried out on the basis of documents kept in accordance with the rules of the Member State of establishment.

64 On the other hand, the mere fact that there are certain differences of form or content cannot justify the keeping of two sets of documents, one of which conforms to the rules of the Member State of establishment and the other to those of the host Member State, if the information provided, as a whole, by the documents required under the rules of the Member State of establishment is adequate to enable the controls needed in the host Member State to be carried out.

65 Consequently, the authorities and, if need be, the courts of the host Member State must verify in turn, before demanding that social or labour documents complying with their own rules be drawn up and kept in the territory of that State, that the social protection for workers which may justify those requirements is not sufficiently safeguarded by the production, within a reasonable time, of originals or copies of the documents kept in the Member State of establishment or, failing that, by keeping the originals or copies of those documents available on site or in an accessible and clearly identified place in the territory of the host Member State.

66 Where the authorities or courts of the host Member State find, as has the court making the reference in the two cases, that, as regards the keeping of social or labour documents such as labour regulations, a special staff register and an individual account for each employee, the employer is subject, in the Member State in which it is established, to obligations which are comparable as regards their objective, and which relate to the same workers and the same periods of activity, the production of the social and labour documents kept by the employer in accordance with the rules of the Member State of establishment must be regarded as sufficient to ensure the social protection of workers; consequently, the employer concerned should not be required to draw up documents in accordance with the rules of the host Member State.

67 In the context of the kind of verification referred to in paragraph 65 of this judgment, it is necessary to have regard to the Community directives providing for coordination or a minimum degree of harmonisation in respect of the information necessary for the protection of workers.

68 First, Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288, p. 32) is designed, according to the second recital in its preamble, to provide employees with improved protection against possible infringements of their rights and to create greater transparency on the labour market. That directive lists certain essential elements of the contract or employment relationship, including, where appropriate, those rendered necessary on account of the worker concerned being deployed in another country, which the employer is required to bring to the notice of the worker. According to Article 7, that directive does not affect Member States' prerogative to apply or to introduce laws, regulations or administrative provisions which are more favourable to employees or to encourage or permit the application of agreements which are more favourable to employees.

69 Second, Article 10 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1) provides, in particular, that workers are to receive certain information concerning risks to their safety and health.

70 In the context of such verification, the national authorities of the host Member State may additionally, in so far as they are not themselves in possession of it, require the provider of services to communicate the information held by him concerning the obligations to which he is subject in the Member State in which he is established.

The detailed rules regarding the keeping and retention of social documents

71 The provisions of Belgian law laying down the detailed rules regarding the keeping and retention of documents by an employer established in another Member State are made up of three parts. First, where the employer employs workers to work in Belgium, social documents must be kept either at one of the workplaces or at the residential address in Belgium of a natural person who is to keep those documents as the employer's agent or servant.

72 Second, where the employer ceases to employ workers in Belgium, the originals or copies of the social documents must be retained for five years at the address in Belgium of the agent or servant in question.

73 Finally, the national authorities must be notified in advance of the identity of the agent or servant, whether that person is designated to keep the documents or to retain them.

74 For the reasons set out in paragraphs 61 to 63 of this judgment, the need for effective control by the authorities of the host Member State may justify the imposition on an employer established in another Member State who provides services in the host Member State of the obligation to keep certain documents available for inspection by the national authorities on site or, at least, in

an accessible and clearly identified place in the territory of the host Member State.

75 It is for the national court to establish, having regard to the principle of proportionality, which documents are covered by such an obligation.

76 Where, as in the present case, there is an obligation to keep available and retain certain documents at the address of a natural person residing in the host Member State, who is to keep them as the agent or servant of the employer by whom he has been designated, even after the employer has ceased to employ workers in that State, it is not sufficient, for the purposes of justifying such a restriction of freedom to provide services, that the presence of such documents within the territory of the host Member State may make it generally easier for the authorities of that State to perform their supervisory task. It must also be shown that those authorities cannot carry out their supervisory task effectively unless the undertaking has, in that Member State, an agent or servant designated to retain the documents in question (see, to that effect, Case 205/84 Commission v Germany [1986] ECR 3755, paragraph 54).

77 In any event, the obligations to retain social documents within the territory of the host Member State for a period of five years and to retain them at the address of a natural person, as opposed to a legal person, cannot be justified.

78 Monitoring of compliance with rules concerning the social protection of workers in the construction industry can be achieved by less restrictive measures. As the Advocate General observes in point 88 of his Opinion, where an employer established in another Member State ceases to employ workers in Belgium, the originals or copies of the social documents comprising the staff register and the individual accounts, or of the equivalent documents which the undertaking is required to draw up under the legislation of the Member State of establishment, may be sent to the national authorities, who may check them and, if necessary, retain them.

79 For the rest, it should be noted that the organised system for cooperation and exchanges of information between Member States, as provided for in Article 4 of Directive 96/71, will shortly render superfluous the retention of the documents in the host Member State after the employer has ceased to employ workers there.

80 The answers to be given to the questions referred must therefore be as follows:

- (1) Articles 59 and 60 of the Treaty do not preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation to pay the workers deployed by it the minimum remuneration fixed by the collective labour agreement applicable in the first Member State, provided that the provisions in question are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an employer to determine the obligations with which he is required to comply.
- (2) Articles 59 and 60 of the Treaty preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation - even if laid down in public-order legislation - to pay, in respect of each worker deployed, employers' contributions to schemes such as the Belgian 'timbres-intempéries' and 'timbres-fidélité' schemes, and to issue to each of such workers an individual record, where the undertaking in question is already subject, in the Member State in which it is established, to obligations which are essentially comparable, as regards their objective of safeguarding the interests of workers, and which relate to the same workers and the same periods of activity.
- (3) Articles 59 and 60 of the Treaty preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of

an obligation - even if laid down in public-order legislation - to draw up social or labour documents such as labour regulations, a special staff register and an individual account for each worker in the form prescribed by the rules of the first State, where the social protection of workers which may justify those requirements is already safeguarded by the production of social and labour documents kept by the undertaking in question in accordance with the rules applying in the Member State in which it is established.

That is the position where, as regards the keeping of social and labour documents, the undertaking is already subject, in the Member State in which it is established, to obligations which are comparable, as regards their objective of safeguarding the interests of workers, to those imposed by the legislation of the host Member State, and which relate to the same workers and the same periods of activity.

- (4) Articles 59 and 60 of the Treaty do not preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation to keep social and labour documents available, throughout the period of activity within the territory of the first Member State, on site or in an accessible and clearly identified place within the territory of that State, where such a measure is necessary in order to enable it effectively to monitor compliance with legislation of that State which is justified by the need to safeguard the social protection of workers.
- (5) Articles 59 and 60 of the Treaty preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation - even if laid down in public-order legislation - to retain, for a period of five years after the undertaking in question has ceased to employ workers in the first Member State, social documents such as a staff register and individual accounts, at the address within that Member State of a natural person who holds those documents as an agent or servant.

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 61992J0019-N32 : N 35 39
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NATCOUR ** AFFAIRE 376/1996 **
 A9 Tribunal de 1re instance de Huy, 6e chambre correctionnelle, jugement
 du 29/10/1996 (P/619/93)
 P1 Tribunal de 1re instance de Huy, 6e chambre correctionnelle, jugement
 du 27/11/2001 (P/619/93 ; 47/00 ; no 664)
 A9 Tribunal de 1re instance de Huy, chambre correctionnelle, jugement du
 29/10/1996 (P/620/93)
 P1 Tribunal de 1re instance de Huy, chambre correctionnelle, jugement du
 27/11/2001 (P/620/93 ; P/621/93 ; 46/00 ; no 663)

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PROCEDU

Reference for a preliminary ruling

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Ruiz-Jarabo Colomer

JUDGRAP

Edward

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**Judgment of the Court
of 2 December 1997**

Fantask A/S e.a. v Industriministeriet (Erhvervministeriet).

Reference for a preliminary ruling: Ostre Landsret - Denmark.

Directive 69/335/EEC - Registration charges on companies - Procedural timelimits under national law.

Case C-188/95.

1 Tax provisions - Harmonization of laws - Indirect taxes on the raising of capital - Registration of capital companies - Duties paid by way of fees or dues - Concept - Charges in direct proportion to the capital raised - Excluded

(Council Directive 69/335, Art. 12(1)(e))

2 Tax provisions - Harmonization of laws - Indirect taxes on the raising of capital - Charges levied in breach of Directive 69/335 - Recovery - Procedures - Application of national law - Limits - Application of a principle of national law excluding the recovery of charges levied in breach of Community law over a long period and without the knowledge of either the national authorities or the persons liable to pay the charges - Not permissible

(Council Directive 69/335)

3 Tax provisions - Harmonization of laws - Indirect taxes on the raising of capital - Charges levied in breach of Directive 69/335 - Recovery - Limitation period - Application of national law - Permissible - Conditions

(Council Directive 69/335)

4 Tax provisions - Harmonization of laws - Indirect taxes on the raising of capital - Directive 69/335 - Articles 10 and 12(1)(e) - Direct effect

(Council Directive 69/335, Arts 10 and 12(1)(e))

5 On a sound construction of Article 12(1)(e) of Directive 69/335 concerning indirect taxes on the raising of capital, in order for charges levied on registration of public and private limited companies and on their capital being increased to be by way of fees or dues, their amount must be calculated solely on the basis of the cost of the formalities in question. It may, however, also cover the costs of minor services performed without charge. In calculating their amount, a Member State is entitled to take account of all the costs related to the effecting of registration, including the proportion of the overheads which may be attributed thereto. Furthermore, a Member State may impose flat-rate charges and fix their amount for an indefinite period, provided that it checks at regular intervals that they continue not to exceed the average cost of the registrations at issue. It follows that charges with no upper limit which increase directly in proportion to the nominal value of the capital raised cannot amount to duties paid by way of fees or dues within the meaning of Article 12(1)(e) of the directive, since the amount of such charges will generally bear no relation to the costs actually incurred by the authority on the registration formalities.

6 Community law precludes actions for the recovery of charges levied in breach of Directive 69/335 from being dismissed on the ground that those charges were imposed as a result of an excusable error by the authorities of the Member State inasmuch as they were levied over a long period without either those authorities or the persons liable to them having been aware that they were unlawful. While the recovery of sums levied in breach of Community law may, in the absence of Community rules governing the matter, be sought only under the substantive and procedural conditions laid down by the national law of the Member States, those conditions must nevertheless be no less favourable than those governing similar domestic claims nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law. The application of a general principle of national

law under which the courts of a Member State should dismiss claims for the recovery of charges levied over a long period in breach of Community law without either the authorities of that State or the persons liable to pay the charges having been aware that they were unlawful, would make it excessively difficult to obtain recovery of charges which are contrary to Community law and, moreover, would have the effect of encouraging infringements of Community law which have been committed over a long period.

7 Community law, as it now stands, does not prevent a Member State which has not properly transposed Directive 69/335 from resisting actions for the repayment of charges levied in breach thereof by relying on a limitation period under national law which runs from the date on which the charges in question became payable, provided that such a period is not less favourable for actions based on Community law than for actions based on national law and does not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

8 Article 10 of Directive 69/335 in conjunction with Article 12(1)(e) thereof gives rise to rights on which individuals may rely before national courts. The prohibition laid down in Article 10 and the derogation from that prohibition in Article 12(1)(e) are expressed in sufficiently precise and unconditional terms to be invoked by individuals in their national courts in order to contest a provision of national law which infringes the directive.

In [Case C-188/95](#),

REFERENCE to the Court under Article 177 of the EC Treaty by the Ostre Landsret, Denmark, for a preliminary ruling in the proceedings pending before that court between

Fantask A/S and Others

and

Industriministeriet (Erhvervsministeriet)

on the interpretation of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412), as most recently amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm and M. Wathelet (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, P.J.G. Kapteyn, J.L. Murray, D.A.O. Edward, J.-P. Puissech (Rapporteur), G. Hirsch, P. Jann and L. Sevón, Judges,

Advocate General: F.G. Jacobs,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Fantask A/S, by Thomas Rørdam, of the Copenhagen Bar,

- Norsk Hydro Danmark A/S, Tryg Forsikring skadesforsikringsselskab A/S and Tryg Forsikring livsforsikringsselskab A/S, by Kai Michelsen, Claus Høeg Madsen and Henning Aasmul-Olsen, of the Copenhagen Bar,

- Aalborg Portland A/S, by Karen Dyekjær-Hansen, of the Copenhagen Bar,

- Forsikrings-Aktieselskabet Alka, Robert Bosch A/S, Uponor A/S, Uponor Holding A/S and Pen-Sam ApS and others, by Vagn Thorup, Henrik Stenbjerre, Jørgen Boe and Lau Normann Jørgensen, from the firm Kromann and Münter, of the Copenhagen Bar,

- the Danish Government, by Peter Biering, Head of Division in the Ministry of Foreign Affairs, acting as Agent, assisted by Karsten Hagel-Sørensen, of the Copenhagen Bar,
- the French Government, by Catherine de Salins, Assistant Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Frédéric Pascal, Administrative Attaché in the same Directorate, acting as Agents,
- the Swedish Government, by Erik Brattgård, Adviser in the Trade Department of the Ministry of Foreign Affairs, acting as Agent,
- the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by Eleanor Sharpston, Barrister,
- the Commission of the European Communities, by Anders C. Jessen and Enrico Traversa, of its Legal Service, acting as Agents, assisted by Susanne Helsteen and Jens Rostock-Jensen, from the firm Reumert &Partnere, of the Copenhagen Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Fantask A/S, represented by Preben Jøker Thorsen, of the Copenhagen Bar; Norsk Hydro Danmark A/S, Tryg Forsikring skadesforsikringsselskab A/S and Tryg Forsikring livsforsikringsselskab A/S, represented by Henning Aasmul-Olsen; Aalborg Portland A/S, represented by Lars Hennenberg, of the Copenhagen Bar; Forsikrings-Aktieselskabet Alka, Robert Bosch A/S, Uponor A/S, Uponor Holding A/S and Pen-Sam ApS and others, represented by Henrik Peytz, of the Copenhagen Bar; the Industriministeriet (Erhvervsministeriet), represented by Karsten Hagel-Sørensen; the Danish Government, represented by Peter Biering; the French Government, represented by Gautier Mignot, Foreign Affairs Secretary in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; the Italian Government, represented by Danilo Del Gaizo, Avvocato dello Stato; the United Kingdom Government, represented by John E. Collins, assisted by Eleanor Sharpston; and the Commission, represented by Anders C. Jessen and Enrico Traversa, assisted by Jens Rostock-Jensen and Hans Henrik Skjødt, of the Copenhagen Bar, at the hearing on 29 April 1997,

after hearing the Opinion of the Advocate General at the sitting on 26 June 1997,

gives the following

Judgment

Costs

57 The costs incurred by the Danish, French, Italian, Swedish and United Kingdom Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Ostre Landsret by order of 8 June 1995, hereby rules:

1. On a sound construction of Article 12(1)(e) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as most recently amended by Council Directive 85/303/EEC of 10 June 1985, in order for charges levied on registration of public and private limited companies and on their capital being increased to be by way of fees or dues, their amount

must be calculated solely on the basis of the cost of the formalities in question. It may, however, also cover the costs of minor services performed without charge. In calculating their amount, a Member State is entitled to take account of all the costs related to the effecting of registration, including the proportion of the overheads which may be attributed thereto. Furthermore, a Member State may impose flat-rate charges and fix their amount for an indefinite period, provided that it checks at regular intervals that they continue not to exceed the average cost of the registrations at issue.

2. Community law precludes actions for the recovery of charges levied in breach of Directive 69/335, as amended, from being dismissed on the ground that those charges were imposed as a result of an excusable error by the authorities of the Member State inasmuch as they were levied over a long period without either those authorities or the persons liable to them having been aware that they were unlawful.

3. Community law, as it now stands, does not prevent a Member State which has not properly transposed Directive 69/335, as amended, from resisting actions for the repayment of charges levied in breach thereof by relying on a limitation period under national law which runs from the date on which the charges in question became payable, provided that such a period is not less favourable for actions based on Community law than for actions based on national law and does not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

4. Article 10 of Directive 69/335, as amended, in conjunction with Article 12(1)(e) thereof gives rise to rights on which individuals may rely before national courts.

1 By order of 8 June 1995, received at the Court on 15 June 1995, the *Ostre Landsret* (Eastern Regional Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty eight questions on the interpretation of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412; 'the Directive'), as most recently amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23).

2 Those questions were raised in actions brought by *Fantask A/S* ('*Fantask*') and a number of other companies or groups of companies against the *Industriministeriet* (*Erhvervsministeriet*) [Danish Ministry of Industry (Ministry of Trade)] relating to charges levied on registration of new public and private limited companies and on the capital of such companies being increased.

3 Law No 468 of 29 September 1917, the First Law on Public Limited Companies (*Lovtidende A 1917*, p. 1117), made it compulsory for public limited companies and increases in their capital to be entered in a companies register. Entries in the register were subject to a charge at a rate to be determined by the competent minister. Substantially recast for the first time in 1930, the Law was subject to general amendment by Law No 370 of 13 June 1973 on Public Limited Companies (*Lovtidende A 1973*, p. 1025). On the same day Law No 371 on Private Limited Companies (*Lovtidende A 1973*, p. 1063) was adopted, which lays down, in relation to such companies, registration formalities analogous to those applicable to public limited companies.

4 Article 154(3) of the Law on Public Limited Companies and Article 124(3) of the Law on Private Limited Companies initially gave the competent minister the power to determine the rates of the registration charges for those two categories of company.

5 From the adoption of the First Law on Public Limited Companies until 1992, there was no change in the charging structure for the registration of new companies and of increases in their capital. It consisted of a fixed basic charge and a supplementary charge calculated in proportion to the nominal value of the capital raised. The rates, on the other hand, were amended on several occasions.

6 Between 1 January 1974 and 1 May 1992, the basic charge ranged from DKR 500 to DKR 1 700 for the registration of new public and private limited companies and from DKR 200 to DKR 900 for the registration of an increase in the capital of either category of company. During that period, the supplementary charge was DKR 4 per DKR 1 000 of the subscribed capital on registration of a new company and the same percentage of the capital raised on registration of an increase in capital.

7 The registry of public limited companies set up by Law No 468 constituted a directorate of the Ministry of Trade and was responsible for the registration of entries relating to public limited companies and, from 1974, to private limited companies. By Law No 851 of 23 December 1987 amending, in particular, the Law on Public Limited Companies and the Law on Private Limited Companies (Lovtidende A 1987, p. 3229), the registry became the Erhvervs- og Selskabsstyrelsen (Trade and Companies Office). Apart from carrying out its registration duties and setting and collecting the related charges, the Trade and Companies Office is involved in the drafting of legislation in the fields of company and business law and ensures its application. It also performs various functions involving the provision of advice and information.

8 Following a report from the Danish Court of Auditors, which found that the Trade and Companies Office had enjoyed significant surpluses of income over expenditure as a result of the levying of the supplementary charge and questioned whether that charge was allowed under Danish law, the supplementary charge was abolished by Order No 301 of 30 April 1992 (Lovtidende A 1992, p. 1149) with effect from 1 May 1992. At the same time the basic charge was increased to DKR 2 500 for the registration of a new public limited company and to DKR 1 800 for that of a new private limited company. The fee for registration of an increase in the capital of either category of company was raised to DKR 600.

9 Fantask and a number of other companies or groups of companies then asked the Trade and Companies Office to refund the supplementary charges which they had been obliged to pay to that directorate between 1983 and 1992. Only Fantask also claimed repayment of the basic charge.

10 Since their requests for a refund were rejected, the companies in question commenced proceedings in the Ostre Landsret against the Ministry of Industry. In their actions they submitted inter alia that, in the light, in particular, of the judgment in Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni v Amministrazione delle Finanze dello Stato* [1993] ECR I-1915 ('*Ponente Carni*'), the supplementary charge - and in Fantask's case the basic charge too - was contrary to Articles 10 and 12 of the Directive.

11 In those circumstances the Ostre Landsret stayed proceedings and referred the following eight questions to the Court of Justice for a preliminary ruling:

1. Does Community law impose requirements upon the Member States' delimitation of the concept of "fees or dues" in Article 12(1)(e) of Directive 69/335/EEC or are the individual Member States free to decide what may be regarded as "fees or dues" for a specific service?

2. May the basis for the calculation of duties charged under Article 12(1)(e) of Directive 69/335/EEC by a Member State for registration of formation or increase in capital of a public limited company or a private limited company include the following types of costs or some of them:

- the cost of salaries and pension contributions for officials not involved in effecting the registration, such as the registration authority's administrative staff or staff of the registration authority or other authorities who are engaged on preparatory legal work in the field of company law.

- the cost of effecting registration of other matters relating to companies, in respect of which the Member State has determined that no specific consideration is to be paid.

- the cost of performing duties, other than registration, required of the registration authority

in pursuance of company legislation and legislation related thereto, such as examination of companies' accounts and supervision of companies' bookkeeping.

- payment of interest and depreciation of all capital costs which are regarded by the registration authority as concerning the field of company law and related fields of law.

- the cost of official journeys not connected with the specific work of registration.

- the cost of the registration authority's external dissemination of information and guidance not connected with the specific work of registration, such as lecturing, preparation of articles and brochures and holding of meetings with trade organizations and other interested groups.

3.(a) Is Article 12(1)(e) of Directive 69/335/EEC to be interpreted as meaning that a Member State is precluded from fixing standardized charges by rules valid without limitation of time?

(b) If that is not possible, is a Member State required to adjust its scale of charges every year or at other fixed intervals?

(c) Is it of any significance for the answer whether charges are fixed in proportion to the amount of the capital to be raised, as notified for registration?

4. Is Article 12(1)(e) in conjunction with Article 10(1) of Directive 69/335/EEC to be interpreted as meaning that the amount charged as consideration for a specific service - such as, for example, registration of the formation or increase in capital of a public limited company or a private limited company - is to be calculated on the basis of the actual cost of the specific service - registration - or can the duty for the individual registration be fixed at, for example, a basic charge together with DKR 4 per DKR 1 000 of the nominal value of the capital subscribed, so that the amount of the duty is independent of the registration authority's time used and other costs necessary for effecting the registration?

5. Is Article 12(1)(e) in conjunction with Article 10(1) of Directive 69/335/EEC to be interpreted as meaning that the Member State in calculating any amount to be recovered must work on the basis that the duty must reflect the cost of the specific service at the time at which the service is performed, or is the Member State entitled to make a comprehensive assessment over a longer period, for example an accounting year or within the period in which it will be possible under national law to assert a claim for recovery?

6. If national law contains a general principle that, in determining claims for recovery of charges made without the requisite authority, importance should be attached to the fact that the charge was made in pursuance of rules which have been in force over a long period without either the authorities or other parties having been aware that the charge was unauthorized, will Community law preclude dismissal on those grounds of an action for recovery of charges levied contrary to Directive 69/335/EEC?

7. Does Community law make it impossible under national law for the authorities of a Member State, in cases of claims for recovery concerning charges made contrary to Directive 69/335/EEC, to contend and establish that national limitation periods start to run from a time at which an unlawful implementation of Directive 69/335/EEC occurred?

8. Does Article 10(1) in conjunction with Article 12(1)(e) of Directive 69/335/EEC as interpreted in the foregoing questions result in rights on which citizens in the individual Member States may rely before the national courts?

12 First, the objectives and the content of the Directive, as set out in the judgment in *Ponente Carni*, should be noted.

13 As the recitals in its preamble indicate, the Directive aims at encouraging the free movement of capital which is regarded as essential for the creation of an economic union whose characteristics

are similar to those of a domestic market. As far as concerns taxes on the raising of capital, the pursuit of such an objective presupposes the abolition of indirect taxes in force in the Member States until then and imposing in place of them a duty charged only once in the common market and at the same level in all the Member States.

14 The Directive thus provides for charging a capital duty on the raising of capital, which, according to the sixth and seventh recitals in the preamble, should be harmonized with regard both to its structures and to its rates, so as not to interfere with the movement of capital (Case 161/78 *Conradsen v Ministeriet for Skatter og Afgifter* [1979] ECR 2221, paragraph 11). That capital duty is governed by Articles 2 to 9 of the Directive.

15 Article 3 defines the capital companies to which the Directive applies and they include, in particular, public and private limited companies under Danish law.

16 Articles 4, 8 and 9 list, subject to the provisions of Article 7, the transactions subject to capital duty and those which the Member States may exempt. Under Article 4(1)(a) and (c) transactions subject to capital duty include the formation of a capital company and an increase in the capital of such a company by contribution of assets of any kind.

17 According to the last recital in its preamble, the Directive also provides for the abolition of other indirect taxes with the same characteristics as the capital duty or the stamp duty on securities, whose retention might frustrate the purposes of the legislation. Those indirect taxes, the levying of which is prohibited, are listed in Articles 10 and 11 of the Directive. Article 10 provides:

'Apart from capital duty, Member States shall not charge, with regard to companies, firms, associations or legal persons operating for profit, any taxes whatsoever:

...

- (c) in respect of registration or any other formality required before the commencement of business to which a company, firm, association or legal person operating for profit may be subject by reason of its legal form'.

18 Article 12(1) of the Directive lays down an exhaustive list of taxes and duties other than capital duty which, in derogation from Articles 10 and 11, may be imposed on capital companies in connection with the transactions referred to in those latter provisions (see, to that effect, Case 36/86 *Ministeriet for Skatter og Afgifter v Dansk Sparinvest* [1988] ECR 409, paragraph 9). Article 12(1)(e) of the Directive covers 'duties paid by way of fees or dues'.

Questions 1 to 5

19 In its first five questions, which should be answered together, the national court essentially asks whether, on a sound construction of Article 12(1)(e) of the Directive, in order for charges levied on registration of public and private limited companies and on their capital being increased to be by way of fees or dues, their amount must be calculated solely on the basis of the cost of the formalities in question, or whether it may be set so as to cover the whole or part of the costs of the authority responsible for registrations.

20 Since Article 12 of the Directive derogates, in particular, from the prohibitions laid down in Article 10, it is necessary to consider at the outset whether the charges at issue fall under any of those prohibitions.

21 Article 10 of the Directive, read in the light of the last recital in the preamble, prohibits in particular indirect taxes with the same characteristics as capital duty. It thus applies, *inter alia*, to taxes in any form which are payable in respect of the formation of a capital company or an increase in its capital (Article 10(a)), or in respect of registration or any other formality

required before the commencement of business, to which a company may be subject by reason of its legal form (Article 10(c)). That latter prohibition is justified by the fact that, even though the taxes in question are not imposed on capital contributions as such, they are nevertheless imposed on account of formalities connected with the company's legal form, in other words on account of the instrument employed for raising capital, so that their continued existence would similarly risk frustrating the aims of the Directive (Case C-2/94 *Denkavit Internationaal and Others v Kamer van Koophandel en Fabrieken voor Midden-Gelderland and Others* [1996] ECR I-2827, paragraph 23).

22 In this case, in so far as the basic charge and the supplementary charge are paid on the registration of new public and private limited companies, they are directly referred to in the prohibition laid down by Article 10(c) of the Directive. A similar conclusion must also be reached where those charges are payable on the registration of increases in the capital of such companies, since they too are imposed on account of an essential formality connected with the legal form of the companies in question. While registration of an increase in capital does not formally amount to a procedure which is required before a capital company commences business, it is none the less necessary for the carrying on of that business.

23 The Danish and Swedish Governments maintain that the term 'duties paid by way of fees or dues' in Article 12 of the Directive also covers charges whose amount is calculated so as to offset not only the registration costs directly at issue but also all the expenses of the charging authority which are linked, in particular, to the drafting and application of legislation in the field of company law.

24 The Danish Government points out in particular that the Directive did not harmonize the laws of the Member States concerning the duties paid by way of fees or dues referred to in Article 12(1)(e) and that their definition continues to be a matter for national law. However, the discretion granted to the Member States is not unlimited inasmuch as the assessment of the costs borne by the authority responsible for registrations must, according to the judgment in *Ponente Carni*, be fixed in a reasonable manner. It therefore considers that, unlike the position in that case, a Member State may not, when calculating the charges, take account of expenditure which has no link whatsoever with the administration of company law.

25 According to *Fantask*, the other applicants in the main proceedings which lodged observations and the Commission, it is, on the contrary, clear from *Ponente Carni* that the term 'duties paid by way of fees or dues' is one of Community law and that such charges must be calculated solely on the basis of the cost of effecting the registration in respect of which they are paid. Thus, a charge set as a proportion of the subscribed capital, such as the supplementary charge, cannot, by its very nature, fall within the derogation provided for in Article 12(1)(e) of the Directive. While a Member State is entitled to set charges paid by way of fees or dues in advance, without limitation in time and on the basis of a flat-rate assessment of the cost of effecting registrations, it must review them periodically, for example once a year, so as to ensure that they continue not to exceed the costs incurred.

26 It should be noted in that regard that the term 'duties paid by way of fees or dues' is contained in a provision of Community law which does not refer to the law of the Member States in order to determine the term's meaning and scope. Furthermore, the objectives of the Directive would be undermined if the Member States were entirely free to retain taxes with the same characteristics as capital duty by categorizing them as duties paid by way of fees or dues. It follows that the interpretation of the term at issue, considered in its entirety, cannot be left to the discretion of each Member State (see Case 270/81 *Felicitas v Finanzamt für Verkehrssteuern* [1982] ECR 2771, paragraph 14).

27 Moreover, the Court has already held, in its judgment in *Ponente Carni* at paragraphs 41 and

42, that the distinction between taxes prohibited by Article 10 of the Directive and duties paid by way of fees or dues implies that the latter cover only payments collected on registration whose amount is calculated on the basis of the cost of the service rendered. A payment the amount of which had no link with the cost of the particular service or was calculated not on the basis of the cost of the transaction for which it is consideration but on the basis of all the running and capital costs of the department responsible for that transaction would have to be regarded as a tax falling solely under the prohibition of Article 10 of the Directive.

28 It follows that charges levied on registration of public and private limited companies and on their capital being increased cannot be by way of fees or dues within the meaning of Article 12(1)(e) of the Directive if their amount is calculated so as to cover costs of the kind specified by the national court in the first three indents of its second question. The costs in question are in fact unrelated to the registrations in respect of which the contested charges are paid. However, for the reasons given by the Advocate General in paragraphs 37 and 45 of his Opinion, a Member State may impose charges for major transactions only and pass on in those charges the costs of minor services performed without charge.

29 As regards the setting of the amount of duties paid by way of fees or dues, the Court stated in *Ponente Carni*, at paragraph 43, that it may be difficult to determine the cost of certain transactions such as the registration of a company. In such a case the assessment of the cost can only be on a flat-rate basis and must be fixed in a reasonable manner, taking account, in particular, of the number and qualification of the officials, the time taken by them and the various material costs necessary for carrying out the transaction.

30 It must be stated in that regard that, in calculating the amount of duties paid by way of fees or dues, the Member States are entitled to take account not only of the material and salary costs which are directly related to the effecting of the registrations in respect of which they are incurred, but also, in the circumstances indicated by the Advocate General in paragraph 43 of his Opinion, of the proportion of the overheads of the competent authority which can be attributed to those registrations. To that extent only, the costs specified by the national court in the first three indents of its second question may form part of the basis for calculating the charges.

31 Charges with no upper limit which increase directly in proportion to the nominal value of the capital raised cannot, by their very nature, amount to duties paid by way of fees or dues within the meaning of the Directive. Even if there may be a link in some cases between the complexity of a registration and the amount of capital raised, the amount of such charges will generally bear no relation to the costs actually incurred by the authority on the registration formalities.

32 Finally, as is evident from the judgment in *Ponente Carni*, at paragraph 43, the amount of duties paid by way of fees or dues does not necessarily have to vary in accordance with the costs actually incurred by the authority in effecting each registration and a Member State is entitled to prescribe in advance, on the basis of the projected average registration costs, standard charges for carrying out registration formalities in relation to capital companies. Furthermore, there is nothing to prevent those charges from being set for an indefinite period, provided that the Member State checks at regular intervals, for example once a year, that they continue not to exceed the registration costs.

33 It is for the national court to review, on the basis of the above considerations, the extent to which the charges at issue are paid by way of fees or dues and, where appropriate, to order a refund on that basis.

34 The reply to the first five questions should therefore be that, on a sound construction of Article 12(1)(e) of the Directive, in order for charges levied on registration of public and private limited

companies and on their capital being increased to be by way of fees or dues, their amount must be calculated solely on the basis of the cost of the formalities in question. It may, however, also cover the costs of minor services performed without charge. In calculating their amount, a Member State is entitled to take account of all the costs related to the effecting of registration, including the proportion of the overheads which may be attributed thereto. Furthermore, a Member State may impose flat-rate charges and fix their amount for an indefinite period, provided that it checks at regular intervals that they continue not to exceed the average cost of the registrations at issue.

Question 6

35 By its sixth question, the national court seeks to ascertain whether Community law precludes actions for the recovery of charges levied in breach of the Directive from being dismissed on the ground that those charges were imposed as a result of an excusable error by the authorities of the Member State inasmuch as they were levied over a long period without either those authorities or the persons liable to them having been aware that they were unlawful.

36 It is settled case-law that the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177 of the Treaty, the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force.

37 It follows that the rule as so interpreted may, and must, be applied by the courts to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied (see Case 61/79 *Amministrazione delle Finanze dello Stato v Denkavit Italiana* [1980] ECR 1205, paragraph 16, and Joined Cases C-197/94 and C-252/94 *Bautiaa and Société Française Maritime* [1996] ECR I-505, paragraph 47).

38 It is also settled case-law that entitlement to the recovery of sums levied by a Member State in breach of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions as interpreted by the Court (Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR 3595, paragraph 12). The Member State is therefore in principle required to repay charges levied in breach of Community law (Joined Cases C-192/95 to C-218/95 *Comateb and Others v Directeur Général des Douanes et Droits Indirects* [1997] ECR I-165, paragraph 20).

39 Accordingly, while the recovery of such charges may, in the absence of Community rules governing the matter, be sought only under the substantive and procedural conditions laid down by the national law of the Member States, those conditions must nevertheless be no less favourable than those governing similar domestic claims nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law (see, for example, Case C-312/93 *Peterbroeck v Belgian State* [1995] ECR I-4599, paragraph 12).

40 A general principle of national law under which the courts of a Member State should dismiss claims for the recovery of charges levied over a long period in breach of Community law without either the authorities of that State or the persons liable to pay the charges having been aware that they were unlawful, does not satisfy the above conditions. Application of such a principle in the circumstances described would make it excessively difficult to obtain recovery of charges which are contrary to Community law. It would, moreover, have the effect of encouraging infringements of Community law which have been committed over a long period.

41 The reply to the sixth question should therefore be that Community law precludes actions for the recovery of charges levied in breach of the Directive from being dismissed on the ground that those charges were imposed as a result of an excusable error by the authorities of the Member State

inasmuch as they were levied over a long period without either those authorities or the persons liable to them having been aware that they were unlawful.

Question 7

42 By its seventh question, the national court essentially asks whether Community law prevents a Member State from relying on a limitation period under national law to resist actions for the recovery of charges levied in breach of the Directive as long as that Member State has not properly transposed the Directive.

43 It is clear from the order for reference that under Danish law the right to recovery of a whole range of debts becomes statute-barred after five years and that that period generally runs from the date on which the debt became payable. On the expiry of that period the debt is normally no longer exigible, unless the debtor has in the meantime acknowledged the debt or the creditor has commenced legal proceedings.

44 When a number of the applicants in the main proceedings brought their applications for repayment, the relevant time-limit for at least some of their claims had expired.

45 The applicants and the Commission consider, on the basis of Case C-208/90 *Emmott v Minister for Social Welfare and the Attorney General* [1991] ECR I-4269, that a Member State may not rely on a limitation period under national law as long as the Directive, in breach of which charges have been wrongly levied, has not been properly transposed into national law. According to them, until that date individuals are unable to ascertain the full extent of their rights under the Directive. A limitation period under national law thus does not begin to run until the Directive has been properly transposed.

46 The Danish, French and United Kingdom Governments consider that a Member State is entitled to rely on a limitation period under national law such as the period at issue, since it complies with the two conditions, of equivalence and of effectiveness, laid down by the Court's case-law (see, in particular, *Amministrazione delle Finanze dello Stato v San Giorgio* and *Peterbroeck v Belgian State*, both cited above). In their view, the judgment in *Emmott* must be confined to the quite particular circumstances of that case, as the Court has, moreover, confirmed in its subsequent case-law.

47 As the Court has pointed out in paragraph 39 of this judgment, it is settled case-law that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules for actions seeking the recovery of sums wrongly paid, provided that those rules are not less favourable than those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

48 The Court has thus acknowledged, in the interests of legal certainty which protects both the taxpayer and the authority concerned, that the setting of reasonable limitation periods for bringing proceedings is compatible with Community law. Such periods cannot be regarded as rendering virtually impossible or excessively difficult the exercise of rights conferred by Community law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought (see, in particular, Case 33/76 *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989, paragraph 5, Case 45/76 *Comet v Produktschap voor Siergewassen* [1976] ECR 2043, paragraphs 17 and 18, and Case C-261/95 *Palmisani v Istituto Nazionale della Previdenza Sociale* [1997] ECR I-0000, paragraph 28).

49 The five-year limitation period under Danish law must be considered to be reasonable (Case C-90/94 *Haahr Petroleum v benrå Havn and Others* [1997] ECR I-0000, paragraph 49). Furthermore,

it is apparent that that period applies without distinction to actions based on Community law and those based on national law.

50 It is true that the Court held in *Emmott*, at paragraph 23, that until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time.

51 However, as was confirmed by the judgment in *Case C-410/92 Johnson v Chief Adjudication Officer* [1994] ECR I-5483, at paragraph 26, it is clear from *Case C-338/91 Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR I-5475 that the solution adopted in *Emmott* was justified by the particular circumstances of that case, in which the time-bar had the result of depriving the applicant of any opportunity whatever to rely on her right to equal treatment under a Community directive (see also *Haahr Petroleum*, cited above, paragraph 52, and *Joined Cases C-114/95 and C-115/95 Texaco and Olieleskabet Danmark* [1997] ECR I-0000, paragraph 48).

52 The reply to the seventh question must therefore be that Community law, as it now stands, does not prevent a Member State which has not properly transposed the Directive from resisting actions for the repayment of charges levied in breach thereof by relying on a limitation period under national law which runs from the date on which the charges in question became payable, provided that such a period is not less favourable for actions based on Community law than for actions based on national law and does not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

Question 8

53 By its eighth question, the national court asks whether Article 10 of the Directive in conjunction with Article 12(1)(e) thereof gives rise to rights on which individuals may rely before national courts.

54 It is settled case-law that where the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon in national courts by individuals against the State where the State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly (see, in particular, *Case C-236/92 Comitato di Coordinamento per la Difesa della Cava and Others v Regione Lombardia and Others* [1994] ECR I-483, paragraph 8).

55 In this case, it is sufficient to observe that the prohibition laid down in Article 10 of the Directive and the derogation from that prohibition in Article 12(1)(e) are expressed in sufficiently precise and unconditional terms to be invoked by individuals in their national courts in order to contest a provision of national law which infringes the Directive.

56 The reply to the eighth question must therefore be that Article 10 of the Directive in conjunction with Article 12(1)(e) thereof gives rise to rights on which individuals may rely before national courts.

DOCNUM 61995J0188
AUTHOR Court of Justice of the European Communities

FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1995 ; J ; judgment
PUBREF	European Court reports 1997 Page I-06783
DOC	1997/12/02
LODGED	1995/06/15
JURCIT	31969L0335-A10 : N 20 21 27 55 56 31969L0335-A10LA : N 21 31969L0335-A10LC : N 21 22 31969L0335-A11 : N 17 18 31969L0335-A12 : N 20 - 23 31969L0335-A12P1 : N 18 31969L0335-A12P1LE : N 18 28 34 55 56 31969L0335 : N 1 12 - 18 61976J0033-N05 : N 48 61976J0045-N17 : N 48 61976J0045-N18 : N 48 61978J0161-N11 : N 14 61979J0061-N16 : N 37 61981J0270-N14 : N 26 61982J0199-N12 : N 38 31985L0303 : N 1 61986J0036-N09 : N 18 61990J0208-N23 : N 50 61991J0071-N41 : N 27 61991J0071-N42 : N 27 61991J0071-N43 : N 29 32 61991J0071 : N 12 61991J0338 : N 51 11992E177 : N 36 37 61992J0236-N08 : N 54 61992J0410-N26 : N 51 61993J0312-N12 : N 39 61994J0002-N23 : N 21 61994J0090-N49 : N 49 61994J0090-N52 : N 51 61994J0197-N47 : N 37 61995J0114-N48 : N 51 61995J0192-N20 : N 38 61995J0261-N28 : N 48
CONCERNS	Interprets 31969L0335-A10 Interprets 31969L0335-A12P1LE Interprets 31985L0303
SUB	Taxation

AUTLANG	Danish
OBSERV	Denmark ; France ; Italy ; Sweden ; United Kingdom ; Commission ; Member States ; Institutions
NATIONA	Denmark
NATCOUR	*A9* Ostre Landsret, 3. afdeling, kendelse af 08/06/1995 (B-2261-92 B-3322-92 B-3324-92 B-3500-92 B-2518-93 B-0011-94 B-0651-94 B-1727-94) - Skat udland 1995 no 211
NOTES	<p>Novak-Stief, Monika: European Law Reporter 1998 p.41-42</p> <p>Rigaux, Anne ; Simon, Denys: Europe 1998 Février Comm. no 44 p.12-14 + Comm. no 76 p.26</p> <p>X: Revue de jurisprudence fiscale 1998 p.142-143</p> <p>Dibout, Patrick: Revue de droit fiscal 1998 p.349-354</p> <p>Gustavus, Eckhart: Zeitschrift für Wirtschaftsrecht 1998 p.502-505</p> <p>Villar Ezcurra, Marta ; Pérez de Ayala Becerril, Miguel: Actualidad jurídica Aranzadi 1998 no 336 p.1-6</p> <p>Limmer, Peter: Entscheidungen zum Wirtschaftsrecht 1998 p.383-384</p> <p>Notaro, Nicola: Revue du marché unique européen 1998 no 1 p.155-157</p> <p>Thorsen, Preben Jøker: Skat udland 1998 no 167 p.267-272</p> <p>Grimaldi, Carmelo: Tributi 1998 no 4 p.401-403</p> <p>Kornprobst, Emmanuel: Revue des sociétés 1998 p.372-380</p> <p>Gundel, Jörg: Neue Zeitschrift für Verwaltungsrecht 1998 p.910-916</p> <p>Wattel, P.J.: Beslissingen in belastingzaken 1998 no 285</p> <p>Gastaldo, Andreina: Diritto e pratica tributaria 1998 II p.575-580</p> <p>Bergerès, Maurice-Christian: Petites affiches. La Loi 1998 no 141 p.26-28</p> <p>Notaro, Nicola: Common Market Law Review 1998 p.1385-1394</p> <p>Lamarque, Jean: Revue générale des procédures 1998 no 4 p.667-673</p> <p>Di Majo, Francesco Maria: Europa e diritto privato 1998 p.353-362</p> <p>Dutheil de la Rochère, Jacqueline: L'actualité juridique ; droit administratif 1999 p.64-68</p> <p>Ward, Angela: The Cambridge Law Journal 1999 p.36-40</p> <p>Docavo Alberti, Luis: Noticias de la Union Europea 1999 no 173 p.131-133</p> <p>Martín Jiménez, Adolfo J.: Revista española de Derecho Financiero 1999 p.180-182</p> <p>Gogos, Konstantinos E.: Elliniki Epitheorisi Evropaïkou Dikaiou 1999 p.135-138</p> <p>Wolf, Martin: Zeitschrift für Wirtschaftsrecht 2000 p.949-952</p>
PROCEDU	Reference for a preliminary ruling
ADVGEN	Jacobs
JUDGRAP	Puissochet
DATES	<p>of document: 02/12/1997</p> <p>of application: 15/06/1995</p>

**Judgment of the Court
of 3 February 1993**

Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media.

Reference for a preliminary ruling: Raad van State - Netherlands.

Freedom to provide services - Free movement of capital - National legislation designed to preserve a pluralistic and non-commercial broadcasting network.

Case C-148/91.

++++

1. Freedom to provide services ° Restrictions imposed on providers of services seeking to evade the rules governing the activity in which they are engaged ° Permissibility

(EEC Treaty, Art. 59)

2. Freedom to provide services ° Free movement of capital ° Restrictions ° Legislation prohibiting a broadcasting organization established on national territory from investing in a broadcasting company whose activities are directed towards that territory from an establishment in another Member State ° Conditions

(EEC Treaty, Arts 59 and 67)

1. A Member State cannot be denied the right to take measures to prevent a person whose activity is entirely or principally directed towards its territory from exercising the freedom guaranteed by Article 59 of the Treaty in order to evade the rules of conduct which would be applicable to him if he were established within that State.

In particular, where a cultural policy seeks to establish a pluralistic and non-commercial radio and television broadcasting system, legislation which has the effect, with a view to safeguarding the exercise of the freedoms guaranteed by Articles 59 and 67 of the Treaty, of ensuring that national broadcasting organizations cannot improperly evade their obligations concerning programme content cannot be regarded as incompatible with those articles.

2. The provisions of the Treaty on the free movement of capital and the freedom to provide services must be interpreted as not precluding legislation of a Member State which prohibits a broadcasting organization established in that State from investing in a broadcasting company established or to be established in another Member State and from providing that company with a bank guarantee or drawing up a business plan and giving legal advice to a television company to be set up in another Member State, where those activities are directed towards the establishment of a commercial television station whose broadcasts are intended to be received, in particular, in the territory of the first Member State and where those prohibitions are necessary in order to ensure the pluralistic and non-commercial character of the audio-visual system introduced by that legislation.

In [Case C-148/91](#),

REFERENCE to the Court under Article 177 of the EC Treaty by the Nederlandse Raad van State (Council of State of the Netherlands) for a preliminary ruling in the proceedings pending before that court between

Vereniging Veronica Omroep Organisatie

and

Commissariaat voor de Media

on the interpretation of Articles 59 and 67 of the EEC Treaty and of the First Directive of the Council of 11 May 1960 for the implementation of Article 67 of the Treaty (OJ English Special

Edition 1959-1962, p. 49) and Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the EEC Treaty (OJ 1988 L 178, p. 5),

THE COURT,

composed of: O. Due, President, C.N. Kakouris, G.C. Rodríguez Iglesias, M. Zuleeg and J.L. Murray (Presidents of Chambers), G.F. Mancini, R. Joliet, F.A. Schockweiler, J.C. Moitinho de Almeida, F. Grévisse, and D.A.O. Edward, Judges,

Advocate General: G. Tesauro,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- ° Vereniging Veronica Omroep Organisatie, by R.A.A. Duk, of the Hague Bar,
- ° the Commissariaat voor de Media, by G.H.L. Weesing, of the Amsterdam Bar,
- ° the Netherlands Government, by T.P. Hofstee, acting Secretary General, Ministry of Foreign Affairs, acting as Agent,
- ° the Commission of the European Communities, by B. Smulders and P. van Nuffel, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Vereniging Veronica Omroep Organisatie, the Netherlands Government, represented by J.W. De Zwaan, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, and the Commission, at the hearing on 6 October 1992,

after hearing the Opinion of the Advocate General at the sitting on 18 November 1992,

gives the following

Judgment

1 By order of 27 May 1991, received at the Court Registry on 3 June 1991, the judicial division of the Netherlands Raad van State referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty five questions on the interpretation of the provisions of the Treaty concerning the freedom to provide services and the free movement of capital with a view to deciding whether national rules imposing restrictions on the activities of broadcasting organizations were compatible with Community law.

2 Those questions were raised in proceedings between Vereniging Veronica Omroep Organisatie, a non-commercial broadcasting organization established in the Netherlands and governed by Dutch law (hereinafter "Veronica"), and the body responsible for overseeing broadcasting, the Commissariaat voor de Media, concerning restrictions contained in Article 57(1) of the Mediawet (the Dutch Law of 21 April 1987 laying down rules on the broadcasting of radio and television programmes, royalties from broadcasting and measures for support of the press, published in Staatsblad No 249 of 4 June 1987). Veronica considers those restrictions to be contrary to Articles 59 and 67 of the Treaty and to the First Directive of the Council of 11 May 1960 for the implementation of Article 67 of the Treaty (OJ, English Special Edition 1959-1962, p. 49) and Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the EEC Treaty (OJ 1988 L 178, p. 5).

3 Under Article 31 of the Mediawet, radio and television broadcasting time on the national Dutch network is allocated by the Commissariaat voor de Media to broadcasting organizations. According to Article 14 of that Law, those organizations are associations of listeners or viewers set up

in order to represent a given social, cultural, religious or spiritual trend indicated in their statutes; they have legal personality. They must have as their sole, or at least main, object the production of programmes for broadcasting and thereby to seek to satisfy the social, cultural, religious and spiritual needs of the Dutch people. Article 57(1) of the Law, the provision at issue in these proceedings, provides: "Apart from producing their programmes, the organizations which have obtained broadcasting time may not pursue any activities other than those provided for or authorized by the Commissariaat voor de Media". According to Article 57(4), the income from such activities must be used for the production of the organization's programmes. Finally, under Article 101, the broadcasting organizations are financed for the most part by means of grants which are shared out by the Commissariaat voor de Media. The grants are themselves built up from royalties levied on listeners and viewers and by receipts from commercial advertising.

4 In the present case, the Commissariaat voor de Media claims essentially that Veronica infringed Article 57(1) of the Mediawet by contributing to the setting up in the Grand Duchy of Luxembourg of a commercial station broadcasting to the Netherlands and by providing material support for it. Its allegation is based on three facts. First, the chairman and the secretary of the governing board of Veronica respectively drew up a business plan and gave legal advice with a view to the incorporation of a Luxembourg limited company, RTL-Véronique, to operate a commercial television station in Luxembourg and broadcast programmes which could be relayed by cable to the Netherlands. The costs of those services were borne by Veronica. Veronica then agreed to provide a guarantee for a current-account credit facility granted to RTL-Véronique by a banking establishment. Finally, Veronica agreed to provide financing to another company for the purpose of setting up a new company which would acquire a minority holding in the capital of RTL-Véronique.

5 The national court considered that those activities were prohibited by Article 57(1) of the Mediawet. However, it entertained doubts as to whether those prohibitions were compatible with Community law.

6 It therefore considered that a preliminary ruling should be obtained on the following five questions:

"1. Must the provisions on the free movement of capital, in particular Article 67 of the EEC Treaty, as implemented by the directive of the Council of 10 May 1960, including the amendments thereto, and Council Directive 88/361/EEC of 24 June 1988, be interpreted as meaning that there is a prohibited restriction on capital movements where the effect of a national rule, such as Article 57(1) of the Mediawet, is that participation by a broadcasting organization authorized under national legislation in the capital of a broadcasting organization established or to be established in another Member State and the provision by the authorized broadcasting organization of guarantees in favour of a broadcasting organization established in another Member State are made subject to restrictive provisions?"

2. Must the provisions on the freedom to provide services, in particular Article 59 of the EEC Treaty, be interpreted as meaning that there is a prohibited restriction on the freedom to provide services where the effect of a national rule, such as Article 57(1) of the Mediawet, is that participation by a broadcasting organization authorized under national legislation in the capital of a broadcasting organization established or to be established in another Member State and the provision by that broadcasting organization of guarantees in favour of a broadcasting organization established in another Member State are made subject to restrictive provisions, if such transactions are not to be regarded as capital movements, as described in Question 1?"

3. Must the provisions on the freedom to provide services, in particular Article 59 of the EEC Treaty, be interpreted as meaning that there is a prohibited restriction on the freedom to provide services where the effect of a national rule, such as Article 57(1) of the Mediawet, is that the carrying out by a broadcasting organization established or to be established under national legislation

of transactions and dealings which serve in part to establish and to promote a broadcasting organization to be established in another Member State, inter alia by the drawing-up of a 'business plan' and the performance of legal work, are made subject to restrictive provisions?

4. In the application of the Treaty provisions on the free movement of capital and freedom to provide services, must national rules containing a restriction on capital movements or on the provision of services, in order to be valid, comply not only with the requirement of non-discrimination but also with the requirement that the rules are justified on grounds of the general interest and are not disproportionate in relation to the objective pursued?

5. If the answer to Question 4 is affirmative, may objectives based on the maintenance of a pluralist and non-commercial broadcasting system constitute such justification?"

7 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 In its first three questions, the Nederlandse Raad van State essentially seeks to ascertain whether the Treaty provisions on the free movement of goods and the freedom to provide services must be interpreted as precluding legislation of a Member State which prohibits a broadcasting organization established in that State from investing in a broadcasting company established or to be established in another Member State and providing a bank guarantee or drawing up a business plan and giving legal advice to a television company to be set up in another Member State.

9 It must first be borne in mind that, as the Court held in its judgments in Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069, paragraphs 3, 29 and 30, and Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda v Commissariaat voor de Media* [1991] ECR I-4007, paragraphs 22 and 23, the *Mediawet* is designed to establish a pluralistic and non-commercial broadcasting system and thus forms part of a cultural policy intended to safeguard, in the audio-visual sector, the freedom of expression of the various (in particular social, cultural, religious and philosophical) components existing in the Netherlands.

10 It also follows from those two judgments (see respectively paragraphs 41 and 42 and 23 and 24) that those cultural-policy objectives are objectives relating to the public interest which a Member State may legitimately pursue by formulating the statutes of its own broadcasting organizations in an appropriate manner.

11 Article 57(1) of the *Mediawet* contributes to the attainment of those objectives. It seeks to prohibit national broadcasting organizations from engaging in activities which are alien to the tasks assigned to them by the Law or undermine the aims thereof, in the view of the Commissariaat voor de Media. Thus, in particular, it provides that the financial resources available to the national broadcasting organizations to enable them to ensure pluralism in the audio-visual sector must not be diverted from that purpose and used for purely commercial ends.

12 Finally, the Court has held in relation to Article 59 of the Treaty that a Member State cannot be denied the right to take measures to prevent the exercise by a person whose activity is entirely or principally directed towards its territory of the freedoms guaranteed by the Treaty for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State (judgment in Case 33/74 *Van Binsbergen v Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299, paragraph 13).

13 By prohibiting national broadcasting organizations from helping to set up commercial radio and television companies abroad for the purpose of providing services there directed towards the Netherlands, the Netherlands legislation at issue has the specific effect, with a view to safeguarding the exercise

of the freedoms guaranteed by the Treaty, of ensuring that those organizations cannot improperly evade the obligations deriving from the national legislation concerning the pluralistic and non-commercial content of programmes.

14 In those circumstances, the requirement that national broadcasting organizations do not engage in activities other than those provided for by the Law or authorized by the Commissariaat voor de Media cannot be regarded as incompatible with Articles 59 and 67 of the Treaty.

15 It must therefore be stated in reply to the national court that the provisions of the Treaty on the free movement of capital and the freedom to provide services must be interpreted as not precluding legislation of a Member State which prohibits a broadcasting organization established in that State from investing in a broadcasting company established or to be established in another Member State and from providing that company with a bank guarantee or drawing up a business plan and giving legal advice to a television company to be set up in another Member State, where those activities are directed towards the establishment of a commercial television station whose broadcasts are intended to be received, in particular, in the territory of the first Member State and those prohibitions are necessary in order to ensure the pluralistic and non-commercial character of the audio-visual system introduced by that legislation.

16 In view of the answer given to the first three questions, the fourth and fifth questions, concerning the justification for certain restrictions on the free movement of capital and the freedom to provide services, do not call for an answer.

Costs

17 The costs incurred by the Netherlands Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the judicial division of the Nederlandse Raad van State, by order of 27 May 1991, hereby rules:

The provisions of the Treaty on the free movement of capital and the freedom to provide services must be interpreted as not precluding legislation of a Member State which prohibits a broadcasting organization established in that State from investing in a broadcasting company established or to be established in another Member State and from providing that company with a bank guarantee or drawing up a business plan and giving legal advice to a television company to be set up in another Member State, where those activities are directed towards the establishment of a commercial television station whose broadcasts are intended to be received, in particular, in the territory of the first Member State and those prohibitions are necessary in order to ensure the pluralistic and non-commercial character of the audio-visual system introduced by that legislation.

DOCNUM 61991J0148
AUTHOR Court of Justice of the European Communities

FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1991 ; J ; judgment
PUBREF	European Court reports 1993 Page I-00487 Swedish special edition XIV Page I-00017 Finnish special edition XIV Page I-00017
DOC	1993/02/03
LODGED	1991/06/03
JURCIT	11957E059 : N 2 6 12 14 11957E067 : N 2 6 14 31960L0921 : N 2 6 61974J0033 : N 12 31988L0361 : N 2 6 61989J0288 : N 9 10 61989J0353 : N 9 10
CONCERNS	Interprets 11957E059 Interprets 11957E067
SUB	Free movement of capital ; Freedom of establishment and services ; Free movement of services
AUTLANG	Dutch
OBSERV	Netherlands ; Commission ; Member States ; Institutions
NATIONA	Netherlands
NATCOUR	*A8* Raad van State (Nederland), voorzitter afdeling rechtspraak, uitspraak van 25/09/1990 (R01.90.5155/S324) - Kort geding 1990 no 343 - Nederlandse jurisprudentie ; Administratiefrechtelijke beslissingen 1991 no 373 - Vermeulen, B.P.: Nederlandse jurisprudentie ; Administratiefrechtelijke beslissingen 1991 no 373 *A9* Raad van State (Nederland), afdeling rechtspraak, uitspraak van 27/05/1991 (R01.90.5155) - Euridica 1991 no 6 p.10 (résumé) *P1* Raad van State (Nederland), afdeling rechtspraak, uitspraak van 29/06/1993 (R01.90.5155)
NOTES	Mok, M.R.: TVVS ondernemingsrecht en rechtspersonen 1993 p.215 Bolze, Christian: Revue trimestrielle de droit commercial et de droit économique 1993 p.436-439 Canisius, N. ; Zijlmans, J.: Rechtskundig weekblad 1993-94 p.704-705 Laporte, Pierre: Les petites affiches 1994 no 70 p.8-10 Klesta Dosi, Laurence: La nuova giurisprudenza civile commentata 1994 II p.289-290

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PROCEDU Reference for a preliminary ruling
ADVGEN Tesauro
JUDGRAP Joliet
DATES of document: 03/02/1993
of application: 03/06/1991

**Judgment of the Court (Sixth Chamber)
of 5 June 1997**

VT4 Ltd v Vlaamse Gemeenschap.

Reference for a preliminary ruling: Raad van State - Belgium.

Free movement of services - Television broadcasting - Establishment - Evasion of domestic legislation.

Case C-56/96.

Freedom to provide services - Television broadcasting - Directive 89/552 - Television broadcaster under the jurisdiction of a Member State - Determining criterion - Establishment - Broadcaster established in more than one Member State

(Council Directive 89/552, Art. 2(1))

Article 2(1) of Directive 89/552 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities is to be interpreted as meaning that a television broadcaster comes under the jurisdiction of the Member State in which it is established.

Although the directive contains no express definition of the phrase 'broadcasters under [the] jurisdiction [of a Member State]', it follows from the wording of Article 2(1) that the concept of jurisdiction of a Member State has to be understood as necessarily covering jurisdiction *ratione personae* over television broadcasters, which can be based only on their connection to that State's legal system, which in substance overlaps with the concept of establishment as used in the first paragraph of Article 59 of the Treaty, the wording of which presupposes that the supplier and the recipient of a service are 'established' in two different Member States.

Where a television broadcaster is established in more than one Member State, the Member State having jurisdiction over it is the Member State in which the broadcaster has the centre of its activities, in particular the place where decisions concerning programme policy are taken and where the programmes to be broadcast are finally put together.

In [Case C-56/96](#),

REFERENCE to the Court under Article 177 of the EC Treaty by the Raad van State, Belgium, for a preliminary ruling in the proceedings pending before that court between

VT4 Ltd

and

Vlaamse Gemeenschap,

Third parties:

Intercommunale Maatschappij voor Gas en Elektriciteit van het Westen (Gaselwest) and Others,

Vlaamse Uitgeversmaatschappij NV (VUM) Integan Intercommunale CV and Others,

Vlaamse Televisie Maatschappij NV (VTM),

on the interpretation of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23),

THE COURT

(Sixth Chamber),

composed of: G.F. Mancini, President of the Chamber, J.L. Murray, C.N. Kakouris, P.J.G. Kapteyn (Rapporteur) and H. Ragnemalm, Judges,

Advocate General: C.O. Lenz,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- VT4 Ltd, by D. Vandermeersch, of the Brussels Bar,
- Vlaamse Gemeenschap, by E. Brewaeys and J. Stuyck, of the Brussels Bar,
- Vlaamse Televisie Maatschappij NV (VTM), by L. Neels, of the Antwerp Bar, and F. Herbert, of the Brussels Bar,
- the German Government, by E. Röder, Ministerialrat at the Federal Ministry for Economic Affairs, and S. Maaß, Regierungsrätin at the same Ministry, acting as Agents,
- the French Government, by C. de Salins, Deputy Director at the Legal Affairs Directorate of the Ministry of Foreign Affairs, and P. Martinet, Foreign Affairs Secretary at the same Directorate, acting as Agents,
- the Commission of the European Communities, by B.J. Drijber, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing oral observations from VT4 Ltd, represented by D. Vandermeersch; Vlaamse Gemeenschap, represented by E. Brewaeys and J. Stuyck; Vlaamse Televisie Maatschappij NV (VTM), represented by F. Herbert; and the Commission, represented by B.J. Drijber, at the hearing on 12 December 1996,

after hearing the Opinion of the Advocate General at the sitting on 6 February 1997,

gives the following

Judgment

1 By judgment of 14 February 1996, received at the Court on 26 February 1996, the Raad van State (Council of State), Belgium, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 2 of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23, hereinafter 'the Directive').

2 The question has been raised in an action for annulment brought by VT4 Ltd (hereinafter 'VT4') against a decision adopted on 16 January 1995 by the Flemish Minister for Culture and Brussels Affairs (hereinafter 'the Decision') refusing VT4 access for its television programme to the cable distribution network.

3 Article 2 of the Directive, which is contained in Chapter II entitled 'General provisions', provides:

'1. Each Member State shall ensure that all television broadcasts transmitted

- by broadcasters under its jurisdiction, or

- ...

comply with the law applicable to broadcasts intended for the public in that Member State.

2. Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields

coordinated by this Directive.

...!

4 According to the documents provided by the national court, under two decrees of the Flemish Executive of 28 January 1987 on, in particular, licensing of private television broadcasters (Belgisch Staatsblad of 19 March 1987) and of 12 June 1991 regulating radio and television advertising and sponsoring (Belgisch Staatsblad of 14 August 1991, hereinafter 'the Flemish Executive Decrees'), Vlaamse Televisie Maatschappij NV (hereinafter 'VTM') holds a monopoly in commercial television and television advertising in the Flemish Community.

5 According to Article 10(1), No 2, of the Flemish Executive Decree of 4 May 1994 on television and radio cable networks, on licences for installing and operating such networks and on the promotion of the dissemination and production of television programmes (Belgisch Staatsblad of 4 June 1994, hereafter 'the Cable Decree'), cable distributors must transmit simultaneously and in their entirety the programmes of VTM, the only private company licensed by the Flemish Executive.

6 Article 10(2) of the Cable Decree provides:

'Without prejudice to the provisions of paragraph (1), a cable distributor may retransmit the following programmes on his radio or television cable network:

...

4. Television and radio programmes of broadcasters licensed by the government of a Member State of the European Union other than Belgium, provided that the broadcaster concerned is subject, in that Member State, to proper supervision of broadcasters broadcasting to the public of that Member State and the supervision exercised covers compliance with European law, in particular copyright and associated rights and international obligations of the European Union and provided that the broadcaster concerned and the programmes which it broadcasts do not undermine public order, morality or public safety in the Flemish Community.

...!

7 VT4, which is established in London, is a company incorporated under English law whose main activity is the broadcasting of radio and television programmes. The Luxembourg company Scandinavian Broadcasting Systems SA is the sole shareholder of VT4. The United Kingdom authorities have granted it a non-domestic satellite licence.

8 VT4's programmes are aimed at the Flemish public. They are either recorded or subtitled in Dutch. The television signals are transmitted via satellite from the territory of the United Kingdom. At Nossegem (a Flemish locality in Belgium), VT4 has what it calls a 'subsidiary' which is in contact with advertisers and production companies. It is also in this locality that information for the news programmes is collected.

9 By the Decision, the Flemish Minister for Culture and Brussels Affairs refused to allow the VT4 television programme to have access to the cable distribution network. The Decision was based mainly on two arguments. First, VT4 did not come within the scope of Article 10(1), No 2, of the Cable Decree because it was not licensed as a private television broadcaster broadcasting to the entire Flemish Community. VT4 is in fact the only licensed broadcaster. Secondly, VT4 could not be regarded as a television broadcaster licensed by another Member State since it was a Flemish body which had been established in another Member State in order to circumvent application of the Flemish Community legislation. Even if VT4 were a British broadcaster, this still would not be sufficient to fulfil the conditions laid down in Article 10(2), No 4, of the Cable Decree and, in particular, the requirement that proper supervision must be exercised with regard to compliance with Community law.

10 On 24 January 1995, the Raad van State suspended the Decision on VT4's application. It considered that the ground for annulment based on infringement of Article 2(2) of the Directive was sufficiently serious and that the requirement for serious damage was fulfilled. As a result, as from 1 February 1995 VT4 was able to distribute its programme on the cable television network in Flanders and Brussels. By judgment of 2 March 1995 the Raad van State then confirmed the suspension it had previously ordered, so that the VT4 programme could continue to be broadcast on the network for as long as the Raad van State had not given a ruling in the main proceedings.

11 Before the national court, reference was made to the Commission proposal adopted on 22 March 1995 for amendment of the Directive (OJ 1995 C 185, p. 4) and which it submitted to the Council and European Parliament on 31 May 1995 at the same time as the report on the application of the Directive [COM(95)86 final-95/0074(COD)]. The point raised by that argument was the extent to which those texts and the provisional results of negotiations which have been going on within the Council could have an effect on the assessment of the Decision's legality.

12 It was in those circumstances that the Raad van State decided, before ruling on the substance, to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'At the time of the contested decision, may regard be had, for the purposes of interpreting Article 2 of Council Directive 89/552/EEC of 3 October 1989 with regard to its scope *ratione personae*, to the abovementioned report and proposal of 31 May 1995 of the Commission and to the abovementioned text provisionally adopted by the Council of Ministers on 20 November 1995? If so, what meaning overlapping the three different texts must be inferred for the purposes of that interpretation?'

13 It is apparent from the documents submitted to the Court that, by this question, raised before the Court delivered its judgment of 10 September 1996 in Case C-222/94 *Commission v United Kingdom* [1996] ECR I-4025, the Raad van State in effect seeks to ascertain the criteria for determining which broadcasters come within a Member State's jurisdiction for the purposes of Article 2(1) of the Directive.

14 In Case C-222/94 *Commission v United Kingdom* the Court examined the interpretation to be given to the term 'jurisdiction' in the phrase 'broadcasters under [a Member State's] jurisdiction' contained in the first indent of Article 2(1) of the Directive.

15 As the Court held in paragraph 26 of that judgment, the Directive contains no express definition of the phrase 'broadcasters under its jurisdiction'.

16 In paragraph 40, after analysing the wording of Article 2(1) of the Directive, the Court concluded that the concept of jurisdiction of a Member State, used in the first indent of that provision, had to be understood as necessarily covering jurisdiction *ratione personae* over television broadcasters.

17 In paragraph 42 the Court went on to state that a Member State's jurisdiction *ratione personae* over a broadcaster can be based only on the broadcaster's connection to that State's legal system, which in substance overlaps with the concept of establishment as used in the first paragraph of Article 59 of the EC Treaty, the wording of which presupposes that the supplier and the recipient of a service are 'established' in two different Member States.

18 It follows therefore that Article 2(1) of the Directive is to be interpreted as meaning that a television broadcaster comes under the jurisdiction of the Member State in which it is established.

19 Where a television broadcaster has more than one establishment, the competent Member State is the State in which the broadcaster has the centre of its activities. It is therefore for the national court to determine, applying that criteria, which Member State has jurisdiction over VT4's activities, taking into account in particular the place where decisions concerning programme policy are taken and the programmes to be broadcast are finally put together (Case C-222/94 *Commission*

v United Kingdom, paragraph 58).

20 According to Vlaamse Gemeenschap, in order for the provisions concerning free provision of services to apply, it is not sufficient for the provider of a service to be established in another Member State; it is also necessary, as is clear from the judgment in Case C-55/94 Gebhard [1995] ECR I-4165, that the person providing the service must not also be established in the host Member State.

21 That argument disregards the fact the activity of a television broadcaster which consists in providing, on a permanent basis, services from the Member State in which it is established for the purposes of Article 2(1) of the Directive does not imply, as such, the pursuit in the host Member State of an activity in regard to which it must be determined whether it is temporary or not, as was the case in Case C-222/94 Commission v United Kingdom.

22 It must also be emphasized that the mere fact that all the broadcasts and advertisements are aimed exclusively at the Flemish public does not, as VTM claims, demonstrate that VT4 cannot be regarded as being established in the United Kingdom. The Treaty does not prohibit an undertaking from exercising the freedom to provide services if it does not offer services in the Member State in which it is established.

23 It follows from the foregoing that Article 2(1) of the Directive is to be interpreted as meaning that a television broadcaster comes under the jurisdiction of the Member State in which it is established. If a television broadcaster is established in more than one Member State, the Member State having jurisdiction over it is the one in whose territory the broadcaster has the centre of its activities, in particular where decisions concerning programme policy are taken and the programmes to be broadcast are finally put together.

Costs

24 The costs incurred by the German and French Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Sixth Chamber)

in answer to the question referred to it by the Raad van State, Belgium, by judgment of 14 February 1996, hereby rules:

Article 2(1) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities is to be interpreted as meaning that a television broadcaster comes under the jurisdiction of the Member State in which it is established. If a television broadcaster is established in more than one Member State, the Member State having jurisdiction over it is the one in whose territory the broadcaster has the centre of its activities, in particular where decisions concerning programme policy are taken and the programmes to be broadcast are finally put together.

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AUTHOR Court of Justice of the European Communities

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TREATY European Economic Community

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 61994J0222-N26 : N 15
 61994J0222-N40 : N 16
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CONCERNS Interprets 31989L0552-A02P1

SUB Freedom of establishment and services ; Free movement of services

AUTLANG Dutch

OBSERV Federal Republic of Germany ; France ; Commission ; Member States ;
 Institutions

NATIONA Belgium

NATCOUR *A9* Raad van State (Belgie), afdeling administratie, arrest no 58.124 van
 14/02/1996 (No 58.124)
 P1 Raad van State (Belgie), afdeling administratie, arrest no 79.952 van
 27/04/1999 (A. 61/900/XII-645)

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 Libri - Nijmegen) 2001 p.179-182

PROCEDU Reference for a preliminary ruling

ADVGEN Lenz

JUDGRAP Kapteyn

DATES

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of application: 26/02/1996

**Judgment of the Court (Fifth Chamber)
of 29 November 2001**

François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort.

Reference for a preliminary ruling: Collège juridictionnel de la Région de Bruxelles-Capitale - Belgium.

Reference for a preliminary ruling - Definition of a national court or tribunal - Freedom to provide services - Municipal tax on satellite dishes - Restriction on the freedom to receive television programmes by satellite.

Case C-17/00.

In [Case C-17/00](#),

REFERENCE to the Court under Article 234 EC by the Collège juridictionnel de la Région de Bruxelles-Capitale (Belgium) for a preliminary ruling in the proceedings pending before that body between François De Coster

and

Collège des bourgmestre et échevins de Watermael-Boitsfort,

on the interpretation of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Articles 60 and 66 of the EC Treaty (now Articles 50 and 55 EC),

THE COURT

(Fifth Chamber),

composed of: P. Jann, President of the Chamber, S. von Bahr, D.A.O. Edward, A. La Pergola (Rapporteur) and M. Wathelet, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- the Commission of the European Communities, by K. Banks and M. Wolfcarius, acting as Agents, having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2001,

gives the following

Judgment

Costs

40 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Fifth Chamber)

in answer to the question referred to it by the Collège juridictionnel de la Région de Bruxelles-Capitale

by order of 9 December 1999, hereby rules:

Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Articles 60 and 66 of the EC Treaty (now Articles 50 and 55 EC) must be interpreted as preventing the application of a tax on satellite dishes such as that introduced by Articles 1 to 3 of the tax regulation adopted on 24 June 1997 by the municipal council of Watermael-Boitsfort.

1 By order of 9 December 1999, received at the Court on 19 January 2000, the Collège juridictionnel de la Région de Bruxelles-Capitale (Judicial Board of the Brussels-Capital region) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Articles 60 and 66 of the EC Treaty (now Articles 50 and 55 EC).

2 The question was raised in proceedings between Mr De Coster and the Collège des bourgmestre et échevins de la commune de Watermael-Boitsfort (Belgium) concerning the municipal tax on satellite dishes which he was charged for the year 1998.

National regulations

3 Articles 1 to 3 of the tax regulation on satellite dishes adopted by the municipal council of Watermael-Boitsfort on 24 June 1997 ('the tax regulation') read as follows:

'1. An annual municipal tax on satellite dishes is hereby introduced for the 1997 to 2001 financial years inclusive.

2. The rate of the tax is set at 5000 francs per satellite dish, whatever its size. The tax is due for the whole calendar year regardless of the date of installation of the dish during the tax year.

3. The tax is payable by the owner of the satellite dish on 1 January of the tax year...'

4 The tax regulation was repealed with effect from 1 January 1999 by a decision of the municipal Council of Watermael-Boitsfort meeting on 21 September 1999, prompted by the fact that in the course of infringement proceedings against the Kingdom of Belgium the Commission had sent the latter a reasoned opinion questioning the compliance of measures such as the tax regulation with Community law.

Main proceedings and the question submitted for a preliminary ruling

5 On 10 December 1998 Mr De Coster lodged at the Collège juridictionnel de la Région de Bruxelles-Capitale a complaint against the satellite dish tax charged him by the municipality of Watermael-Boitsfort for the 1998 financial year.

6 Mr De Coster considers that such a tax results in a restriction on the freedom to receive television programmes coming from other Member States which is contrary to Community law and especially to Article 59 of the Treaty.

7 By letter of 27 April 1999 addressed to the Collège juridictionnel de la Région de Bruxelles-Capitale, the municipality of Watermael-Boitsfort stated that the tax on satellite dishes was introduced in an attempt to prevent their uncontrolled proliferation in the municipality and thereby preserve the quality of the environment.

8 Since the Collège noted inter alia that the tax could result in inequality between cable broadcasting companies and those broadcasting by satellite, it decided to stay the proceedings and submit the following question to the Court of Justice for a preliminary ruling:

'Are Articles 1 to 3 of the tax regulation on satellite dishes adopted by vote of the municipal

council of Watermael-Boitsfort sitting in public on 24 June 1997 introducing a tax on satellite dishes compatible with Articles 59 to 66 of the Treaty establishing the European Community of 25 March 1957?'

Admissibility

9 First of all, the question of whether the Collège juridictionnel de la Région de Bruxelles-Capitale should be considered to be a national court or tribunal for the purposes of Article 234 EC must be examined.

10 It is settled case-law that in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, in particular, Case C-54/96 Dorsch Consult [1997] ECR I-4961, paragraph 23 and the caselaw cited therein, and Joined Cases C-110/98 to C-147/98 Gabalfrisa and Others [2000] ECR I-1577, paragraph 33).

11 In the case of the Collège juridictionnel de la Région de Bruxelles-Capitale, Article 83d(2) of the Law of 12 January 1989 concerning the Brussels institutions (Moniteur belge of 14 January 1989, p. 667), states:

'The judicial functions which in the provinces are exercised by the permanent deputation are exercised in respect of the territory referred to in Article 2(1) by a board of 9 members appointed by the Council of the Brussels-Capital Region on the proposal of its government. At least three members must come from the smallest linguistic group.

The members of this board are subject to the same rules on ineligibility as those which apply to the members of the permanent deputations in the provinces.

In proceedings before the board, the same rules must be respected as those which apply when the permanent deputation exercises a judicial function in the provinces.'

12 It is thus established that the Collège juridictionnel de la Région de Bruxelles-Capitale is a permanent body, established by law, that it gives legal rulings and that the jurisdiction thereby invested in it concerning local tax proceedings is compulsory.

13 However, the Commission maintains that no assurance can be gained from examination of Article 83d of the Law of 12 January 1989 that the procedure followed before the Collège juridictionnel is inter partes, or that the latter exercises its functions completely independently and impartially in applications by taxpayers challenging taxes charged them by the municipal councils. In particular, the Commission raises the question of whether the Collège juridictionnel is independent of the executive.

14 Regarding the requirement that the procedure be inter partes, it must first be noted that that is not an absolute criterion (Dorsch Consult, paragraph 31, and Gabalfrisa, paragraph 37, both cited above).

15 Secondly, it must be noted that in the present case Article 104a of the Provincial Law of 30 April 1836, a provision inserted by the Law of 6 July 1987 (Moniteur belge of 18 August 1987, p. 12309), and the Royal Decree of 17 September 1987 concerning the procedure before the permanent deputation when it exercises a judicial function (Moniteur belge of 29 September 1987, p. 14073), both of which are applicable to the Collège juridictionnel de la Région de Bruxelles-Capitale by virtue of Article 83d(2) of the Law of 12 January 1989, indicate that the procedure followed before the latter is indeed inter partes.

16 Article 104a of the abovementioned Provincial Law and Article 5 of the Royal Decree of 17 September 1987 indicate that a copy of the application is sent to the defendant, who has 30 days in which to submit a reply (which is then sent to the applicant), that the preparatory inquiries are adversarial, that the file may be consulted by the parties and that they may present their oral observations at a public hearing.

17 As to the criteria of independence and impartiality, it must be noted that there is no reason to consider that the Collège juridictionnel does not satisfy such requirements.

18 First, as is clear from Article 83d(2) of the Law of 12 January 1989, it is the Conseil de la Région de Bruxelles-Capitale that appoints the members of the Collège juridictionnel and not the municipal authorities whose tax decisions the Collège juridictionnel is, as in the main proceedings, required to examine.

19 Secondly, it is apparent *inter alia* from the Belgian Government's answers to the questions put to it by the Court that members of the Collège juridictionnel may not be members of a municipal council or of the staff of a municipal authority.

20 Thirdly, Articles 22 to 25 of the Royal Decree of 17 September 1987 establish procedure for challenging appointment which is applicable to the members of the Collège juridictionnel by virtue of Article 83d(2) of the Law of 12 January 1989, and which is to be based on reasons essentially identical to those which apply in the case of members of the judiciary.

21 Finally, it appears from the explanations provided by the Belgian Government at the request of the Court that appointments of members of the Collège juridictionnel are for an unlimited period of time and cannot be revoked.

22 It is clear from the above that the Collège juridictionnel de la Région de Bruxelles-Capitale must be considered to be a court or tribunal for the purposes of Article 234 EC; accordingly, the reference for a preliminary ruling is admissible.

Substance

23 When addressing that question, it must be borne in mind that in proceedings brought under Article 234 EC the Court does not have jurisdiction to rule on the compatibility of a national measure with Community law. However, it does have jurisdiction to supply the national court with a ruling on the interpretation of Community law so as to enable that court to determine whether such compatibility exists in order to decide the case before it (see especially Joined Cases C-37/96 and C-38/96 *Sodiprem and Others* [1998] ECR I-2039, paragraph 22).

24 The question submitted for a preliminary ruling must therefore be understood as asking in substance whether Articles 59, 60 and 66 of the Treaty must be interpreted as preventing the application of a tax on satellite dishes such as that introduced by Articles 1 to 3 of the tax regulation.

25 In order to reply to the question as thus reformulated, it must be observed that although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law (see, in particular,

Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 21).

26 In the context of freedom to provide services the Court has also recognised that a national tax measure restricting that freedom may constitute a prohibited measure (see, in particular, Case C-49/89 *Corsica Ferries France* [1989] ECR 4441, paragraph 9, and Case C-381/93 *Commission v France* [1994] ECR I-5145, paragraphs 20 to 22).

27 Since the duty to abide by the rules relating to the freedom to provide services applies to

the actions of public authorities (Case 36/74 Walrave and Koch [1974] ECR 1405, paragraph 17), it is, in that respect, irrelevant that the tax measure in question was adopted, as in the main proceedings, by a local authority and not by the State itself.

28 Furthermore, it is settled case-law that the transmission, and broadcasting, of television signals comes within the rules of the Treaty relating to the provision of services (see, in particular, Case 155/73 Sacchi [1974] ECR 409, paragraph 6; Case 52/79 Debaue and Others [1980] ECR 833, paragraph 8; Case C-260/89 ERT [1991] ECR I-2925, paragraphs 20 to 25; Case C-353/89 Commission v Netherlands [1991] ECR I-4069, paragraph 38; Case C-211/91 Commission v Belgium [1992] ECR I-6757, paragraph 5, and Case C-23/93 TV10 [1994] ECR I-4795, paragraphs 13 and 16).

29 It must also be noted that, according to the case-law of the Court, Article 59 of the Treaty requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit or further impede the activities of a provider of services established in another Member State where he lawfully provides similar services (see Case C-76/90 Säger [1991] ECR I-4221, paragraph 12; Case C-43/93 Vander Elst [1994] ECR I-3803, paragraph 14).

30 Furthermore, the Court has already held that Article 59 of the Treaty precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (Commission v France, cited above, paragraph 17, and Safir, cited above, paragraph 23; Case C-158/96 Kohll [1998] ECR I-1931, paragraph 33; Case C-157/99 Smits and Peerbooms, [2001] ECR I-0000, paragraph 61).

31 In that regard it must be noted that the introduction of a tax on satellite dishes has the effect of a charge on the reception of television programmes transmitted by satellite which does not apply to the reception of programmes transmitted by cable, since the recipient does not have to pay a similar tax on that method of reception.

32 However, the Commission indicated in its written observations that whilst broadcasters established in Belgium enjoy unlimited access to cable distribution for their programmes in that Member State, broadcasters established in certain other Member States do not. The number of Danish, Greek, Italian, Finnish or Swedish channels which can be broadcast by cable in Belgium is thus particularly limited, the Commission noting in that regard a maximum of one channel per State, if any. It follows that most television broadcasting programmes transmitted from those Member States can only be received by satellite dishes.

33 In such circumstances, as the Commission correctly observes, a tax such as that introduced by the tax regulation is liable to dissuade the recipients of the television broadcasting services established in the municipality of Watermael-Boitsfort from seeking access to television programmes broadcast from other Member States, since the reception of such programmes is subject to a charge which does not apply to the reception of programmes coming from broadcasters established in Belgium.

34 Furthermore, as the Commission also observes, the introduction of such a tax is liable to hinder the activities of operators in the field of satellite transmission by imposing a charge on the reception of programmes transmitted by such operators which does not apply to the reception of programmes transmitted by the national cable distributors.

35 It follows from those considerations that the tax on satellite dishes introduced by the tax regulation is liable to impede more the activities of operators in the field of broadcasting or television transmission established in Member States other than the Kingdom of Belgium, while

giving an advantage to the internal Belgian market and to radio and television distribution within that Member State.

36 As stated in paragraph 7 of this judgment, the municipality of Watermael-Boitsfort nevertheless justifies the tax regulation by stating its concern to prevent the uncontrolled proliferation of satellite dishes in the municipality and thereby preserve the quality of the environment.

37 In that regard, it suffices to state that even if the need for protection relied on by the municipality of Watermael-Boitsfort is capable of justifying restriction of the freedom to provide services, and even if it is established that merely reducing the number of satellite dishes as anticipated by the introduction of a tax such as the one in question in the main proceedings is capable of meeting that need, the tax exceeds what is necessary to do so.

38 As the Commission observed, there are methods other than the tax in question in the main proceedings, less restrictive of the freedom to provide services, which could achieve an objective such as the protection of the urban environment, for instance the adoption of requirements concerning the size of the dishes, their position and the way in which they are fixed to the building or its surroundings or the use of communal dishes. Moreover, such requirements have been adopted by the municipality of Watermael-Boitsfort, as is apparent from the planning rules on outdoor aerials adopted by that municipality and approved by regulation of 27 February 1997 of the government of the Brussels-Capital region (*Moniteur belge* of 31 May 1997, p. 14520).

39 In view of all of the above considerations the answer to the question submitted must be that Articles 59, 60 and 66 of the Treaty must be interpreted as preventing the application of a tax on satellite dishes such as that introduced by Articles 1 to 3 of the tax regulation.

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11992E059 : N 1 29 30 39
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11992E066 : N 1 39
61993J0023 : N 28
61993J0043 : N 29
61993J0381 : N 26 30
61996J0037 : N 23
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61996J0118 : N 25 30
61996J0158 : N 30
11997E234 : N 10 22 23
61998J0110 : N 10 14
61999J0157 : N 30

SUB Freedom of establishment and services ; Free movement of services

AUTLANG French

OBSERV Commission ; Institutions

NATIONA Belgium

NATCOUR *A9* Collège juridictionnel de la Région de Bruxelles-Capitale, ordonnance du 09/12/1999 (No Cel. 18360)

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PROCEDU Reference for a preliminary ruling

ADVGEN Ruiz-Jarabo Colomer

JUDGRAP La Pergola

DATES of document: 29/11/2001
of application: 19/01/2000

**Judgment of the Court
of 27 September 1988**

**The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and
General Trust plc.**

**Reference for a preliminary ruling: High Court of Justice, Queen's Bench Division - United
Kingdom.**

**Freedom of establishment - Right to leave the Member State of origin - Legal persons.
Case 81/87.**

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1 . Free movement of persons - Freedom of establishment - Company incorporated under the legislation of a Member State and having its registered office there - Right to transfer the central management and control of a company to another Member State - None

(EEC Treaty, Arts 52 and 58)

2 . Free movement of persons - Freedom of establishment - Directive 73/148 - Not applicable to legal persons

(Council Directive 73/148)

1 . The Treaty regards the differences in national legislation concerning the connecting factor required of companies incorporated thereunder and the question whether - and if so how - the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions, which have not yet been adopted or concluded. Therefore, in the present state of Community law, Articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State.

2 . The title and provisions of Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services refer solely to the movement and residence of natural persons, and the provisions of the directive cannot, by their nature, be applied by analogy to legal persons . Therefore, Directive 73/148, properly construed, confers no right on a company to transfer its central management and control to another Member State.

In [Case 81/87](#)

REFERENCE to the Court under Article 177 of the EEC Treaty by the High Court of Justice, Queen's Bench Division, for a preliminary ruling in the proceedings pending before that court between

The Queen

and

HM Treasury and Commissioners of Inland Revenue

ex parte Daily Mail and General Trust PLC

on the interpretation of Articles 52 and 58 of the EEC Treaty and the provisions of Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (Official Journal 1973, L 172, p. 14),

THE COURT

composed of : Lord Mackenzie Stuart, President, G. Bosco, O. Due and G . C . Rodríguez Iglesias (Presidents of Chambers), T. Koopmans, U . Everling, K. Bahlmann, Y. Galmot, R. Joliet, T. F. O' Higgins and F. A. Schockweiler, Judges,

Advocate General : M. Darmon

Registrar : D. Louterman, Administrator

after considering the observations submitted on behalf of

Daily Mail and General Trust PLC, the applicant in the main proceedings, represented by David Vaughan, QC, and Derrick Wyatt, Barrister, instructed by F. Sandison, Solicitor, of Freshfields, London,

the United Kingdom, by S. J. Hay, Treasury Solicitor, Queen Anne' s Chambers, acting as Agent, assisted by R. Buxton, QC, of Gray' s Inn, and A . Moses and N. Green, Barristers,

the Commission, by its Legal Adviser D. Gilmour, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 22 March 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 7 June 1988,

gives the following

Judgment

1 By an order of 6 February 1987, which was received at the Court on 19 March 1987, the High Court of Justice, Queen' s Bench Division, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Articles 52 and 58 of the Treaty and Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (Official Journal 1973, L 172, p. 14).

2 Those questions arose in proceedings between Daily Mail and General Trust PLC, the applicant in the main proceedings (hereinafter referred to as "the applicant "), and HM Treasury for a declaration, inter alia, that the applicant is not required to obtain consent under United Kingdom tax legislation in order to cease to be resident in the United Kingdom for the purpose of establishing its residence in the Netherlands .

3 It is apparent from the documents before the Court that under United Kingdom company legislation a company such as the defendant, incorporated under that legislation and having its registered office in the United Kingdom, may establish its central management and control outside the United Kingdom without losing legal personality or ceasing to be a company incorporated in the United Kingdom.

4 According to the relevant United Kingdom tax legislation, only companies which are resident for tax purposes in the United Kingdom are as a rule liable to United Kingdom corporation tax. A company is resident for tax purposes in the place in which its central management and control is located.

5 Section 482 (1) (a) of the Income and Corporation Taxes Act 1970 prohibits companies resident for tax purposes in the United Kingdom from ceasing to be so resident without the consent of the Treasury.

6 In 1984 the applicant, which is an investment holding company, applied for consent under the abovementioned national provision in order to transfer its central management and control to the Netherlands, whose legislation does not prevent foreign companies from establishing their central management there; the company proposed, in particular, to hold board meetings and to rent offices

for its management in the Netherlands. Without waiting for that consent, it subsequently decided to open an investment management office in the Netherlands with a view to providing services to third parties.

7 It is common ground that the principal reason for the proposed transfer of central management and control was to enable the applicant, after establishing its residence for tax purposes in the Netherlands, to sell a significant part of its non-permanent assets and to use the proceeds of that sale to buy its own shares, without having to pay the tax to which such transactions would make it liable under United Kingdom tax law, in regard in particular to the substantial capital gains on the assets which the applicant proposed to sell. After establishing its central management and control in the Netherlands the applicant would be subject to Netherlands corporation tax, but the transactions envisaged would be taxed only on the basis of any capital gains which accrued after the transfer of its residence for tax purposes.

8 After a long period of negotiations with the Treasury, which proposed that it should sell at least part of the assets before transferring its residence for tax purposes out of the United Kingdom, the applicant initiated proceedings before the High Court of Justice, Queen's Bench Division, in 1986. Before that court, it claimed that Articles 52 and 58 of the EEC Treaty gave it the right to transfer its central management and control to another Member State without prior consent or the right to obtain such consent unconditionally.

9 In order to resolve that dispute, the national court stayed the proceedings and referred the following questions to the Court of Justice :

- (1) Do Articles 52 and 58 of the EEC Treaty preclude a Member State from prohibiting a body corporate with its central management and control in that Member State from transferring without prior consent or approval that central management and control to another Member State in one or both of the following circumstances, namely where :
 - (a) payment of tax upon profits or gains which have already arisen may be avoided;
 - (b) were the company to transfer its central management and control, tax that might have become chargeable had the company retained its central management and control in that Member State would be avoided?
- (2) Does Council Directive 73/148/EEC give a right to a corporate body with its central management and control in a Member State to transfer without prior consent or approval its central management and control to another Member State in the conditions set out in Question 1? If so, are the relevant provisions directly applicable in this case?
- (3) If such prior consent or approval may be required, is a Member State entitled to refuse consent on the grounds set out in Question 1?
- (4) What difference does it make, if any, that under the relevant law of the Member State no consent is required in the case of a change of residence to another Member State of an individual or firm?

10 Reference is made to the Report for the Hearing for a fuller account of the facts and the background to the main proceedings, the provisions of national legislation at issue and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

First question

11 The first question seeks in essence to determine whether Articles 52 and 58 of the Treaty give a company incorporated under the legislation of a Member State and having its registered office

there the right to transfer its central management and control to another Member State. If that is so, the national court goes on to ask whether the Member State of origin can make that right subject to the consent of national authorities, the grant of which is linked to the company's tax position.

12 With regard to the first part of the question, the applicant claims essentially that Article 58 of the Treaty expressly confers on the companies to which it applies the same right of primary establishment in another Member State as is conferred on natural persons by Article 52. The transfer of the central management and control of a company to another Member State amounts to the establishment of the company in that Member State because the company is locating its centre of decision-making there, which constitutes genuine and effective economic activity.

13 The United Kingdom argues essentially that the provisions of the Treaty do not give companies a general right to move their central management and control from one Member State to another. The fact that the central management and control of a company is located in a Member State does not itself necessarily imply any genuine and effective economic activity on the territory of that Member State and cannot therefore be regarded as establishment within the meaning of Article 52 of the Treaty.

14 The Commission emphasizes first of all that in the present state of Community law, the conditions under which a company may transfer its central management and control from one Member State to another are still governed by the national law of the State in which it is incorporated and of the State to which it wishes to move. In that regard, the Commission refers to the differences between the national systems of company law. Some of them permit the transfer of the central management and control of a company and, among those, certain attach no legal consequences to such a transfer, even in regard to taxation. Under other systems, the transfer of the management or the centre of decision-making of a company out of the Member State in which it is incorporated results in the loss of legal personality. However, all the systems permit the winding-up of a company in one Member State and its reincorporation in another. The Commission considers that where the transfer of central management and control is possible under national legislation, the right to transfer it to another Member State is a right protected by Article 52 of the Treaty.

15 Faced with those diverging opinions, the Court must first point out, as it has done on numerous occasions, that freedom of establishment constitutes one of the fundamental principles of the Community and that the provisions of the Treaty guaranteeing that freedom have been directly applicable since the end of the transitional period. Those provisions secure the right of establishment in another Member State not merely for Community nationals but also for the companies referred to in Article 58.

16 Even though those provisions are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58. As the Commission rightly observed, the rights guaranteed by Articles 52 et seq. would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State. In regard to natural persons, the right to leave their territory for that purpose is expressly provided for in Directive 73/148, which is the subject of the second question referred to the Court.

17 In the case of a company, the right of establishment is generally exercised by the setting-up of agencies, branches or subsidiaries, as is expressly provided for in the second sentence of the first paragraph of Article 52. Indeed, that is the form of establishment in which the applicant engaged in this case by opening an investment management office in the Netherlands. A company may also exercise its right of establishment by taking part in the incorporation of a company in another

Member State, and in that regard Article 221 of the Treaty ensures that it will receive the same treatment as nationals of that Member State as regards participation in the capital of the new company .

18 The provision of United Kingdom law at issue in the main proceedings imposes no restriction on transactions such as those described above. Nor does it stand in the way of a partial or total transfer of the activities of a company incorporated in the United Kingdom to a company newly incorporated in another Member State, if necessary after winding-up and, consequently, the settlement of the tax position of the United Kingdom company. It requires Treasury consent only where such a company seeks to transfer its central management and control out of the United Kingdom while maintaining its legal personality and its status as a United Kingdom company.

19 In that regard it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning.

20 As the Commission has emphasized, the legislation of the Member States varies widely in regard to both the factor providing a connection to the national territory required for the incorporation of a company and the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor . Certain States require that not merely the registered office but also the real head office, that is to say the central administration of the company, should be situated on their territory, and the removal of the central administration from that territory thus presupposes the winding-up of the company with all the consequences that winding-up entails in company law and tax law. The legislation of other States permits companies to transfer their central administration to a foreign country but certain of them, such as the United Kingdom, make that right subject to certain restrictions, and the legal consequences of a transfer, particularly in regard to taxation, vary from one Member State to another.

21 The Treaty has taken account of that variety in national legislation . In defining, in Article 58, the companies which enjoy the right of establishment, the Treaty places on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company. Moreover, Article 220 of the Treaty provides for the conclusion, so far as is necessary, of agreements between the Member States with a view to securing inter alia the retention of legal personality in the event of transfer of the registered office of companies from one country to another. No convention in this area has yet come into force.

22 It should be added that none of the directives on the coordination of company law adopted under Article 54 (3) (g) of the Treaty deal with the differences at issue here.

23 It must therefore be held that the Treaty regards the differences in national legislation concerning the required connecting factor and the question whether - and if so how - the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions.

24 Under those circumstances, Articles 52 and 58 of the Treaty cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State.

25 The answer to the first part of the first question must therefore be that in the present state of Community law Articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State.

26 Having regard to that answer, there is no need to reply to the second part of the first question.

Second question

27 In its second question, the national court asks whether the provisions of Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services give a company a right to transfer its central management and control to another Member State.

28 It need merely be pointed out in that regard that the title and provisions of that directive refer solely to the movement and residence of natural persons and that the provisions of the directive cannot, by their nature, be applied by analogy to legal persons.

29 The answer to the second question must therefore be that Directive 73/148, properly construed, confers no right on a company to transfer its central management and control to another Member State.

Third and fourth questions

30 Having regard to the answers given to the first two questions referred by the national court, there is no need to reply to the third and fourth questions.

Costs

31 The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the High Court of Justice, Queen' s Bench Division, by order of 6 February 1987, hereby rules :

- (1) In the present state of Community law, Articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State.
- (2) Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, properly construed, confers no right on a company to transfer its central management and control to another Member State.

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SUB Freedom of establishment and services ; Right of establishment

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NATCOUR *A9* High Court of Justice (England), Queen's Bench Division, order and judgment of 06/02/1987 (CO/902/86)
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**Judgment of the Court
of 9 March 1999**

Centros Ltd v Erhvervs- og Selskabsstyrelsen.

Reference for a preliminary ruling: Højesteret - Denmark.

Freedom of establishment - Establishment of a branch by a company not carrying on any actual business - Circumvention of national law - Refusal to register.

Case C-212/97.

Freedom of movement for persons - Freedom of establishment - Company formed in accordance with the law of a Member State in which it has its registered office but in which it conducts no business - Establishment of a branch in another Member State - Registration refused - Not permissible - Member States free to adopt measures to combat fraud

(EC Treaty, Arts 52 and 58)

It is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. Given that the right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment.

That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.

In [Case C-212/97](#),

REFERENCE to the Court under Article 177 of the EC Treaty by the Højesteret (Denmark) for a preliminary ruling in the proceedings pending before that court between

Centros Ltd

and

Erhvervs- og Selskabsstyrelsen,

on the interpretation of Articles 52, 56 and 58 of the EC Treaty,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, J.-P. Puissochet, G. Hirsch and P. Jann (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, C. Gulmann, J.L. Murray, D.A.O. Edward, H. Ragnemalm, L. Sevón, M. Wathelet (Rapporteur), R. Schintgen and K.M. Ioannou, Judges,

Advocate General: A. La Pergola,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Erhvervs- og Selskabsstyrelsen, by Kammeradvokaten, represented by Karsten Hagel-Sørensen, Advokat, Copenhagen,
- the Danish Government, by Peter Biering, Head of Division in the Ministry of Foreign Affairs, acting as Agent,
- the French Government, by Kareen Rispal-Bellanger, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Gautier Mignot, Secretary for Foreign Affairs in that Directorate, acting as Agents,
- the Netherlands Government, by Adriaan Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,
- the United Kingdom Government, by Stephanie Ridley, of the Treasury Solicitor's Department, acting as Agent, and Derrick Wyatt QC,
- the Commission of the European Communities, by Antonio Caeiro, Legal Adviser, and Hans Støvlbæk, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Erhvervs- og Selskabsstyrelsen, represented by Karsten Hagel-Sørensen; the French Government, represented by Gautier Mignot; the Netherlands Government, represented by Marc Fiestra, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; the Swedish Government, represented by Erik Brattgård, Departementsråd in the Legal Service of the Ministry of Foreign Affairs, acting as Agent; the United Kingdom Government, represented by Derrick Wyatt; and the Commission, represented by Antonio Caeiro and Hans Støvlbæk, at the hearing on 19 May 1998,

after hearing the Opinion of the Advocate General at the sitting on 16 July 1998,

gives the following

Judgment

Costs

40 The costs incurred by the Danish, French, Netherlands, Swedish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Højesteret by order of 3 June 1997, hereby rules:

It is contrary to Articles 52 and 58 of the EC Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the

paying up of a minimum share capital. That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.

1 By order of 3 June 1997, received at the Court on 5 June 1997 the Højesteret referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 52, 56 and 58 of the Treaty.

2 That question was raised in proceedings between Centros Ltd, a private limited company registered on 18 May 1992 in England and Wales, and Erhvervs- og Selskabsstyrelsen (the Trade and Companies Board, 'the Board') which comes under the Danish Department of Trade, concerning that authority's refusal to register a branch of Centros in Denmark.

3 It is clear from the documents in the main proceedings that Centros has never traded since its formation. Since United Kingdom law imposes no requirement on limited liability companies as to the provision for and the paying-up of a minimum share capital, Centros's share capital, which amounts to GBP 100, has been neither paid up nor made available to the company. It is divided into two shares held by Mr and Mrs Bryde, Danish nationals residing in Denmark. Mrs Bryde is the director of Centros, whose registered office is situated in the United Kingdom, at the home of a friend of Mr Bryde.

4 Under Danish law, Centros, as a 'private limited company', is regarded as a foreign limited liability company. The rules governing the registration of branches ('filialer') of such companies are laid down by the Anpartsselskabslov (Law on private limited companies).

5 In particular, Article 117 of the Law provides:

'1. Private limited companies and foreign companies having a similar legal form which are established in one Member State of the European Communities may do business in Denmark through a branch.'

6 During the summer of 1992, Mrs Bryde requested the Board to register a branch of Centros in Denmark.

7 The Board refused that registration on the grounds, inter alia, that Centros, which does not trade in the United Kingdom, was in fact seeking to establish in Denmark, not a branch, but a principal establishment, by circumventing the national rules concerning, in particular, the paying-up of minimum capital fixed at DKK 200 000 by Law No 886 of 21 December 1991.

8 Centros brought an action before the Ostre Landsret against the refusal of the Board to effect that registration.

9 The Ostre Landsret upheld the arguments of the Board in a judgment of 8 September 1995, whereupon Centros appealed to the Højesteret.

10 In those proceedings, Centros maintains that it satisfies the conditions imposed by the law on private limited companies relating to the registration of a branch of a foreign company. Since it was lawfully formed in the United Kingdom, it is entitled to set up a branch in Denmark pursuant to Article 52, read in conjunction with Article 58, of the Treaty.

11 According to Centros the fact that it has never traded since its formation in the United Kingdom has no bearing on its right to freedom of establishment. In its judgment in Case 79/85 Segers v Bedrijfsvereniging voor Bank- en Verzekeringswegen, Groothandel en Vrije Beroepen [1986] ECR 2375, the Court ruled that Articles 52 and 58 of the Treaty prohibited the competent authorities

of a Member State from excluding the director of a company from a national sickness insurance scheme solely on the ground that the company had its registered office in another Member State, even though it did not conduct any business there.

12 The Board submits that its refusal to grant registration is not contrary to Articles 52 and 58 of the Treaty since the establishment of a branch in Denmark would seem to be a way of avoiding the national rules on the provision for and the paying-up of minimum share capital. Furthermore, its refusal to register is justified by the need to protect private or public creditors and other contracting parties and also by the need to endeavour to prevent fraudulent insolvencies.

13 In those circumstances, the Højesteret has decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is it compatible with Article 52 of the EC Treaty, in conjunction with Articles 56 and 58 thereof, to refuse registration of a branch of a company which has its registered office in another Member State and has been lawfully founded with company capital of GBP 100 (approximately DKK 1 000) and exists in conformity with the legislation of that Member State, where the company does not itself carry on any business but it is desired to set up the branch in order to carry on the entire business in the country in which the branch is established, and where, instead of incorporating a company in the latter Member State, that procedure must be regarded as having been employed in order to avoid paying up company capital of not less than DKK 200 000 (at present DKR 125 000)?'

14 By its question, the national court is in substance asking whether it is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the legislation of another Member State in which it has its registered office but where it does not carry on any business when the purpose of the branch is to enable the company concerned to carry on its entire business in the State in which that branch is to be set up, while avoiding the formation of a company in that State, thus evading application of the rules governing the formation of companies which are, in that State, more restrictive so far as minimum paid-up share capital is concerned.

15 As a preliminary point, it should be made clear that the Board does not in any way deny that a joint stock or private limited company with its registered office in another Member State may carry on business in Denmark through a branch. It therefore agrees, as a general rule, to register in Denmark a branch of a company formed in accordance with the law of another Member State. In particular, it has added that, if Centros had conducted any business in England and Wales, the Board would have agreed to register its branch in Denmark.

16 According to the Danish Government, Article 52 of the Treaty is not applicable in the case in the main proceedings, since the situation is purely internal to Denmark. Mr and Mrs Bryde, Danish nationals, have formed a company in the United Kingdom which does not carry on any actual business there with the sole purpose of carrying on business in Denmark through a branch and thus of avoiding application of Danish legislation on the formation of private limited companies. It considers that in such circumstances the formation by nationals of one Member State of a company in another Member State does not amount to a relevant external element in the light of Community law and, in particular, freedom of establishment.

17 In this respect, it should be noted that a situation in which a company formed in accordance with the law of a Member State in which it has its registered office desires to set up a branch in another Member State falls within the scope of Community law. In that regard, it is immaterial that the company was formed in the first Member State only for the purpose of establishing itself in the second, where its main, or indeed entire, business is to be conducted (see, to this effect, Segers paragraph 16).

18 That Mrs and Mrs Bryde formed the company Centros in the United Kingdom for the purpose of avoiding Danish legislation requiring that a minimum amount of share capital be paid up has not been denied either in the written observations or at the hearing. That does not, however, mean that the formation by that British company of a branch in Denmark is not covered by freedom of establishment for the purposes of Article 52 and 58 of the Treaty. The question of the application of those articles of the Treaty is different from the question whether or not a Member State may adopt measures in order to prevent attempts by certain of its nationals to evade domestic legislation by having recourse to the possibilities offered by the Treaty.

19 As to the question whether, as Mr and Mrs Bryde claim, the refusal to register in Denmark a branch of their company formed in accordance with the law of another Member State in which it has its registered office constitutes an obstacle to freedom of establishment, it must be borne in mind that that freedom, conferred by Article 52 of the Treaty on Community nationals, includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as are laid down by the law of the Member State of establishment for its own nationals. Furthermore, under Article 58 of the Treaty companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are to be treated in the same way as natural persons who are nationals of Member States.

20 The immediate consequence of this is that those companies are entitled to carry on their business in another Member State through an agency, branch or subsidiary. The location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular State in the same way as does nationality in the case of a natural person (see, to that effect, Segers, paragraph 13, Case 270/83 Commission v France [1986] ECR 273, paragraph 18, Case C-330/91 Commerzbank [1993] ECR I-4017, paragraph 13, and Case C-264/96 ICI [1998] I-4695, paragraph 20).

21 Where it is the practice of a Member State, in certain circumstances, to refuse to register a branch of a company having its registered office in another Member State, the result is that companies formed in accordance with the law of that other Member State are prevented from exercising the freedom of establishment conferred on them by Articles 52 and 58 of the Treaty.

22 Consequently, that practice constitutes an obstacle to the exercise of the freedoms guaranteed by those provisions.

23 According to the Danish authorities, however, Mr and Mrs Bryde cannot rely on those provisions, since the sole purpose of the company formation which they have in mind is to circumvent the application of the national law governing formation of private limited companies and therefore constitutes abuse of the freedom of establishment. In their submission, the Kingdom of Denmark is therefore entitled to take steps to prevent such abuse by refusing to register the branch.

24 It is true that according to the case-law of the Court a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law (see, in particular, regarding freedom to supply services, Case 33/74 Van Binsbergen v Bedrijfsvereniging Metaalnijverheid [1974] ECR 1299, paragraph 13, Case C-148/91 Veronica Omroep Organisatie v Commissariaat voor de Media [1993] ECR I-487, paragraph 12, and Case C-23/93 TV 10 v Commissariaat voor de Media [1994] ECR I-4795, paragraph 21; regarding freedom of establishment, Case 115/78 Knoors [1979] ECR 399, paragraph 25, and Case C-61/89 Bouchoucha [1990] ECR I-3551, paragraph 14; regarding the free movement of goods, Case 229/83 Leclerc and Others v 'Au Blé Vert' and Others [1985] ECR 1, paragraph 27; regarding social security, Case C-206/94 Brennet v Paletta [1996] ECR

I-2357, 'Paletta II', paragraph 24; regarding freedom of movement for workers, Case 39/86 *Lair v Universität Hannover* [1988] ECR 3161, paragraph 43; regarding the common agricultural policy, Case C-8/92 *General Milk Products v Hauptzollamt Hamburg-Jonas* [1993] ECR I-779, paragraph 21, and regarding company law, Case C-367/96 *Kefalas and Others v Greece* [1988] ECR I-2843, paragraph 20).

25 However, although, in such circumstances, the national courts may, case by case, take account - on the basis of objective evidence - of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions (*Paletta II*, paragraph 25).

26 In the present case, the provisions of national law, application of which the parties concerned have sought to avoid, are rules governing the formation of companies and not rules concerning the carrying on of certain trades, professions or businesses. The provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary.

27 That being so, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.

28 In this connection, the fact that company law is not completely harmonised in the Community is of little consequence. Moreover, it is always open to the Council, on the basis of the powers conferred upon it by Article 54(3)(g) of the EC Treaty, to achieve complete harmonisation.

29 In addition, it is clear from paragraph 16 of *Segers* that the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment.

30 Accordingly, the refusal of a Member State to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office on the grounds that the branch is intended to enable the company to carry on all its economic activity in the host State, with the result that the secondary establishment escapes national rules on the provision for and the paying-up of a minimum capital, is incompatible with Articles 52 and 58 of the Treaty, in so far as it prevents any exercise of the right freely to set up a secondary establishment which Articles 52 and 58 are specifically intended to guarantee.

31 The final question to be considered is whether the national practice in question might not be justified for the reasons put forward by the Danish authorities.

32 Referring both to Article 56 of the Treaty and to the case-law of the Court on imperative requirements in the general interest, the Board argues that the requirement that private limited companies provide for and pay up a minimum share capital pursues a dual objective: first, to reinforce the financial soundness of those companies in order to protect public creditors against the risk of seeing the public debts owing to them become irrecoverable since, unlike private creditors, they cannot secure those debts by means of guarantees and, second, and more generally, to protect all creditors, whether

public or private, by anticipating the risk of fraudulent bankruptcy due to the insolvency of companies whose initial capitalisation was inadequate.

33 The Board adds that there is no less restrictive means of attaining this dual objective. The other way of protecting creditors, namely by introducing rules making it possible for shareholders to incur personal liability, under certain conditions, would be more restrictive than the requirement to provide for and pay up a minimum share capital.

34 It should be observed, first, that the reasons put forward do not fall within the ambit of Article 56 of the Treaty. Next, it should be borne in mind that, according to the Court's case-law, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it (see Case C-19/92 Kraus v Land Baden-Württemberg [1993] ECR I-1663, paragraph 32, and Case C-55/94 Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, paragraph 37).

35 Those conditions are not fulfilled in the case in the main proceedings. First, the practice in question is not such as to attain the objective of protecting creditors which it purports to pursue since, if the company concerned had conducted business in the United Kingdom, its branch would have been registered in Denmark, even though Danish creditors might have been equally exposed to risk.

36 Since the company concerned in the main proceedings holds itself out as a company governed by the law of England and Wales and not as a company governed by Danish law, its creditors are on notice that it is covered by laws different from those which govern the formation of private limited companies in Denmark and they can refer to certain rules of Community law which protect them, such as the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11), and the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ 1989 L 395, p. 36).

37 Second, contrary to the arguments of the Danish authorities, it is possible to adopt measures which are less restrictive, or which interfere less with fundamental freedoms, by, for example, making it possible in law for public creditors to obtain the necessary guarantees.

38 Lastly, the fact that a Member State may not refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office does not preclude that first State from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of the company, to evade their obligations towards private or public creditors established on the territory of a Member State concerned. In any event, combating fraud cannot justify a practice of refusing to register a branch of a company which has its registered office in another Member State.

39 The answer to the question referred must therefore be that it is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a

company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.

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**Judgment of the Court
of 14 January 1988**

Commission of the European Communities v Italian Republic.

Failure of a Member State to fulfil its obligations - Nationality requirement for access to social housing and reduced-rate mortgage loans.

Case 63/86.

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FREE MOVEMENT OF PERSONS - FREEDOM OF ESTABLISHMENT - FREEDOM TO PROVIDE SERVICES - ACCESS TO PUBLIC AID FOR HOUSING - EXCLUSION OF NATIONALS OF THE OTHER MEMBER STATES - NOT PERMISSIBLE

(EEC TREATY, ARTS 52 AND 59)

A NATIONAL OF A MEMBER STATE WHO WISHES TO PURSUE AN ACTIVITY AS A SELF-EMPLOYED PERSON IN ANOTHER MEMBER STATE MUST, IF COMPLETE EQUALITY OF COMPETITION WITH THE NATIONALS OF THE LATTER STATE IS TO BE ASSURED, BE ABLE TO OBTAIN HOUSING IN CONDITIONS EQUIVALENT TO THOSE ENJOYED BY SUCH NATIONALS. IN THIS RESPECT, EVEN THOUGH IN PRACTICE THE HOUSING NEEDS OF COMMUNITY NATIONALS WHO MAKE USE OF THE FREEDOMS CONFERRED BY THE TREATY ARE VARIABLE, IT IS NOT PERMISSIBLE, IN THE MATTER OF THE APPLICATION OF THE FUNDAMENTAL PRINCIPLE OF NATIONAL TREATMENT, TO DISTINGUISH BETWEEN DIFFERENT FORMS OF ESTABLISHMENT OR TO EXCLUDE PROVIDERS OF SERVICES.

THAT IS WHY THERE IS AN INFRINGEMENT OF ARTICLES 52 AND 59 OF THE TREATY WHERE A MEMBER STATE, UNDER VARIOUS PROVISIONS OF ITS LEGISLATION, PERMITS ONLY ITS OWN NATIONALS TO PURCHASE AND LEASE HOUSING BUILT OR RENOVATED WITH THE HELP OF PUBLIC FUNDS AND TO OBTAIN REDUCED-RATE MORTGAGE LOANS.

IN **CASE 63/86**

COMMISSION OF THE EUROPEAN COMMUNITIES, REPRESENTED BY GUIDO BERARDIS, A MEMBER OF ITS LEGAL DEPARTMENT, ACTING AS AGENT, ASSISTED BY SILVIO PIERI, AN ITALIAN OFFICIAL WORKING FOR THE COMMISSION UNDER THE SYSTEM OF EXCHANGES OF COMMUNITY AND NATIONAL OFFICIALS, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICE OF G. KREMLIS, ALSO A MEMBER OF ITS LEGAL DEPARTMENT, JEAN MONNET BUILDING, KIRCHBERG,

APPLICANT,

V

ITALIAN REPUBLIC, REPRESENTED BY LUIGI FERRARI BRAVO, HEAD OF THE DEPARTMENT FOR CONTENTIOUS DIPLOMATIC LEGAL AFFAIRS, ACTING AS AGENT, ASSISTED BY PIERGIORGIO FERRI, AVVOCATO DELLO STATO, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE ITALIAN EMBASSY, 5 RUE MARIE-ADELAIDE,

DEFENDANT,

APPLICATION FOR A DECLARATION THAT BY ALLOWING - BY MEANS OF VARIOUS NATIONAL AND REGIONAL LAWS - ONLY ITALIAN NATIONALS TO OBTAIN REDUCED-RATE MORTGAGE LOANS AND TO LEASE AND BE ALLOCATED HOUSING BUILT BY THE PUBLIC SECTOR OR SUBSIDIZED HOUSING, THE ITALIAN REPUBLIC HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER THE EEC TREATY,

THE COURT

COMPOSED OF G. BOSCO, PRESIDENT OF CHAMBER, ACTING FOR THE PRESIDENT, O. DUE AND G. C. RODRIGUEZ IGLESIAS (PRESIDENTS OF CHAMBERS), T. KOOPMANS, U. EVERLING, K. BAHLMANN, Y. GALMOT, C. KAKOURIS, R. JOLIET, T. F. O' HIGGINS AND F. SCHOCKWEILER, JUDGES,

ADVOCATE GENERAL : J. L. DA CRUZ VILACA

REGISTRAR : B. PASTOR, ADMINISTRATOR

HAVING REGARD TO THE REPORT FOR THE HEARING AND FURTHER TO THE HEARING ON 4 JUNE 1987,

HAVING REGARD TO THE OPINION OF THE ADVOCATE GENERAL DELIVERED AT THE HEARING ON 22 OCTOBER 1987

GIVES THE FOLLOWING :

JUDGMENT

1 BY AN APPLICATION LODGED AT THE COURT REGISTRY ON 6 MARCH 1986 THE COMMISSION OF THE EUROPEAN COMMUNITIES BROUGHT AN ACTION UNDER ARTICLE 169 OF THE EEC TREATY FOR A DECLARATION THAT, BY PERMITTING ONLY ITALIAN NATIONALS TO PURCHASE OR LEASE HOUSING BUILT OR RENOVATED WITH THE AID OF PUBLIC FUNDS OR TO OBTAIN REDUCED-RATE MORTGAGE LOANS THE ITALIAN REPUBLIC HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLES 48, 52 AND 59 OF THE EEC TREATY AND ARTICLE 9 (1) OF COUNCIL REGULATION NO 1612/68 OF THE COUNCIL OF 15 OCTOBER 1968 (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1968 (II), P. 475). MORE PRECISELY, THE COMMISSION COMPLAINS THAT THE ITALIAN REPUBLIC DENIES THOSE FACILITIES TO THE NATIONALS OF THE OTHER MEMBER STATES BY MEANS OF THE REQUIREMENT OF ITALIAN NATIONALITY PRESCRIBED IN THE DECREES OF THE PRESIDENT OF THE REPUBLIC NO 655 OF 23 MAY 1964 AND NO 1035 OF 30 DECEMBER 1972, IN LAW NO 33 OF 24 APRIL 1980 OF THE REGION OF PUGLIA, IN LAW NO 38 OF 7 MAY 1980 OF THE REGION OF TUSCANY, IN LAW NO 15 OF 25 MAY 1981 OF THE REGION OF EMILIA-ROMAGNA AND IN THE 10-YEAR PLAN OF THE LATTER REGION FOR RESIDENTIAL HOUSING APPROVED ON 8 SEPTEMBER 1981, AND IN LAW NO 22 OF 23 APRIL 1982 OF THE REGION OF LIGURIA.

2 IT IS APPARENT FROM THE DOCUMENTS BEFORE THE COURT THAT, FOLLOWING A COMPLAINT BY A BELGIAN NATIONAL WHOSE APPLICATION FOR A REDUCED-RATE MORTGAGE LOAN WITH A VIEW TO THE PURCHASE OF A DWELLING IN MORDANO (BOLOGNA) WHERE HE RESIDED AND PURSUED ACTIVITIES AS A SELF-EMPLOYED PERSON WAS REJECTED BY THE AUTHORITIES OF THE REGION OF EMILIA-ROMAGNA, THE COMMISSION SENT A FORMAL NOTICE TO THE ITALIAN GOVERNMENT INITIATING THE PROCEDURE UNDER ARTICLE 169 OF THE EEC TREATY AGAINST THE AFOREMENTIONED LEGISLATION ON THE GROUND THAT IT WAS CONTRARY TO ARTICLES 48, 52 AND 59 OF THE TREATY AND TO REGULATION NO 1612/68 OF THE COUNCIL.

3 ON 16 APRIL 1985 THE COMMISSION SENT TO THE ITALIAN GOVERNMENT THE REASONED OPINION PROVIDED FOR IN THE FIRST PARAGRAPH OF ARTICLE 169 OF THE TREATY.

4 BY TELEX MESSAGE OF 24 APRIL 1985 THE ITALIAN GOVERNMENT DREW THE COMMISSION'S ATTENTION TO THE FACT THAT IT HAD ALREADY, IN DECEMBER 1984, FORWARDED TO THE COMMISSION A COPY OF A MINISTERIAL CIRCULAR DATED 24 NOVEMBER 1984 ACCORDING TO WHICH NATIONALS OF THE MEMBER STATES OF THE COMMUNITY WHO

PURSUED THEIR MAIN OCCUPATION IN ITALY AND RESIDED THERE WERE TO BE TREATED IN ALL RESPECTS IN THE SAME WAY AS ITALIAN NATIONALS WITH REGARD TO ACCESS TO SOCIAL HOUSING.

5 ON 4 SEPTEMBER 1985 THE COMMISSION ISSUED A SUPPLEMENTARY OPINION IN WHICH IT TOOK THE VIEW THAT THE AFORESAID CIRCULAR WAS NOT SUFFICIENT TO PUT AN END TO THE INFRINGEMENT ON THE GROUND, IN PARTICULAR, THAT IT WAS NOT BINDING ON THE REGIONAL AUTHORITIES AND HAD NOT BEEN MADE THE SUBJECT OF AN APPROPRIATE PUBLICATION.

6 IN THE COURSE OF THE WRITTEN PROCEDURE BEFORE THE COURT THE ITALIAN GOVERNMENT ACKNOWLEDGED THE INADEQUACY OF THE MINISTERIAL CIRCULAR AND ON 15 MAY 1987 THE PRESIDENT OF THE ITALIAN COUNCIL OF MINISTERS ADOPTED A DECREE UNDER WHICH THE NATIONALS OF THE OTHER MEMBER STATES OF THE COMMUNITY RESIDING IN ITALY, IN EMPLOYMENT THERE AND FULFILLING THE SUBJECTIVE AND OBJECTIVE CONDITIONS LAID DOWN IN THE LEGISLATION ON SOCIAL HOUSING ARE DEEMED TO BE ITALIAN NATIONALS FOR THE PURPOSES OF THAT LEGISLATION.

7 AT THE HEARING THE AGENT OF THE COMMISSION, HAVING NOTED THAT THE AFORESAID DECREE WAS ALSO BINDING ON THE REGIONAL AUTHORITIES AND HAD BEEN PUBLISHED IN THE GAZZETTA UFFICIALE DELLA REPUBBLICA ITALIANA, STATED THAT THE ACTION HAD THUS BECOME DEVOID OF PURPOSE AS REGARDS THE RELATIONS BETWEEN THE LEGISLATION AT ISSUE AND THE COMMUNITY PROVISIONS CONTAINED IN ARTICLE 48 OF THE TREATY AND IN REGULATION NO 1612/68 . THE COMMISSION THEREFORE DISCONTINUED THE PROCEEDINGS SO FAR AS THAT POINT WAS CONCERNED.

8 REFERENCE IS MADE TO THE REPORT FOR THE HEARING FOR A FULLER ACCOUNT OF THE ITALIAN LEGISLATION, THE PROCEDURE AND THE SUBMISSIONS AND ARGUMENTS OF THE PARTIES, WHICH ARE MENTIONED OR DISCUSSED HEREINAFTER ONLY IN SO FAR AS IS NECESSARY FOR THE REASONING OF THE COURT .

9 WITH A VIEW TO DELIMITING THE SUBJECT-MATTER OF THE DISPUTE IT SHOULD BE OBSERVED THAT THE ACTION IS CONCERNED ONLY WITH THE NATIONALITY REQUIREMENT LAID DOWN BY THE ITALIAN LEGISLATION ON SOCIAL HOUSING . AS THE COMMISSION ACKNOWLEDGED AT THE HEARING, THE OTHER CONDITIONS PRESCRIBED BY THAT LEGISLATION ARE NOT AT ISSUE. ACCORDINGLY, AFTER THE AFOREMENTIONED DECREE OF THE PRESIDENT OF THE ITALIAN COUNCIL OF MINISTERS OF 15 MAY 1987 AND THE COMMISSION' S WITHDRAWAL OF PART OF ITS CONCLUSIONS, THE ONLY PROBLEM PRESENTED BY THIS CASE IS WHETHER IN THE FIELD OF APPLICATION OF ARTICLES 52 AND 59 OF THE TREATY COMMUNITY LAW PROHIBITS THE RESERVATION OF ACCESS TO SOCIAL HOUSING FOR NATIONALS OF THE STATE IN POINT.

10 ON THAT POINT THE ITALIAN GOVERNMENT CONTENDS THAT THERE IS NO DIRECT LINK BETWEEN THE PURSUIT OF OCCUPATIONS AND THE RIGHT OF ACCESS TO SOCIAL HOUSING OR A REDUCED-RATE MORTGAGE LOAN WITH A VIEW TO THE CONSTRUCTION OR ACQUISITION OF SUCH HOUSING. THE NATIONALITY CONDITION IN QUESTION DOES NOT CONSTITUTE A RESTRICTION ON THE RIGHT OF ESTABLISHMENT OR ON THE FREEDOM TO PROVIDE SERVICES. ALL IT DOES IS TO LIMIT A FACILITY WHICH COULD ENCOURAGE AND MAKE EASIER THE EXERCISE OF THOSE RIGHTS. THE OBLIGATIONS WHICH FLOW FROM ARTICLES 52 AND 59 OF THE TREATY, AS INTERPRETED BY THE COURT, DO NOT EXTEND TO SUCH FACILITIES IN THE RESPECT OF WHICH THE ABOLITION OF NATIONALITY CONDITIONS WOULD PRESUPPOSE A COORDINATION OF NATIONAL LEGISLATION AS LAID DOWN IN REGULATION NO 1612/68 WITH RESPECT TO EMPLOYED

PERSONS.

11 AT THE HEARING THE ITALIAN GOVERNMENT ACKNOWLEDGED, HOWEVER, THAT THE NATIONALITY CONDITION IN QUESTION COULD BE REGARDED AS CONTRARY TO ARTICLE 52 OF THE TREATY AS REGARDS THE RIGHT OF ESTABLISHMENT IN RESPECT OF A MAIN ACTIVITY. ON THE OTHER HAND, AS REGARDS THE "SECONDARY" RIGHT OF ESTABLISHMENT AND THE FREEDOM TO PROVIDE SERVICES THE ITALIAN GOVERNMENT MAINTAINS THAT THE EXERCISE OF THOSE RIGHTS DOES NOT IMPLY THE PERMANENT PRESENCE OF THE PERSON CONCERNED IN THE PLACE WHERE THE OCCUPATION IS PURSUED. IT CANNOT THEREFORE BE THE CASE THAT THE COMMUNITY RULES ON NON-DISCRIMINATION APPLY TO THE ACCESS OF SUCH PERSONS TO SOCIAL HOUSING. FURTHERMORE, THOSE PERSONS CANNOT SATISFY THE OTHER CONDITIONS LAID DOWN BY THE LEGISLATION IN QUESTION WHICH ARE NOT DISCRIMINATORY AND ARE LINKED TO THE SOCIAL OBJECTIVES OF THAT LEGISLATION.

12 IN RESPONSE TO THOSE ARGUMENTS IT SHOULD BE POINTED OUT THAT ARTICLES 52 AND 59 OF THE TREATY ARE ESSENTIALLY INTENDED TO GIVE EFFECT, IN THE FIELD OF ACTIVITIES AS SELF-EMPLOYED PERSONS, TO THE PRINCIPLE OF EQUAL TREATMENT ENSHRINED IN ARTICLE 7 ACCORDING TO WHICH "WITHIN THE SCOPE OF APPLICATION OF THIS TREATY, AND WITHOUT PREJUDICE TO ANY SPECIAL PROVISIONS CONTAINED THEREIN, ANY DISCRIMINATION ON GROUNDS OF NATIONALITY SHALL BE PROHIBITED".

13 THOSE TWO ARTICLES ARE THUS INTENDED TO SECURE THE BENEFIT OF NATIONAL TREATMENT FOR A NATIONAL OF A MEMBER STATE WHO WISHES TO PURSUE AN ACTIVITY AS A SELF-EMPLOYED PERSON IN ANOTHER MEMBER STATE AND THEY PROHIBIT ALL DISCRIMINATION ON GROUNDS OF NATIONALITY RESULTING FROM NATIONAL OR REGIONAL LEGISLATION AND PREVENTING THE TAKING UP OR PURSUIT OF SUCH AN ACTIVITY.

14 AS IS APPARENT FROM THE GENERAL PROGRAMMES WHICH WERE ADOPTED BY THE COUNCIL ON 18 DECEMBER 1961 (JOURNAL OFFICIEL 1962, PP. 32 AND 36) AND WHICH, AS THE COURT HAS POINTED OUT ON NUMEROUS OCCASIONS, PROVIDE USEFUL GUIDANCE WITH A VIEW TO THE IMPLEMENTATION OF THE PROVISIONS OF THE TREATY RELATING TO THE RIGHT OF ESTABLISHMENT AND THE FREEDOM TO PROVIDE SERVICES, THE AFORESAID PROHIBITION IS CONCERNED NOT SOLELY WITH THE SPECIFIC RULES ON THE PURSUIT OF OCCUPATIONAL ACTIVITIES BUT ALSO WITH THE RULES RELATING TO THE VARIOUS GENERAL FACILITIES WHICH ARE OF ASSISTANCE IN THE PURSUIT OF THOSE ACTIVITIES. AMONG THE EXAMPLES MENTIONED IN THE TWO PROGRAMMES ARE THE RIGHT TO PURCHASE, EXPLOIT AND TRANSFER REAL AND PERSONAL PROPERTY AND THE RIGHT TO OBTAIN LOANS AND IN PARTICULAR TO HAVE ACCESS TO THE VARIOUS FORMS OF CREDIT.

15 FOR A NATURAL PERSON THE PURSUIT OF AN OCCUPATION DOES NOT PRESUPPOSE SOLELY THE POSSIBILITY OF ACCESS TO PREMISES FROM WHICH THE OCCUPATION CAN BE PURSUED, IF NECESSARY BY BORROWING THE AMOUNT NEEDED TO PURCHASE THEM, BUT ALSO THE POSSIBILITY OF OBTAINING HOUSING. IT FOLLOWS THAT RESTRICTIONS CONTAINED IN THE HOUSING LEGISLATION APPLICABLE TO THE PLACE WHERE THE OCCUPATION IS PURSUED ARE LIABLE TO CONSTITUTE AN OBSTACLE TO THAT PURSUIT.

16 IF COMPLETE EQUALITY OF COMPETITION IS TO BE ASSURED, THE NATIONAL OF A MEMBER STATE WHO WISHES TO PURSUE AN ACTIVITY AS A SELF-EMPLOYED PERSON IN ANOTHER MEMBER STATE MUST THEREFORE BE ABLE TO OBTAIN HOUSING IN CONDITIONS EQUIVALENT TO THOSE ENJOYED BY THOSE OF HIS COMPETITORS WHO ARE NATIONALS

OF THE LATTER STATE. ACCORDINGLY, ANY RESTRICTION PLACED NOT ONLY ON THE RIGHT OF ACCESS TO HOUSING BUT ALSO ON THE VARIOUS FACILITIES GRANTED TO THOSE NATIONALS IN ORDER TO ALLEVIATE THE FINANCIAL BURDEN MUST BE REGARDED AS AN OBSTACLE TO THE PURSUIT OF THE OCCUPATION ITSELF.

17 THAT BEING SO, HOUSING LEGISLATION, EVEN WHERE IT CONCERNS SOCIAL HOUSING, MUST BE REGARDED AS PART OF THE LEGISLATION THAT IS SUBJECT TO THE PRINCIPLE OF NATIONAL TREATMENT WHICH RESULTS FROM THE PROVISIONS OF THE TREATY CONCERNING ACTIVITIES AS SELF-EMPLOYED PERSONS .

18 IT IS TRUE, AS THE ITALIAN GOVERNMENT HAS CONTENDED, THAT IN PRACTICE NOT ALL INSTANCES OF ESTABLISHMENT GIVE RISE TO THE SAME NEED TO FIND PERMANENT HOUSING AND THAT AS A RULE THAT NEED IS NOT FELT IN THE CASE OF THE PROVISION OF SERVICES. IT IS ALSO TRUE THAT IN MOST CASES THE PROVIDER OF SERVICES WILL NOT SATISFY THE CONDITIONS, OF A NON-DISCRIMINATORY NATURE, BOUND UP WITH THE OBJECTIVES OF THE LEGISLATION ON SOCIAL HOUSING.

19 HOWEVER, IT CANNOT BE HELD TO BE A PRIORI OUT OF THE QUESTION THAT A PERSON, WHILST RETAINING HIS PRINCIPAL PLACE OF ESTABLISHMENT IN ONE MEMBER STATE, MAY BE LED TO PURSUE HIS OCCUPATIONAL ACTIVITIES IN ANOTHER MEMBER STATE FOR SUCH AN EXTENDED PERIOD THAT HE NEEDS TO HAVE PERMANENT HOUSING THERE AND THAT HE MAY SATISFY THE CONDITIONS OF A NON-DISCRIMINATORY NATURE FOR ACCESS TO SOCIAL HOUSING. IT FOLLOWS THAT NO DISTINCTION CAN BE DRAWN BETWEEN DIFFERENT FORMS OF ESTABLISHMENT AND THAT PROVIDERS OF SERVICES CANNOT BE EXCLUDED FROM THE BENEFIT OF THE FUNDAMENTAL PRINCIPLE OF NATIONAL TREATMENT.

20 IT MUST THEREFORE BE HELD THAT, BY PERMITTING, UNDER VARIOUS PROVISIONS OF ITS LEGISLATION, ONLY ITALIAN NATIONALS TO PURCHASE OR LEASE HOUSING BUILT OR RENOVATED WITH THE HELP OF PUBLIC FUNDS AND TO OBTAIN REDUCED-RATE MORTGAGE LOANS, THE ITALIAN REPUBLIC HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLES 52 AND 59 OF THE EEC TREATY.

COSTS

21 UNDER ARTICLE 69 (2) OF THE RULES OF PROCEDURE THE UNSUCCESSFUL PARTY IS TO BE ORDERED TO PAY THE COSTS ASKED FOR IN THE SUCCESSFUL PARTY' S PLEADING. ACCORDING TO ARTICLE 69 (4) A PARTY WHO DISCONTINUES OR WITHDRAWS FROM PROCEEDINGS IS TO BE ORDERED TO PAY THE COSTS UNLESS THE DISCONTINUANCE OR WITHDRAWAL IS JUSTIFIED BY THE CONDUCT OF THE OTHER PARTY.

22 AT THE HEARING THE COMMISSION ABANDONED ONE OF THE HEADS OF CLAIM IN ITS APPLICATION BECAUSE THE ITALIAN REPUBLIC HAD COMPLIED WITH ITS OBLIGATIONS IN THAT RESPECT AFTER THE INSTITUTION OF THE PROCEEDINGS.

23 IT FOLLOWS THAT THE PARTIAL WITHDRAWAL BY THE COMMISSION IS JUSTIFIED BY THE CONDUCT OF THE ITALIAN REPUBLIC WHICH MOREOVER HAS BEEN UNSUCCESSFUL SO FAR AS THE REMAINDER OF THE ACTION IS CONCERNED.

24 THE ITALIAN REPUBLIC MUST THEREFORE BE ORDERED TO PAY THE COSTS.

ON THOSE GROUNDS,

THE COURT

HEREBY :

- (1) DECLARES THAT BY PERMITTING, UNDER VARIOUS PROVISIONS OF ITS LEGISLATION, ONLY ITALIAN NATIONALS TO PURCHASE OR LEASE HOUSING BUILT OR RENOVATED WITH THE HELP OF PUBLIC FUNDS AND TO OBTAIN REDUCED-RATE MORTGAGE LOANS THE ITALIAN REPUBLIC HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLES 52 AND 59 OF THE EEC TREATY.
- (2) ORDERS THE ITALIAN REPUBLIC TO PAY THE COSTS.

DOCNUM 61986J0063

AUTHOR Court of Justice of the European Communities

FORM Judgment

TREATY European Economic Community

TYPDOC 6 ; CJUS ; cases ; 1986 ; J ; judgment

PUBREF European Court reports 1988 Page 00029

DOC 1988/01/14

LODGED 1986/03/06

JURCIT 11957E007 : N 12
11957E048 : N 1 7
11957E052 : N 1 9 - 13 20
11957E059 : N 1 9 - 13 20
31959X0301-A69P4 : N 21
31961X1201 : N 14
31961X1202 : N 14
31968R1612-A09P1 : N 1
31968R1612 : N 7

CONCERNS Failure concerning 11957E052
Failure concerning 11957E059

SUB Freedom of establishment and services ; Right of establishment ; Free movement of services

AUTLANG Italian

APPLICA Commission ; Institutions

DEFENDA Italy ; Member States

NATIONA	Italy
NOTES	X: Gaceta Jurídica de la CEE - Boletín 1988 no 30 p.35-36 Boutard-Labarde, Marie-Chantal: Journal du droit international 1988 p.508-510 Boutard-Labarde, Marie-Chantal: La Semaine juridique - édition générale 1988 II 21140
PROCEDU	Proceedings concerning failure by Member State - successful
ADVGEN	Vilaça
JUDGRAP	Due
DATES	of document: 14/01/1988 of application: 06/03/1986

**Judgment of the Court
of 7 July 1992**

**Mario Vicente Micheletti and others v Delegacion del Gobierno en Cantabria.
Reference for a preliminary ruling: Tribunal Superior de Justicia de Cantabria - Spain.
Freedom of establishment - Persons eligible - Dual nationality.
Case C-369/90.**

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Freedom of movement for persons ° Freedom of establishment ° Community rules ° Class of persons covered ° National of a Member State possessing at the same time the nationality of a non-member country ° Included

(EEC Treaty, Art. 52; Council Directive 73/148)

The provisions of Community law concerning freedom of establishment preclude a Member State from withholding that freedom from a national of another Member State who at the same time possesses the nationality of a non-member country, on the ground that the legislation of the host State deems him to be a national of the non-member country.

Whenever a Member State, having due regard to Community law, has granted its nationality to a person, another Member State may not, by imposing an additional condition for its recognition, restrict the effects of the grant of that nationality with a view to the exercise of a fundamental freedom provided for in the Treaty, particularly since the consequence of allowing such a possibility would be that the class of persons to whom the Community rules on freedom of establishment were applied might vary from one Member State to another.

In Case C-369/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal Superior de Justicia, Cantabria, for a preliminary ruling in the proceedings pending before that court between

Mario Vicente Micheletti and Others

and

Delegacion del Gobierno en Cantabria

on the interpretation of Articles 3(c), 7, 52, 53 and 56 of the EEC Treaty and Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14), and of the corresponding provisions of secondary legislation on freedom of movement and freedom of establishment for persons,

THE COURT,

composed of: O. Due, President, F.A. Schockweiler, F. Grévisse and P.J.G. Kapteyn (Presidents of Chambers), G.F. Mancini, C.N. Kakouris, J.C. Moitinho de Almeida, G.C. Rodríguez Iglesias, M. Díez de Velasco, M. Zuleeg and J.L. Murray, Judges,

Advocate General: G. Tesauró,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

° Mario Vicente Micheletti, by María del Carmen Simon-Altuna Moreno, Procuradora de los Tribunales, and Miguel Trueba Arguiñarena, of the Cantabria Bar,

° the Spanish Government, by Carlos Bastarreche Sagúes, Director-General for Community Legal

and Institutional Co-ordination, and Antonio Hierro Hernandez-Mora, Abogado del Estado, a member of the State Legal Department for matters before the Court of Justice, acting as Agents,

° the Italian Government, by Luigi Ferrarini Bravo, Head of the Department for Legal Affairs at the Ministry of Foreign Affairs, acting as Agent, assisted by Giorgio Ferri, Avvocato dello Stato,

° the Commission of the European Communities, by Etienne Lasnet, Legal Adviser, and Daniel Calleja, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the plaintiff in the main proceedings, the Spanish Government, represented by Gloria Calvo Díaz, acting as Agent, and the Commission, at the hearing on 3 December 1991,

after hearing the Opinion of the Advocate General at the sitting on 30 January 1992,

gives the following

Judgment

1 By order of 1 December 1990, which was received at the Court on 14 December 1990, the Tribunal Superior de Justicia (High Court), Cantabria, referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 3(c), 7, 52, 53 and 56 of the EEC Treaty and Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14).

2 The question was raised in proceedings between Mario Vicente Micheletti and the Delegacion del Gobierno (Regional Office of the Ministry of the Interior), Cantabria. Mr Micheletti has dual Argentine and Italian nationality, having acquired the latter in accordance with Article 1 of Law No 555 of 13 June 1912 (*Gazzetta Ufficiale della Repubblica Italiana* of 30 June 1912), which, as amended by Article 5 of Law No 123 of 21 April 1983 (*Gazzetta Ufficiale della Repubblica Italiana* of 26 April 1983), provides that the child of an Italian mother or father is an Italian citizen.

3 It is apparent from the order for reference that on 13 January 1989 the Spanish Ministry of Education and Science officially recognized Mr Micheletti's university degree in dentistry under a cultural cooperation agreement between Spain and Argentina. On 3 March 1989, Mr Micheletti applied to the Spanish authorities for a temporary Community residence card, submitting for that purpose a valid Italian passport issued by the Italian Consulate in Rosario, Argentina. On 23 March 1989, the Spanish authorities issued the card requested, which was valid for a period of six months.

4 Before the expiry of that period, Mr Micheletti applied to the Spanish authorities for a permanent residence card as a Community national in order to set up as a dentist in Spain. That application and a subsequent administrative appeal were dismissed, whereupon he brought proceedings before the national court for the annulment of the Spanish authorities' decision, recognition of his right to obtain a Community national's residence card enabling him to practise as a dentist and the issue of residence cards for the members of his family.

5 The Spanish authorities' decision was based on Article 9 of the Spanish Civil Code, according to which, in cases of dual nationality where neither nationality is Spanish, the nationality corresponding to the habitual residence of the person concerned before his arrival in Spain is to take precedence, that being Argentine nationality in the case of the plaintiff in the main proceedings.

6 The national court, considering that the solution of the dispute called for an interpretation of Community law, stayed the proceedings and referred the following question to the Court for a preliminary ruling:

"May Articles 3(c), 7, 52, 53 and 56 of the EEC Treaty, and Directive 73/148 and the relevant provisions of secondary law on the free movement of persons and freedom of establishment be interpreted as being compatible and thus as allowing the application of domestic legislation which does not recognize the 'Community rights' inherent in a person's status as a national of another Member State of the EEC merely because that person simultaneously possesses the nationality of a non-member country and that country was the place of his habitual residence, his last residence or his actual residence?"

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 The national court's question seeks essentially to determine whether the provisions of Community law concerning freedom of establishment preclude a Member State from denying a national of another Member State who possesses at the same time the nationality of a non-member country entitlement to that freedom on the ground that the law of the host State deems him to be a national of the non-member country.

9 In answering that question, it must be borne in mind that Article 52 of the Treaty grants freedom of establishment to persons who are "nationals of a Member State".

10 Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. However, it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.

11 Consequently, it is not permissible to interpret Article 52 of the Treaty to the effect that, where a national of a Member State is also a national of a non-member country, the other Member States may make recognition of the status of Community national subject to a condition such as the habitual residence of the person concerned in the territory of the first Member State.

12 That conclusion is reinforced by the fact that the consequence of allowing such a possibility would be that the class of persons to whom the Community rules on freedom of establishment were applied might vary from one Member State to another.

13 In keeping with that interpretation, Directive 73/148 provides that Member States are to grant to the persons referred to in Article 1 the right to enter their territory merely on production of a valid identity card or passport (Article 3) and are to issue a residence card or permit to such persons, and to those mentioned in Article 4, upon production, in particular, of the document with which they entered their territory (Article 6).

14 Thus, once the persons concerned have produced one of the documents mentioned in Directive 73/148 in order to establish their status as nationals of a Member State, the other Member States are not entitled to challenge that status on the ground that the persons concerned might also have the nationality of a non-member country which, under the legislation of the host Member State, overrides that of the Member State.

15 The answer to the question submitted must therefore be that the provisions of Community law on freedom of establishment preclude a Member State from denying a national of another Member State who possesses at the same time the nationality of a non-member country entitlement to that

freedom on the ground that the law of the host State deems him to be a national of the non-member country.

Costs

16 The costs incurred by the Spanish and Italian Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Tribunal Superior de Justicia de Cantabria by order of 1 December 1990, hereby rules:

The provisions of Community law on freedom of establishment preclude a Member State from denying a national of another Member State who possesses at the same time the nationality of a non-member country entitlement to that freedom on the ground that the law of the host State deems him to be a national of the non-member country.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
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TYPDOC	6 ; CJUS ; cases ; 1990 ; J ; judgment
PUBREF	European Court reports 1992 Page I-04239 Swedish special edition XIII Page I-00011 Finnish special edition XIII Page I-00011
DOC	1992/07/07
LODGED	1990/12/14
JURCIT	11957E052 : N 9 - 15 31973L0148-A01 : N 13 31973L0148-A03 : N 13 31973L0148-A04 : N 13 31973L0148-A06 : N 13
CONCERNS	Interprets 11957E052
SUB	Freedom of establishment and services ; Right of establishment

AUTLANG	Spanish
OBSERV	Spain ; Italy ; Commission ; Member States ; Institutions
NATIONA	Spain
NATCOUR	*A9* Tribunal Superior de Justicia de Cantabria, Sala de lo Contencioso-Administrativo, auto de 01/12/1990 *P1* Tribunal Superior de Justicia de Cantabria, Sala de lo Contencioso-Administrativo, sentencia de 21/09/1992
NOTES	Cartou, Louis: Les petites affiches 1993 no 1 p.18-19 X: Gaceta Jurídica de la C.E. y de la Competencia - Boletín 1993 no 81 p.29-31 Ruzié, David: Revue générale de droit international public 1993 p.107-120 Borràs Rodríguez, Alegría: Revista Jurídica de Catalunya 1993 p.584-587 Jessurun d'Oliveira, Hans Ulrich: Common Market Law Review 1993 p.623-637 Boutard-Labarde, Marie-Chantal: Journal du droit international 1993 p.430-431 Iglesias Buhigues, José Luis: Hacia un nuevo orden internacional y europeo. Estudios en homenaje al profesor don Manuel Díez de Velasco (Ed. Tecnos - Madrid) 1993 p.953-967 Bouza I Vidal, Nuria: Revista de Instituciones Europeas 1993 p.563-581 Espinar Vicente, José María: La ley - Comunidades Europeas 1994 no 84 p.1-5 De Groot, Gerard-René: Migrantenrecht 1998 p.123
PROCEDU	Reference for a preliminary ruling
ADVGEN	Tesauro
JUDGRAP	Moitinho de Almeida
DATES	of document: 07/07/1992 of application: 14/12/1990

**Judgment of the Court
of 12 May 1998**

María Martínez Sala v Freistaat Bayern.

Reference for a preliminary ruling: Bayerisches Landessozialgericht - Germany.

**Articles 8A, 48 and 51 of the EC Treaty - Definition of 'worker' - Article 4 of Regulation (EEC) No 1408/71 - Child-raising allowance - Definition of 'family benefit'- Article 7(2) of Regulation (EEC) No 1612/68 - Definition of 'social advantage' - Requirement of possession of a residence permit or authorization.
Case C-85/96.**

1 Social security for migrant workers - Community rules - Scope *ratione materiae* - Child-raising allowance intended to meet family expenses of the recipient, granted on the basis of objective and legally defined criteria - Whether included

(Council Regulation No 1408/71, Art. 4(1)(h))

2 Freedom of movement for persons - Workers - Equal treatment - Social advantages - Definition - Child-raising allowance intended to meet family expenses of the recipient, granted on the basis of objective and legally defined criteria - Whether included

(Council Regulation 1612/68, Art. 7(2))

3 Freedom of movement for persons - Workers - Definition of worker - Definition varying according to area in which it is applied - Worker within the meaning of Article 48 of the Treaty and Regulation No 1612/68 - Definition - Employed person within the meaning of Regulation No 1408/71 - Definition

(EC Treaty, Arts 48 and 51; Council Regulations Nos 1612/68 and 1408/71, Arts 1(a) and 2))

4 Citizenship of the European Union - Treaty provisions - Scope *ratione personae* - National of one Member State lawfully residing on the territory of another Member State - Whether included - Effect - Benefit of rights attaching to the status of citizen of the European Union

(EC Treaty, Arts 6 and 8(2))

5 Community law - Principles - Equal treatment - Discrimination on grounds of nationality - Child-raising allowance - Conditions for granting - National rules requiring only nationals of other Member States to produce a residence permit - Not permissible

(EC Treaty, Art. 6)

1 A benefit such as the child-raising allowance, which is automatically granted to persons fulfilling certain objective criteria, without any individual and discretionary assessment of personal needs, and which is intended to meet family expenses, falls within the scope *ratione materiae* of Community law as a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71.

2 A benefit such as the child-raising allowance, which is automatically granted to persons fulfilling certain objective criteria, without any individual and discretionary assessment of personal needs, and which is intended to meet family expenses, falls within the scope *ratione materiae* of Community law as a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.

The concept of social advantage covers all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community

3 There is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied. For instance, the definition of worker used in the context

of Article 48 of the Treaty and Regulation No 1612/68 does not necessarily coincide with the definition applied in relation to Article 51 of the Treaty and Regulation No 1408/71.

In the context of Article 48 of the Treaty and Regulation No 1612/68, a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration must be considered to be a worker.

On the other hand, a person has the status of employed person within the meaning of Regulation No 1408/71 where he is covered, even if only in respect of a single risk, compulsorily or on an optional basis, by a general or special social security scheme mentioned in Article 1(a) of Regulation No 1408/71, irrespective of the existence of an employment relationship.

4 A national of a Member State lawfully residing in the territory of another Member State comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship and can rely on the rights laid down by the Treaty which Article 8(2) attaches to the status of citizen of the Union, including the right, laid down in Article 6, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty.

5 Community law precludes a Member State from requiring nationals of other Member States authorised to reside in its territory to produce a formal residence permit issued by the national authorities in order to receive a child-raising allowance, whereas that Member State's own nationals are only required to be permanently or ordinarily resident in that Member State.

For the purposes of the grant of the benefit in question, possession of a residence permit cannot be constitutive of the right to the benefit when, for the purposes of recognition of the right of residence, it has only declaratory and probative force.

In Case [C-85/96](#),

REFERENCE to the Court under Article 177 of the EC Treaty by the Bayerisches Landessozialgericht (Higher Social Court of Bavaria) (Germany) for a preliminary ruling in the proceedings pending before that court between

María Martínez Sala

and

Freistaat Bayern

on the interpretation of Articles 1, 2, 3(1) and 4(1)(h) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EEC) No 3427/89 of 30 October 1989 (OJ 1989 L 331, p. 1), and of Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm and M. Wathelet (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, P.J.G. Kapteyn, J.L. Murray, D.A.O. Edward (Rapporteur), J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón, Judges,

Advocate General: A. La Pergola,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mrs Martínez Sala, by Antonio Pérez Garrido, Leiter der Rechtsstelle at the Spanish Embassy in Bonn,
- the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat in that Ministry, acting as Agents,
- the Spanish Government, by D. Luis Pérez de Ayala Becerril, Abogado del Estado, State Legal Service, acting as Agent,
- the Commission of the European Communities, by Peter Hillenkamp, Legal Adviser, and Klaus-Dieter Borchardt, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Martínez Sala, represented by Antonio Pérez Garrido; of the German Government, represented by Ernst Röder; of the Spanish Government, represented by D. Luis Pérez de Ayala Becerril; of the French Government, represented by Claude Chavance, Foreign Affairs Secretary at the Foreign Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; of the United Kingdom Government, represented by Stephen Richards, Barrister; and of the Commission, represented by Klaus-Dieter Borchardt, at the hearing on 15 April 1997,

after hearing the Opinion of the Advocate General at the sitting on 1 July 1997,

gives the following

Judgment

Costs

66 The costs incurred by the German, Spanish, French and United Kingdom Governments, and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bayerisches Landessozialgericht by order of 2 February 1996, hereby rules:

1. A benefit such as the child-raising allowance provided for by the Bundeserziehungsgeldgesetz, which is automatically granted to persons fulfilling certain objective criteria, without any individual and discretionary assessment of personal needs, and which is intended to meet family expenses, falls within the scope *ratione materiae* of Community law as a family benefit within the meaning of Article 4(1)(h) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, as amended by Council Regulation (EEC) No 3427/89 of 30 October 1989 and as a social advantage within the meaning of Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community.
2. It is for the referring court to determine whether a person such as the appellant in the main proceedings comes within the scope *ratione personae* of Article 48 of the EC Treaty and of Regulation No 1612/68 or of Regulation No 1408/71.
3. Community law precludes a Member State from requiring nationals of other Member States authorised to reside in its territory to produce a formal residence permit issued by the national authorities

in order to receive a child-raising allowance, whereas that Member State's own nationals are only required to be permanently or ordinarily resident in that Member State.

1 By order of 2 February 1996, received by the Court on 20 March, the Bayerisches Landessozialgericht referred to the Court for a preliminary ruling pursuant to Article 177 of the EC Treaty four questions on the interpretation of Articles 1, 2, 3(1) and 4(1)(h) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EEC) No 3427/89 of 30 October 1989 (OJ 1989 L 331, p. 1), and on the interpretation of Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

2 The four questions were raised in proceedings between Mrs Martínez Sala and Freistaat Bayern (State of Bavaria) concerning the latter's refusal to grant her child-raising allowance for her child.

Community law

3 Article 7(2) of Regulation No 1612/68 provides that a worker who is a national of a Member State is to enjoy, in the territory of other Member States, the same social and tax advantages as national workers.

4 Under Article 1(a)(i) of Regulation No 1408/71, the terms 'employed person' and 'self-employed person' mean, for the purposes of the implementation of that regulation, any person 'who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed persons or self-employed persons'. Article 2 provides that the regulation is to 'apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States'.

5 Article 3(1) of Regulation No 1408/71 provides: 'Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'

6 Article 4(1)(h) of Regulation No 1408/71 provides that the regulation is to apply 'to all legislation concerning... family benefits'. According to Article 1(u)(i), 'family benefits' means 'all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4(1)(h), excluding the special childbirth allowances mentioned in Annex II'.

7 According to Annex I, point I - 'Employed persons and/or self-employed persons (Article 1(a)(ii) and (iii) of the Regulation)', C ('Germany') -, to Regulation No 1408/71,

'If the competent institution for granting family benefits in accordance with Chapter 7 of Title III of the Regulation is a German institution, then within the meaning of Article 1(a)(ii) of the Regulation:

- (a) "employed person" means any person compulsorily insured against unemployment or any person who, as a result of such insurance, obtains cash benefits under sickness insurance or comparable benefits;
- (b) "self-employed person" means any person pursuing self-employment who is bound:
 - to join, or pay contributions in respect of, an old-age insurance within a scheme for self-employed persons, or
 - to join a scheme within the framework of compulsory pension insurance.'

The German legislation and the European Convention on Social and Medical Assistance

8 German child-raising allowance is a non-contributory benefit forming part of a set of family-policy measures. It is granted pursuant to the Bundeserziehungsgeldgesetz of 6 December 1985 (Federal Law on the Grant of Child-raising Allowance and Parental Leave, BGBl. I, p. 2154, hereinafter 'the BErzGG').

9 Paragraph 1(1) of the BErzGG, in the version thereof dated 25 July 1989 (BGBl. I, p. 1550), as amended by the Law of 17 December 1990 (BGBl. I, p. 2823), provides that any person who (1) is permanently or ordinarily resident in the territory to which the Law applies, (2) has a dependent child in his household, (3) looks after and brings up that child, and (4) has no, or no full-time, employment, is entitled to child-raising allowance.

10 Article 1(1)(a) of the BErzGG provides that 'a non-national wishing to receive the allowance must be in possession of a residence entitlement (Aufenthaltsberechtigung) or a residence permit (Aufenthaltsurlaubnis)'. The referring court points out that the Bundessozialgericht (Federal Social Court) has consistently held that a person is 'in possession' of a residence entitlement only if he has a document from the Foreigners' Office duly attesting his right of residence at the start of the benefit period; mere confirmation that an application for a residence permit has been made and that the person concerned is therefore entitled to stay is not sufficient for that person to be considered to be in possession of a residence entitlement within the meaning of that legislation.

11 According to Article 1 of the European Convention on Social and Medical Assistance adopted by the Council of Europe on 11 December 1953 and in force since 1956 in Germany and since 1983 in Spain, 'each of the Contracting Parties undertakes to ensure that nationals of the other Contracting Parties who are lawfully present in any part of its territory to which this Convention applies, and who are without sufficient resources, shall be entitled equally with its own nationals and on the same conditions to social and medical assistance provided by the legislation in force from time to time in that part of its territory.'

12 Article 6(a) of that Convention provides that 'a Contracting Party in whose territory a national of another Contracting Party is lawfully resident shall not repatriate that national on the sole ground that he is in need of assistance.'

The main proceedings

13 Mrs Martínez Sala, born on 8 February 1956, is a Spanish national who has lived in Germany since May 1968. She had various jobs there at intervals between 1976 and 1986 and was in employment again from 12 September 1989 to 24 October 1989. Since then she has received social assistance from the City of Nuremberg and the Landratsamt Nürnberger Land (Nuremberg Rural District Authority) under the Bundessozialhilfegesetz (Federal Social Welfare Law).

14 Until 19 May 1984, Mrs Martínez Sala obtained from the various competent authorities residence permits which ran more or less without interruption. Thereafter, she obtained only documents certifying that the extension of her residence permit had been applied for. In its order for reference, the Bayerisches Landessozialgericht points out that the European Convention on Social and Medical Assistance of 11 December 1953 did not, however, allow her to be deported. A residence permit expiring on 18 April 1995 was issued to Mrs Martínez Sala on 19 April 1994, and this permit was extended for a further year on 20 April 1995.

15 In January 1993, that is to say during the period in which she did not have a residence permit, Mrs Martínez Sala applied to Freistaat Bayern for child-raising allowance for her child born during that month.

16 Freistaat Bayern, by decision of 21 January 1993, rejected her application on the ground that she did not have German nationality, a residence entitlement or a residence permit.

17 By judgment of 21 March 1994, the Sozialgericht (Social Court) Nürnberg dismissed an action brought on 13 July 1993 by Mrs Martínez Sala against that decision on the ground that she was not in possession of a residence permit.

18 On 8 June 1994, Mrs Martínez Sala appealed against that judgment to the Bayerisches Landessozialgericht.

19 Taking the view that it might be possible for the appellant to rely on Regulations Nos 1408/71 and 1612/68 in order to obtain child-raising allowance, the Bayerisches Landessozialgericht stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Was a Spanish national living in Germany who, with various interruptions, was employed until 1986 and, apart from a short period of employment in 1989, later received social assistance under the Bundessozialhilfegesetz (Federal Social Welfare Law, the "BSHG") still, in 1993, a worker within the meaning of Article 7(2) of Regulation (EEC) No 1612/68 or an employed person within the meaning of Article 2 in conjunction with Article 1 of Regulation (EEC) No 1408/71?

(2) Is child-raising allowance granted under the Gesetz über die Gewährung von Erziehungsgeld und Erziehungsurlaub (Law on the Grant of Child-raising Allowance and Parental Leave, "the BERzGG") a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71, to which Spanish nationals living in Germany are entitled in the same way as German nationals under Article 3(1) of Regulation No 1408/71?

(3) Is child-raising allowance payable under the BERzGG a social advantage within the meaning of Article 7(2) of Regulation No 1612/68?

(4) Is it compatible with the law of the European Union for the BERzGG to require possession of a formal residence permit for the grant of child-raising allowance to nationals of a Member State, even though they are permitted to reside in Germany?'

20 It is appropriate to answer the second and third questions first, then the first question and, finally, the fourth question.

The second and third questions

21 By its second and third questions the national court is asking essentially whether a benefit such as the child-raising allowance provided for by the BERzGG, which is automatically granted to persons fulfilling certain objective criteria, without any individual and discretionary assessment of personal needs, and which is intended to meet family expenses, falls within the scope of Community law as a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71 or as a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.

22 In its judgment of 10 October 1996 in Joined Cases C-245/94 and C-312/94 Hoever and Zachow [1996] ECR I-4895 the Court has already held that a benefit such as the child-raising allowance provided for by the BERzGG, which is automatically granted to persons fulfilling certain objective criteria, without any individual and discretionary assessment of personal needs, and which is intended to meet family expenses, must be treated as a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71.

23 The German Government submits that the Court should reconsider that interpretation and in its written observations refers to the observations which it submitted in the abovementioned case and, at the hearing, to the observations which it submitted to the Court in Case C-16/96 Mille-Wilsmann. Following delivery of the judgment in Hoever and Zachow the Bundessozialgericht annulled its order for reference and Case C-16/96 was removed from the register by order of 14 April 1997.

24 Since the German Government has not further explained the aspects of the judgment in *Hoever and Zachow* which, in its view, ought to be revised, nor the reasons which might justify such a revision, it must be repeated that a benefit such as the child-raising allowance provided for by the *BERzGG*, which is automatically granted to persons fulfilling certain objective criteria, without any individual and discretionary assessment of personal needs, and which is intended to meet family expenses, constitutes a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71.

25 As far as the concept of social advantage, referred to in Article 7(2) of Regulation No 1612/68, is concerned, this term means, according to consistent case-law, all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community (Case 249/83 *Hoeckx* [1985] ECR 973, paragraph 20).

26 The child-raising allowance in question here is an advantage granted *inter alia* to workers who work part-time. It is therefore a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.

27 It must be added that, since Regulation No 1612/68 is of general application regarding the free movement of workers, Article 7(2) thereof may be applied to social advantages which at the same time fall specifically within the scope of Regulation No 1408/71 (Case C-111/91 *Commission v Luxembourg* [1993] ECR I-817, paragraph 21).

28 The answer to be given to the second and third questions is therefore that a benefit such as the child-raising allowance provided for by the *BERzGG*, which is automatically granted to persons fulfilling certain objective criteria, without any individual and discretionary assessment of personal needs, and which is intended to meet family expenses, falls within the scope *ratione materiae* of Community law as a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71 and as a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.

The first question

29 By its first question the national court is asking essentially whether a national of one Member State who resides in another Member State, where he is employed and subsequently receives social assistance, has the status of worker within the meaning of Regulation No 1612/68 or of employed person within the meaning of Regulation No 1408/71.

30 It should be remembered at the outset that, under the *BERzGG*, the grant of the child-raising allowance is subject, *inter alia*, to the condition that the recipient must either not be engaged in gainful occupation or not be so engaged on a full-time basis. That condition is likely to restrict the number of persons who can both receive the child-raising allowance and still be categorised as workers under Community law.

31 It must also be pointed out that there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied. For instance, the definition of worker used in the context of Article 48 of the EC Treaty and Regulation No 1612/68 does not necessarily coincide with the definition applied in relation to Article 51 of the EC Treaty and Regulation No 1408/71.

The status of worker within the meaning of Article 48 of the Treaty and Regulation No 1612/68

32 In the context of Article 48 of the Treaty and Regulation No 1612/68, a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration must be considered to be a worker. Once the employment relationship

has ended, the person concerned as a rule loses his status of worker, although that status may produce certain effects after the relationship has ended, and a person who is genuinely seeking work must also be classified as a worker (see, in that connection, Case 66/85 Lawrie-Blum [1986] ECR 2121, paragraph 17, Case 39/86 Lair [1988] ECR 3161, paragraphs 31 to 36, and Case C-292/89 Antonissen [1991] ECR I-745, paragraphs 12 and 13).

33 Furthermore, when a worker who is a national of one Member State has been employed in another Member State and remains there after obtaining a retirement pension, his descendants do not retain the right to equal treatment under Article 7 of Regulation No 1612/68 with regard to a social benefit provided for by the legislation of the host Member State if they have reached the age of 21, are no longer dependent on him and do not have the status of workers (Case 316/85 Lebon [1987] ECR 2811).

34 In the present case, the referring court has not furnished sufficient information to enable the Court to determine whether, having regard to the foregoing considerations, a person in the position of the appellant in the main proceedings is a worker within the meaning of Article 48 of the Treaty and Regulation No 1612/68, by reason, for example, of the fact that she is seeking employment. It is for the national court to undertake that investigation.

The status of employed or self-employed person within the meaning of Regulation No 1408/71

35 Article 2 of Regulation No 1408/71 provides that it is to apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States as well as to members of their families.

36 So a person has the status of employed person within the meaning of Regulation No 1408/71 where he is covered, even if only in respect of a single risk, compulsorily or on an optional basis, by a general or special social security scheme mentioned in Article 1(a) of Regulation No 1408/71, irrespective of the existence of an employment relationship (see, on this point, Case 182/78 Pierik II [1979] ECR 1977, paragraphs 4 and 7, and Joined Cases 82/86 and 103/86 Laborero and Sabato [1987] ECR 3401, paragraph 17).

37 The Commission therefore takes the view that the appellant must be considered to be an employed person within the meaning of Regulation No 1408/71 simply by virtue of the fact that she was covered by compulsory retirement pension insurance in Germany or that the social welfare body gave her and her children sickness insurance cover and paid the relevant contributions.

38 Similarly, at the hearing, the French Government argued that the appellant in the main proceedings could be considered to be a worker for the purposes of Community social security law because she was - and possibly still is - covered in one way or another by a German retirement pension scheme.

39 However, the German Government points out that, according to Annex I, point I, C ('Germany'), of Regulation No 1408/71, in the context of family benefits, of which the allowance in issue is one, only a person compulsorily insured against unemployment or who, as a result of such insurance, obtains cash benefits under sickness insurance or comparable benefits may be classified as an employed person.

40 At the hearing, the Commission also pointed out that in the Court's judgment of 30 January 1997 in Joined Cases C-4/95 and C-5/95 Stöber and Piosa Pereira [1997] ECR I-511 the argument that being insured against only one risk mentioned in Regulation No 1408/71 was sufficient for a person to be classified as an employed person within the meaning of that regulation had been called in question.

41 It is to be noted that, at paragraph 36 of its judgment in Stöber and Piosa Pereira, the Court expressed the view that there was nothing to prevent Member States from restricting entitlement

to family benefits to persons belonging to a solidarity system constituted by a particular insurance scheme, in that case an old-age insurance scheme for self-employed persons.

42 According to Annex I, point I, C ('Germany'), to which Article 1(a)(ii) of Regulation No 1408/71 refers, only persons compulsorily insured against unemployment or persons who, as a result of such insurance, obtain cash benefits under sickness insurance or comparable benefits can be considered, for the purposes of the grant of family benefits pursuant to Title III, Chapter 7, of Regulation No 1408/71, to be employed persons within the meaning of Article 1(a)(ii) of that regulation (Case C-266/95 Merino García [1997] ECR I-3279).

43 As is clear from the wording of that provision, Annex I, point I, C, of Regulation No 1408/71 clarified or narrowed the definition of employed person within the meaning of Article 1(a)(ii) of that regulation solely for the purposes of the grant of family benefits pursuant to Title III, Chapter 7 of the regulation.

44 Since the situation of a person like the appellant in the main proceedings is not covered by any of the provisions of Title III, Chapter 7, the restriction laid down by Annex I, point I, C, cannot be applied to her, so that the question of her status of employed person within the meaning of Regulation No 1408/71 must be determined solely on the basis of Article 1(a)(ii) of that regulation. Such a person will therefore be able to enjoy the rights attaching to that status once it is established that he or she is covered, even if only in respect of a single risk, compulsorily or on an optional basis, by a general or special social security scheme mentioned in Article 1(a) of Regulation No 1408/71.

45 Since the order for reference does not provide sufficient information to enable the Court to take account of all the circumstances which may be relevant in this case, it is for the referring court to determine whether a person such as the appellant in the main proceedings comes within the scope *ratione personae* of Article 48 of the Treaty and of Regulation No 1612/68 or of Regulation No 1408/71.

The fourth question

46 By its fourth question the referring court seeks to ascertain whether Community law precludes a Member State from requiring nationals of other Member States to produce a formal residence permit in order to receive a child-raising allowance.

47 This question is based on the assumption that the appellant in the main proceedings has been authorised to reside in the Member State concerned.

48 Under the BErzGG, in order to be entitled to German child-raising allowance, the claimant, besides meeting the other material conditions for its grant, must be permanently or ordinarily resident in German territory.

49 A national of another Member State who is authorised to reside in German territory and who does reside there meets this condition. In that regard, such a person is in the same position as a German national residing in German territory.

50 However, the BErzGG provides that, unlike German nationals, 'a non-national', including a national of another Member State, must be in possession of a certain type of residence permit in order to receive the benefit in question. It is common ground that a document merely certifying that an application for a residence permit has been made is not sufficient, even though such a certificate warrants that the person concerned is entitled to stay.

51 The referring court points out, moreover, that 'delays in granting [residence permits] for purely technical administrative reasons can materially affect the substance of the rights enjoyed by citizens of the European Union'.

52 Whilst Community law does not prevent a Member State from requiring nationals of other Member States lawfully resident in its territory to carry at all times a document certifying their right of residence, if an identical obligation is imposed upon its own nationals as regards their identity cards (see, to that effect, Case 321/87 *Commission v Belgium* [1989] ECR 997, paragraph 12, and the judgment of 30 April 1998 in Case C-24/97 *Commission v Germany* [1998] ECR I-0000, paragraph 13), the same is not necessarily the case where a Member State requires nationals of other Member States, in order to receive a child-raising allowance, to be in possession of a residence permit for the issue of which the administration is responsible.

53 For the purposes of recognition of the right of residence, a residence permit can only have declaratory and probative force (see, to this effect, Case 48/75 *Royer* [1976] ECR 497, paragraph 50). However, the case-file shows that, for the purposes of the grant of the benefit in question, possession of a residence permit is constitutive of the right to the benefit.

54 Consequently, for a Member State to require a national of another Member State who wishes to receive a benefit such as the allowance in question to produce a document which is constitutive of the right to the benefit and which is issued by its own authorities, when its own nationals are not required to produce any document of that kind, amounts to unequal treatment.

55 In the sphere of application of the Treaty and in the absence of any justification, such unequal treatment constitutes discrimination prohibited by Article 6 of the EC Treaty.

56 At the hearing, the German Government, while accepting that the condition imposed by the *BERzGG* constituted unequal treatment within the meaning of Article 6 of the Treaty, argued that the facts of the case being considered in the main proceedings did not fall within either the scope *ratione materiae* or the scope *ratione personae* of the Treaty so that the appellant in the main proceedings could not rely on Article 6.

57 As regards the scope *ratione materiae* of the Treaty, reference should be made to the replies given to the first, second and third questions, according to which the child-raising allowance in question in the main proceedings indisputably falls within the scope *ratione materiae* of Community law.

58 As regards its scope *ratione personae*, if the referring court were to conclude that, in view of the criteria provided in reply to the first preliminary question, the appellant in the proceedings before it has the status of worker within the meaning of Article 48 of the Treaty and of Regulation No 1612/68 or of employed person within the meaning of Regulation No 1408/71, the unequal treatment in question would be incompatible with Articles 48 and 51 of the Treaty.

59 Should this not be the case, the Commission submits that, in any event, since 1 November 1993 when the Treaty on European Union came into force, the appellant in the main proceedings has a right of residence under Article 8a of the EC Treaty, which provides that: '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 this Treaty and by the measures adopted to give it effect'. According to Article 8(1) of the EC Treaty, every person holding the nationality of a Member State is to be a citizen of the Union.

60 It should, however, be pointed out that, in a case such as the present, it is not necessary to examine whether the person concerned can rely on Article 8a of the Treaty in order to obtain recognition of a new right to reside in the territory of the Member State concerned, since it is common ground that she has already been authorised to reside there, although she has been refused issue of a residence permit.

61 As a national of a Member State lawfully residing in the territory of another Member State,

the appellant in the main proceedings comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship.

62 Article 8(2) of the Treaty attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in Article 6 of the Treaty, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty.

63 It follows that a citizen of the European Union, such as the appellant in the main proceedings, lawfully resident in the territory of the host Member State, can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law, including the situation where that Member State delays or refuses to grant to that claimant a benefit that is provided to all persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same State are not required to have and the issue of which may be delayed or refused by the authorities of that State.

64 Since the unequal treatment in question thus comes within the scope of the Treaty, it cannot be considered to be justified: it is discrimination directly based on the appellant's nationality and, in any event, nothing to justify such unequal treatment has been put before the Court.

65 The answer to the fourth question must therefore be that Community law precludes a Member State from requiring nationals of other Member States authorised to reside in its territory to produce a formal residence permit issued by the national authorities in order to receive a child-raising allowance, whereas that Member State's own nationals are only required to be permanently or ordinarily resident in that Member State.

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NATCOUR	*A9* Landessozialgericht Bayern, Vorlagebeschuß vom 02/02/1996 (L 9 Eg 8/94) *P1* Landessozialgericht Bayern, Schreiben vom 11/05/2000 (L 9 Eg 8/94)
NOTES	Novak, Meinhard: European Law Reporter 1998 p.304-305 Idot, Laurence: Europe 1998 Juillet Comm. no 241 p.14 Van der Steen, I.: Nederlands tijdschrift voor Europees recht 1998 p.163-166 Gutmann, Rolf: Informationsbrief Ausländerrecht 1998 p.320-322 Denys, C.: Nederlands tijdschrift voor Europees recht 1998 p.210-213 X.L.: Petites affiches. La Loi 1998 no 148 p.14-15 Albors-Llorens, Albertina: The Cambridge Law Journal 1998 p.461-463 X: Il Foro italiano 1998 IV Col.381-382 X: Giurisprudenza italiana 1998 p.1708-1709 Verschueren, Herwig: Tijdschrift voor vreemdelingenrecht 1998 p.19-23 Fries, Sybilla ; Shaw, Jo: European Public Law 1998 p.533-559 Cabral, Pedro: Revue du marché unique européen 1998 no 3 p.254-256 Prévédourou, Evgenia: Epitheorisis Dimosiou Dikaiou kai Dioikitikou Dikaiou 1998 p.975-979 O'Leary, Siofra: European Law Review 1999 p.68-79 Luby, Monique: Journal du droit international 1999 p.557-559 Schrauwen, A.: S.E.W. ; Sociaal-economische wetgeving 1999 p.429-430 Whelan, Anthony: Revue des affaires européennes 1999 p.228-238 Whelan, Anthony: The Bar Review 2000 Vol.5 p.179-185 Tomuschat, Christian: Common Market Law Review 2000 p.449-457
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ADVGEN	La Pergola
JUDGRAP	Edward
DATES	of document: 12/05/1998 of application: 20/03/1996

**Judgment of the Court
of 11 July 2002**

Mary Carpenter v Secretary of State for the Home Department.

Reference for a preliminary ruling: Immigration Appeal Tribunal - United Kingdom.

**Freedom to provide services - Article 49 EC - Directive 73/148/EEC - National of a Member State established in that State and providing services to persons established in other Member States - Right of residence in that State of a spouse who is a national of a third country.
Case C-60/00.**

1. Freedom to provide services - Treaty provisions - Not applicable in situations purely internal to a Member State

(Art. 49 EC)

2. Freedom to provide services - Treaty provisions - Scope - Services provided to persons established in other Member States - Included - Possibility for the provider to rely on the Treaty provisions as against the Member State of establishment

(Art. 49 EC)

3. Freedom to provide services - Restrictions justified by reasons of public interest - Permissibility conditional on respect for fundamental rights - Observance ensured by the Community judicature - European Convention on Human Rights taken into consideration - Right to respect for family life - Decision to deport a person from a country where close members of his family are living

(Art. 49 EC; European Convention on Human Rights, Art. 8)

4. Freedom to provide services - Restrictions - National of a Member State established in that State providing services in other Member States - Spouse who is a national of a third country refused right to reside - Measure constituting an infringement of the right to respect for family life guaranteed by the European Convention on Human Rights - Not permissible - Criterion

(Art. 49 EC; European Convention on Human Rights, Art. 8)

§§1. The provisions of the Treaty relating to the freedom to provide services, and the rules adopted for their implementation, are not applicable to situations which do not present any link to any of the situations envisaged by Community law.

(see para. 28)

2. The right freely to provide services guaranteed by Article 49 EC may be relied on by a provider as against the State in which he is established if the services are provided for persons established in another Member State.

(see para. 30)

3. A Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures. In that regard, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8 of the European Convention on Human Rights, which is among the fundamental rights which are protected in Community law. Such an infringement will infringe the Convention if such a decision does not meet the requirements of paragraph 2 of that article, that is unless it is in accordance with the law, motivated by one or more of the legitimate aims under that paragraph and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.

(see paras 40-42)

4. Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding a refusal by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country, if such a decision, which constitutes an infringement of the right to respect for family life, is not proportionate to the objective pursued.

(see paras 45-46, operative part)

In Case C-60/00,

REFERENCE to the Court under Article 234 EC by the Immigration Appeal Tribunal (United Kingdom) for a preliminary ruling in the proceedings pending before that court between

Mary [Carpenter](#)

and

Secretary of State for the Home Department,

on the interpretation of Article 49 EC and Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, N. Colneric and S. von Bahr (Presidents of Chambers), C. Gulmann, D.A.O. Edward, J.-P. Puissechet, M. Wathelet, R. Schintgen and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: C. Stix-Hackl,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mrs [Carpenter](#), by J. Walsh, Barrister, instructed by J. Wyman, Solicitor,
- the United Kingdom Government, by G. Amodeo, acting as Agent, and by D. Wyatt QC,
- the Commission of the European Communities, by N. Yerrell, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs [Carpenter](#), represented by J. Walsh, of the United Kingdom Government, represented by R. Magrill, acting as Agent, and by D. Wyatt QC, and of the Commission, represented by N. Yerrell and H. Michard, acting as Agent, at the hearing on 29 May 2001,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2001,

gives the following

Judgment

Costs

47 The costs incurred by the United Kingdom Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to

the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Immigration Appeal Tribunal by order of 16 December 1999, hereby rules:

Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding, in circumstances such as those in the main proceedings, a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country.

1 By order of 16 December 1999, received at the Court on 21 February 2000, the Immigration Appeal Tribunal referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 49 EC and Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14, hereinafter the Directive).

2 The question was raised in proceedings between Mrs [Carpenter](#), a national of the Philippines, and the Secretary of State for the Home Department (hereinafter the Secretary of State) concerning her right to reside in the United Kingdom.

Legislative framework

Community legislation

3 The first paragraph of Article 49 EC provides:

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

4 The first recital of the preamble to the Directive states as follows:

Whereas freedom of movement of persons as provided for in the Treaty and the General Programmes for the abolition of restrictions on freedom of establishment and on freedom to provide services entails the abolition of restrictions on movement and residence within the Community for nationals of Member States wishing to establish themselves or to provide services within the territory of another Member State.

5 Article 1(1) of the Directive provides:

The Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of:

- (a) nationals of a Member State who are established or who wish to establish themselves in another Member State in order to pursue activities as self-employed persons, or who wish to provide services in that State;
- (b) nationals of Member States wishing to go to another Member State as recipients of services;
- (c) the spouse and the children under 21 years of age of such nationals, irrespective of their nationality;

(d) the relatives in the ascending and descending lines of such nationals and of the spouse of such nationals, which relatives are dependent on them, irrespective of their nationality.

6 The first subparagraph of Article 4(2) of the Directive provides:

The right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided.

United Kingdom legislation

7 In terms of the Immigration Act 1971 and the 1994 United Kingdom Immigration Rules (House of Commons Paper 395, hereinafter the Immigration Rules), a person who is not a British citizen may not, as a general rule, enter or remain in the United Kingdom unless he has obtained permission to do so. Such permission is called respectively leave to enter and leave to remain.

8 Section 7(1) of the Immigration Act 1988 provides:

A person shall not under the [Immigration Act 1971] require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable Community right or of any provision made under section 2(2) of the European Communities Act 1972.

9 Paragraph 281 of the Immigration Rules lists the requirements for leave to enter the United Kingdom as the spouse of a person present and settled in the United Kingdom. Paragraph 281(vi) states that the applicant must hold a valid United Kingdom entry clearance for entry as a spouse. However, a person present in the United Kingdom with leave to enter or remain in another capacity may switch into the spouse category if he or she satisfies the requirements of paragraph 284 of the Immigration Rules.

10 Paragraph 284 of the Immigration Rules lays down the requirements for an extension of stay in the United Kingdom as the spouse of a person present and settled in the United Kingdom. Paragraph 284(i) provides that the applicant must have limited leave to remain in the United Kingdom (this would include leave to enter) and Paragraph 284(iv) states that the applicant must not have remained in breach of the immigration laws.

11 Section 3(5)(a) of the Immigration Act 1971 lays down the general rules relating to deportation from the United Kingdom. It provides:

A person who is not a British Citizen shall be liable to deportation from the United Kingdom -

(a) if, having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave....

12 As regards, more particularly, the deportation of spouses of UK nationals, the Secretary of State is required, under paragraph 364 of the Immigration Rules, to consider the particular circumstances of each case before deciding whether or not to order deportation. However, a published policy concession, DP 3/96, sets out the circumstances in which the Secretary of State will normally grant leave to remain to spouses who are liable to deportation or who are in the United Kingdom illegally. Paragraph 5 of the concession states that, as a general rule, deportation action should not normally be initiated where the person concerned has a genuine and subsisting marriage with someone settled in the United Kingdom and the couple have lived together in the United Kingdom continuously since their marriage for at least two years before the commencement of enforcement action, and it is unreasonable to expect the settled spouse to accompany his/her spouse on removal.

The dispute in the main proceedings

13 Mrs [Carpenter](#), a national of the Philippines, was given leave to enter the United Kingdom

as a visitor on 18 September 1994 for six months. She overstayed that leave and failed to apply for any extension of her stay. On 22 May 1996 she married Peter [Carpenter](#), a United Kingdom national.

14 It appears from the order for reference that Mr [Carpenter](#) runs a business selling advertising space in medical and scientific journals and offering various administrative and publishing services to the editors of those journals. The business is established in the UK, where the publishers of the journals for which he sells advertising space are based. A significant proportion of the business is conducted with advertisers established in other Member States of the European Community. Mr [Carpenter](#) travels to other Member States for the purpose of his business.

15 On 15 July 1996 Mrs [Carpenter](#) applied to the Secretary of State for leave to remain in the UK as the spouse of a national of that Member State. Her application was refused by a decision of the Secretary of State of 21 July 1997.

16 The Secretary of State also decided to make a deportation order against Mrs [Carpenter](#) removing her to the Philippines. Under that decision it is open to Mrs [Carpenter](#) to leave the United Kingdom voluntarily. If she does not do so, the Secretary of State will sign the deportation order and Mrs [Carpenter](#) will have to obtain its revocation before she can seek leave to enter the United Kingdom as the spouse of a UK citizen.

17 Mrs [Carpenter](#) appealed against the decision to make a deportation order to an Immigration Adjudicator (United Kingdom), arguing that the Secretary of State was not entitled to deport her because she was entitled to a right to remain in the United Kingdom under Community law. She maintained that since her husband's business required him to travel around in other Member States, providing and receiving services, he could do so more easily as she was looking after his children from his first marriage, so that her deportation would restrict her husband's right to provide and receive services.

18 The Immigration Adjudicator was satisfied that Mrs [Carpenter's](#) marriage was genuine and that she played an important part in the upbringing of her stepchildren. He also accepted that she could be indirectly responsible for the increased success of her husband's business and that her husband was a provider of services for the purposes of Community law. According to the Immigration Adjudicator, Mr [Carpenter](#) has the right to travel to other Member States to provide services and to be accompanied for that purpose by his spouse. However, while he is resident in the United Kingdom, he cannot be considered to be exercising any freedom of movement within the meaning of Community law. The Immigration Adjudicator therefore dismissed Mrs [Carpenter's](#) appeal by decision of 10 June 1998.

19 On Mrs [Carpenter's](#) appeal to the Immigration Appeal Tribunal, it considered that the issue of Community law raised by the proceedings before it was whether it was contrary to Community law and, in particular, Article 49 EC and/or the Directive, for the Secretary of State to refuse to grant a right of residence to, and to decide to deport Mrs [Carpenter](#) where, first, Mr [Carpenter](#) was exercising his freedom to provide services in other Member States, and second, the childcare and homemaking performed by Mrs [Carpenter](#) might indirectly assist and facilitate Mr [Carpenter's](#) exercise of his rights under Article 49 EC, by providing him with economic assistance which permitted him to spend greater time on his business.

20 Since it considered that the case turned on the interpretation of Community law, the Immigration Appeal Tribunal decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

In circumstances where:

- (a) a national of a Member State, who is established in that Member State and who provides services to persons in other Member States; and
- (b) has a spouse who is not a national of a Member State;

can the non-national spouse rely on

- (i) Article 49 EC and/or
- (ii) Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services,

to provide the non-national spouse with the right to reside with his or her spouse in his or her spouse's Member State of origin?

Is the answer to the question referred different if the non-national spouse indirectly assists the national of a Member State in carrying on the provision of services in other Member States by carrying out childcare?

The question referred

Observations submitted to the Court

21 Mrs [Carpenter](#) admits that she has no right of her own to reside in any Member State but claims that her rights derive from those enjoyed by Mr [Carpenter](#) to provide services and to travel within the European Union. Her husband is entitled to carry on his business throughout the internal market without being subjected to unlawful restrictions. Her deportation would require Mr [Carpenter](#) to go to live with her in the Philippines or separate the members of the family unit if he remained in the United Kingdom. In both cases Mr [Carpenter's](#) business would be affected. Moreover it cannot be maintained that the restriction on the freedom to provide services, to which Mr [Carpenter](#) would be subjected if his spouse was deported, would be a purely internal matter, since he provides services throughout the internal market.

22 According to the United Kingdom Government the provisions of the Directive mean, for example, that a UK national wishing to provide services in another Member State is entitled to reside in that State for the period during which the services are provided, and that his or her spouse would be entitled to reside there for the same period. Those provisions do not, however, give any right of residence in the United Kingdom to UK nationals, who have such a right in any event under United Kingdom law, or to their spouses. The Court has confirmed that interpretation in its judgment in Case C-370/90 Singh [1992] ECR I-4265, paragraphs 17 and 18.

23 The United Kingdom Government points out that, in its judgment in Case C-107/94 Asscher [1996] ECR I-3089, the Court considered the question whether a national of a Member State pursuing an activity as a self-employed person in another Member State, in which he resides, may rely on Article 52 of the EC Treaty (now, after amendment, Article 43 EC) against his Member State of origin, on whose territory he pursues another activity as a self-employed person. The Court held, at paragraph 32 of that judgment, that, although the provisions of the Treaty relating to freedom of establishment cannot be applied to situations which are purely internal to a Member State, the scope of Article 52 of the Treaty nevertheless cannot be interpreted in such a way as to exclude a given Member State's own nationals from the benefit of Community law where by reason of their conduct they are, with regard to their Member State of origin, in a situation which may be regarded as equivalent to that of any other person enjoying the rights and liberties guaranteed by the Treaty.

24 However, since Mr [Carpenter](#) has not exercised his right to freedom of movement, his spouse cannot rely on Singh or Asscher, cited above. Therefore, a person in Mrs [Carpenter's](#) position is not entitled to derive from Community law any right to enter or remain in the United Kingdom.

25 According to the Commission, the situation of Mrs [Carpenter](#) must be clearly distinguished from that of a spouse of a national of a Member State who has exercised his right to freedom of movement

and has left his Member State of origin and moved to another Member State in order to become established or to work there.

26 In that case the spouse, whatever his or her nationality, would undoubtedly be covered by Community law, and would be entitled to establish himself or herself, with the Community national in the host Member State, since otherwise that national might be deterred from exercising his or her right to freedom of movement. Also, as the Court held at paragraph 23 of its judgment in *Singh*, cited above, when that Community national returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law, if his or her spouse chose to enter and reside in another Member State.

27 On the other hand, the principle expressed in paragraph 23 of the judgment in *Singh*, cited above, cannot be applied to a situation such as that in issue in the main proceedings, in which a national of a Member State has never sought to establish himself with his spouse in another Member State but merely provides services from his State of origin. The Commission submits that such a situation is rather to be classified as an internal situation within the meaning of the judgment in *Joined Cases 35/82 and 36/82 Morson and Jhanjan* [1982] ECR 3723, so that Mrs *Carpenter's* right to remain in the United Kingdom, if it exists, depends exclusively on United Kingdom law.

Findings of the Court

28 It is to be noted, at the outset, that the provisions of the Treaty relating to the freedom to provide services, and the rules adopted for their implementation, are not applicable to situations which do not present any link to any of the situations envisaged by Community law (see, to that effect, among others, *Case C-97/98 Jägerskiöld* [1999] ECR I-7319, paragraphs 42 to 45).

29 As is apparent from paragraph 14 of this judgment, a significant proportion of Mr *Carpenter's* business consists of providing services, for remuneration, to advertisers established in other Member States. Such services come within the meaning of services in Article 49 EC both in so far as the provider travels for that purpose to the Member State of the recipient and in so far as he provides cross-border services without leaving the Member State in which he is established (see, in respect of cold-calling, *Case C-384/93 Alpine Investments* [1995] ECR I-1141, paragraphs 15 and 20 to 22).

30 Mr *Carpenter* is therefore availing himself of the right freely to provide services guaranteed by Article 49 EC. Moreover, as the Court has frequently held, that right may be relied on by a provider as against the State in which he is established if the services are provided for persons established in another Member State (see, among others, *Alpine Investments*, cited above, paragraph 30).

31 With regard to the right of establishment and the freedom to provide services, the Directive aims to abolish restrictions on the movement and residence of nationals of Member States within the Community.

32 It follows both from the objective of the Directive and the wording of Article 1(1)(a) and (b) thereof, that it applies to cases where nationals of Member States leave their Member State of origin and move to another Member State in order to establish themselves there, or to provide services in that State, or to receive services there.

33 That interpretation is borne out, in particular, by Article 2(1) of the Directive, whereby Member States shall grant the persons referred to in Article 1 the right to leave their territory; Article 3(1), whereby Member States shall grant to the persons referred to in Article 1 the right to enter their territory merely on production of a valid identity card or passport; Article 4(1), whereby [e]ach Member State shall grant the right of permanent residence to nationals of other

Member States who establish themselves within its territory; and Article 4(2) of the Directive, whereby, [t]he right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided.

34 It is true that Article 1(1)(c) of the Directive extends to the spouses of the Member States' nationals referred to in subparagraphs (a) and (b) of that article the right to enter and reside in another Member State, irrespective of their nationality. But, in so far as the Directive aims to facilitate the exercise by Member States' nationals of freedom of establishment and freedom to provide services, the rights were accorded to their spouses so that they can accompany them when they exercise, in the circumstances provided for by the Directive, the rights which they derive from the Treaty by moving to or residing in a Member State other than their Member State of origin.

35 Therefore, it follows from both its objectives and its content that the Directive governs the conditions under which a national of a Member State, and the other persons covered by Article 1(1)(c) and (d), may leave that national's Member State of origin and enter and reside in another Member State, for one of the purposes set out in Article 1(1)(a) and (b), for a period specified in Article 4(1) or (2).

36 Since the Directive does not govern the right of residence of members of the family of a provider of services in his Member State of origin, the answer to the question referred to the Court therefore depends on whether, in circumstances such as those in the main proceedings, a right of residence in favour of the spouse may be inferred from the principles or other rules of Community law.

37 As has been held in paragraphs 29 and 30 of this judgment, Mr [Carpenter](#) is exercising the right freely to provide services guaranteed by Article 49 EC. The services provided by Mr [Carpenter](#) make up a significant proportion of his business, which is carried on both within his Member State of origin for the benefit of persons established in other Member States, and within those States.

38 In that context it should be remembered that the Community legislature has recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty, as is particularly apparent from the provisions of the Council regulations and directives on the freedom of movement of employed and self-employed workers within the Community (see, for example, Article 10 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475); Articles 1 and 4 of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485), and Articles 1(1)(c) and 4 of the Directive).

39 It is clear that the separation of Mr and Mrs [Carpenter](#) would be detrimental to their family life and, therefore, to the conditions under which Mr [Carpenter](#) exercises a fundamental freedom. That freedom could not be fully effective if Mr [Carpenter](#) were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse (see, to that effect, Singh, cited above, paragraph 23).

40 A Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures (see, to that effect, Case C-260/89 ERT [1991] ECR I-2925, paragraph 43, and Case C-368/95 Familiapress [1997] ECR I-3689, paragraph 24).

41 The decision to deport Mrs [Carpenter](#) constitutes an interference with the exercise by Mr [Carpenter](#) of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter

the Convention), which is among the fundamental rights which, according to the Court's settled case-law, restated by the Preamble to the Single European Act and by Article 6(2) EU, are protected in Community law.

42 Even though no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of that article, that is unless it is in accordance with the law, motivated by one or more of the legitimate aims under that paragraph and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, in particular, *Boultif v Switzerland*, no. 54273/00, ^{oo} 39, 41 and 46, ECHR 2001-IX).

43 A decision to deport Mrs [Carpenter](#), taken in circumstances such as those in the main proceedings, does not strike a fair balance between the competing interests, that is, on the one hand, the right of Mr [Carpenter](#) to respect for his family life, and, on the other hand, the maintenance of public order and public safety.

44 Although, in the main proceedings, Mr [Carpenter's](#) spouse has infringed the immigration laws of the United Kingdom by not leaving the country prior to the expiry of her leave to remain as a visitor, her conduct, since her arrival in the United Kingdom in September 1994, has not been the subject of any other complaint that could give cause to fear that she might in the future constitute a danger to public order or public safety. Moreover, it is clear that Mr and Mrs [Carpenter's](#) marriage, which was celebrated in the United Kingdom in 1996, is genuine and that Mrs [Carpenter](#) continues to lead a true family life there, in particular by looking after her husband's children from a previous marriage.

45 In those circumstances, the decision to deport Mrs [Carpenter](#) constitutes an infringement which is not proportionate to the objective pursued.

46 In view of all the foregoing, the answer to the question referred to the Court is that Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding, in circumstances such as those in the main proceedings, a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country.

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NATIONA	United Kingdom
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ADVGEN Stix-Hackl
JUDGRAP Cunha Rodrigues
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**Judgment of the Court
of 1 June 1999**

Klaus Konle v Republik Österreich.

Reference for a preliminary ruling: Landesgericht für Zivilrechtssachen Wien - Austria.

Freedom of establishment - Free movement of capital - Articles 52 of the EC Treaty (now, after amendment, Article 43 EC) and 56 EC (ex Article 73b) - Authorisation procedure for the acquisition of immovable property - Article 70 of the Act concerning the conditions of accession of the Republic of Austria - Secondary residences - Liability for breach of Community law.

Case C-302/97.

1 Freedom of movement for persons - Freedom of establishment - Free movement of capital - Treaty provisions - Scope - National legislation regulating the acquisition of land - Covered

(EC Treaty, Art. 54(3)(e) (now, after amendment, Art. 44(3)(e) EC); Council Directive 88/361, Annex I)

2 Accession of new Member States to the Communities - Austria - Finland - Sweden - Freedom of movement for persons, free movement of services and capital - Transitional measures concerning Austria - Existing legislation regarding secondary residences - Concept of 'existing legislation'

(1994 Act of Accession, Art. 70)

3 Free movement of capital - Restrictions on the acquisition of immovable property - Transitional measures, under the 1994 Act of Accession, concerning Austria - Scheme, adopted before the date of accession, for prior authorisation of the acquisition of immovable property - Exemption only for own nationals - Justification put forward - Article 70 of the Act of Accession

(EC Treaty, Art. 73b (now Art. 56 EC); 1994 Act of Accession, Art. 70)

4 Free movement of capital - Restrictions on the acquisition of immovable property - Transitional measures, under the 1994 Act of Accession, concerning Austria - Scheme, adopted after the date of accession, for prior authorisation of the acquisition of immovable property - Whether justified - No justification

(EC Treaty, Art. 73b (now Art. 56 EC); 1994 Act of Accession, Art. 70)

5 Community law - Rights conferred on individuals - Where breached by a Member State - To be assessed by the national courts

6 Community law - Rights conferred on individuals - Where breached by a Member State - To be assessed by the national courts - Obligation to make reparation for damage caused to individuals - In federal States, reparation to be ensured by public authorities - Application of national law - Limits

1 National legislation on the acquisition of land must comply with the provisions of the Treaty on freedom of establishment for nationals of Member States and the free movement of capital. As is apparent from Article 54(3)(e) of the Treaty (now, after amendment, Article 44 EC), the right to acquire, use or dispose of immovable property on the territory of another Member State is the necessary corollary of freedom of establishment. Capital movements include investments in immovable property on the territory of a Member State by non-residents, as is clear from the nomenclature of capital movements set out in Annex I to Directive 88/361 for the implementation of Article 67 of the Treaty.

2 The concept of 'existing legislation' within the meaning of Article 70 of the 1994 Act of Accession - a provision which permits Austria to maintain its existing legislation regarding secondary residences for five years from the date of accession - is based on a factual criterion, so that its application

does not require an assessment of the validity in domestic law of the national provisions at issue. Thus, any rule regarding secondary residences which was in force in the Republic of Austria at the date of accession is, in principle, covered by the derogation laid down in Article 70 of the Act of Accession. It would be otherwise if that rule were withdrawn from the domestic legal system by a decision by the constitutional court of the Member State concerned subsequent to the date of accession but with retroactive effect from before that date, thereby eliminating the provision in question as regards the past, it being for the courts of that Member State to assess the temporal effects of declarations of unconstitutionality made by the constitutional court of that State.

3 Article 73b of the Treaty (now Article 56 EC) and Article 70 of the 1994 Act of Accession do not preclude a scheme for acquiring land such as that introduced by the *Tiroler Grundverkehrsgesetz 1993* (Tyrol Law on the Transfer of Land), exempting only Austrian nationals from having to obtain authorisation before acquiring a plot of land which is built on and thus from having to demonstrate, to that end, that the planned acquisition will not be used to establish a secondary residence. Although that legislation creates a discriminatory restriction against nationals of other Member States in respect of capital movements between Member States, that is authorised by the Act of Accession which allows Austria to maintain its existing legislation regarding secondary residences for five years from the date of accession.

4 Article 73b of the Treaty (now Article 56 EC) and Article 70 of the 1994 Act of Accession preclude a scheme for acquiring land such as that introduced by the *Tiroler Grundverkehrsgesetz 1996* (Tyrol Law on the Transfer of Land), which places all prospective acquirers of land under an obligation to apply for administrative authorisation prior to the acquisition of such property.

As regards Article 73b, such a requirement entails, by its very purpose, a restriction on the free movement of capital and constitutes a restrictive measure which can be justified only if it meets a town and country planning objective such as maintaining, in the general interest, a permanent population and an economic activity independent of the tourist sector in certain regions, provided that it is not applied in a discriminatory manner and that the same result cannot be achieved by other less restrictive procedures. That is not the position, however, given the risk of discrimination inherent in a system of prior authorisation for the acquisition of land and the other possibilities at the disposal of the Member State concerned for ensuring compliance with its town and country planning guidelines.

As regards the purported justification based on Article 70 of the Act of Accession, which enables Austria to maintain its existing legislation regarding secondary residences for five years from the date of accession, the relevant provisions of the 1996 Law cannot be covered by the derogation provided for by that provision. Although no measure adopted after the date of accession is, by that fact alone, automatically excluded from the derogation - for example, it is covered by the derogation if, in substance, it is identical to the previous legislation or limited to reducing or eliminating an obstacle to the exercise of Community rights and freedoms in the earlier legislation - legislation such as that at issue, which is based on an approach which differs from that of the previous law and establishes new procedures, cannot be treated as legislation existing at the time of accession.

In [Case C-302/97](#),

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the *Landesgericht für Zivilrechtssachen Wien* (Austria) for a preliminary ruling in the proceedings pending before that court between

Klaus Konle

and

Republic of Austria

on the interpretation of Articles 5 of the EC Treaty (now Article 10 EC), 6 of the EC Treaty (now, after amendment, Article 12 EC), 52, 54, 56 and 57 of the EC Treaty (now, after amendment, Articles 43 EC, 44 EC, 46 EC and 47 EC), 53 of the EC Treaty (repealed by the Treaty of Amsterdam), 55 and 58 of the EC Treaty (now Articles 45 EC and 48 EC), 73b to 73d, 73f and 73g of the EC Treaty (now Articles 56 EC to 60 EC), 73e and 73h of the EC Treaty (repealed by the Treaty of Amsterdam), and Article 70 of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, J.-P. Puissochet (Rapporteur), G. Hirsch and P. Jann (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, C. Gulmann, J.L. Murray, D.A.O. Edward, H. Ragnemalm, L. Sevón and M. Wathelet, Judges,

Advocate General: A. La Pergola,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Konle, by A. Fuith, Rechtsanwalt, Innsbruck,
- the Republic of Austria, by M. Windisch, Oberkommissär at the Finanzprokuratur, acting as Agent,
- the Austrian Government, by C. Stix-Hackl, Gesandte in the Federal Ministry of Foreign Affairs, acting as Agent,
- the Greek Government, by A. Samoni-Rantou, Special Legal Adviser to the Special Department for Community Legal Affairs, Ministry of Foreign Affairs, and S. Vodina and G. Karipsiadis, Special Scientific Assistants in the same department, acting as Agents,
- the Spanish Government, by N. Díaz Abad, Abogado del Estado, acting as Agent,
- the Commission of the European Communities, by C. Tufvesson and V. Kreuzschatz, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of: Mr Konle, represented by A. Fuith; the Republic of Austria, represented by M. Windisch; the Austrian Government, represented by C. Stix-Hackl, assisted by J. Unterlechner, Consultant to the Office of the Land Government; the Greek Government, represented by A. Samoni-Rantou; the Spanish Government, represented by M. Lopez-Monís Gallego, Abogado del Estado, acting as Agent; and the Commission, represented by C. Tufvesson and V. Kreuzschatz, at the hearing on 1 December 1998,

after hearing the Opinion of the Advocate General at the sitting on 23 February 1999,

gives the following

Judgment

Costs

65 The costs incurred by the Austrian, Greek and Spanish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for

the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Landesgericht für Zivilrechtssachen Wien by decision of 13 August 1997, hereby rules:

1. Article 73b of the EC Treaty (now Article 56 EC) and Article 70 of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded:

- do not preclude a scheme for acquiring land such as that introduced by the Tiroler Grundverkehrsgesetz 1993, unless that Law was deemed not to form part of the domestic legal system of the Republic of Austria on 1 January 1995;

- preclude a scheme such as that introduced by the Tiroler Grundverkehrsgesetz 1996;

2. It is in principle for the national courts to assess whether a breach of Community law is sufficiently serious for a Member State to incur non-contractual liability vis-à-vis an individual;

3. In Member States with a federal structure, reparation for damage caused to individuals by national measures taken in breach of Community law need not necessarily be provided by the federal State in order for the obligations of the Member State concerned under Community law to be fulfilled.

1 By order of 13 August 1997, received at the Court on 22 August 1997, the Landesgericht für Zivilrechtssachen (Regional Civil Court), Vienna, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) four questions on the interpretation of Articles 5 of the EC Treaty (now Article 10 EC), 6 of the EC Treaty (now, after amendment, Article 12 EC), 52, 54, 56 and 57 of the EC Treaty (now, after amendment, Articles 43 EC, 44 EC, 46 EC and 47 EC), 53 of the EC Treaty (repealed by the Treaty of Amsterdam), 55 and 58 of the EC Treaty (now Articles 45 EC and 48 EC), 73b to 73d, 73f and 73g of the EC Treaty (now Articles 56 EC to 60 EC), 73e and 73h of the EC Treaty (repealed by the Treaty of Amsterdam), and Article 70 of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1, 'the Act of Accession').

2 Those questions were raised in the context of an action brought by Mr Konle, a German national, against the Republic of Austria for damages for the loss sustained by him as a result of the alleged infringement of Community law by the Tyrol legislation on land transactions.

The relevant national legislation

3 The Tiroler Grundverkehrsgesetz 1993 (Tiroler LGBL. 82/1993; Tyrol Law on the Transfer of Land, 'the TGVG 1993'), adopted by the Tyrol in respect of transfers of land there, entered into force on 1 January 1994 and was replaced, with effect from 1 October 1996, by the Tiroler Grundverkehrsgesetz 1996 (Tiroler LGBL. 61/1996; 'the TGVG 1996').

4 According to Sections 9(1)(a) and 12(1)(a) of the TGVG 1993, acquisition of the ownership of building land is subject to authorisation by the authority responsible for land transactions.

5 Section 14(1) of the TGVG 1993 provides that authorisation 'shall be refused, in particular where the acquirer fails to show that the planned acquisition will not be used to establish a secondary residence'.

6 However, Section 10(2) of the TGVG 1993 states that authorisation 'is not ... required where the right acquired relates to land which has been built on and the acquirer makes a written declaration to the authority responsible for land transactions that he has Austrian nationality and that the acquisition will not be used to establish a secondary residence'.

7 Furthermore, under Section 13(1) of the TGVG 1993, authorisation may be granted to a foreigner only on condition that the intended purchase does not conflict with the policy interests of the State and there is an economic, cultural or social interest in acquisition by the foreigner. That rule is not, however, applicable where it is precluded by obligations under international agreements (Section 13(2) of the TGVG 1993).

8 Under Section 3 of the TGVG 1993, which, unlike the remainder of the Law, did not enter into force until 1 January 1996, the condition for granting authorisation laid down in Section 13(1) is also inapplicable where the foreign acquirer furnishes proof that he is exercising one of the freedoms guaranteed by the Agreement on the European Economic Area.

9 By judgment of 10 December 1996, when the TGVG 1993 was already no longer in force, the Verfassungsgerichtshof (Constitutional Court) held that the Law was unconstitutional in its entirety since it involved an excessive infringement of the fundamental right to property.

10 The TGVG 1996 abolished the declaration procedure which had previously been limited to Austrian nationals alone and thus extended to all acquirers, by Sections 9(1)(a) and 12(1), the obligation to apply for administrative authorisation prior to the acquisition of land.

11 Sections 11(1)(a) and 14(1) of that Law maintain the obligation for the acquirer to show that the acquisition will not be used to create a secondary residence.

12 Additional conditions are still imposed on foreigners by Section 13(1)(b) of the TGVG 1996 for the acquisition of land, although they are not applicable, pursuant to Section 3 of the TGVG 1996, where the foreign acquirer furnishes proof that he is exercising one of the freedoms guaranteed by the EC Treaty or the Agreement on the European Economic Area.

13 Finally, Section 25(2) of the TGVG 1996 provides for an accelerated procedure allowing authorisation for the acquisition of land which is built on to be granted within two weeks if the conditions for authorisation are clearly satisfied.

The relevant Community legislation

14 Article 70 of the Act of Accession provides:

'Notwithstanding the obligations under the Treaties on which the European Union is founded, the Republic of Austria may maintain its existing legislation regarding secondary residences for five years from the date of accession.'

The main proceedings

15 In the context of a procedure for compulsory sale by auction, the Bezirksgericht Lienz (Lienz District Court) allocated on 11 August 1994 a plot of land in the Tyrol to Mr Konle on condition that he obtain the administrative authorisation required under the TGVG 1993 then in force.

16 On 18 November 1994, the Bezirkshauptmannschaft Lienz (Lienz District Administration) rejected Mr Konle's application for authorisation, although he stated that he intended to transfer his principal residence to Austria and carry on business there within the framework of the undertaking that he was already running in Germany. Mr Konle appealed to the Landes-Grundverkehrskommission beim Amt der Tiroler Landesregierung (Land Transfer Commission to the Office of the Tyrol Land Government, 'the LGvK') which, by decision of 12 June 1995, upheld the refusal to grant authorisation.

17 Mr Konle instituted proceedings against that decision, both before the Verwaltungsgerichtshof (Administrative Court), which dismissed the action by judgment of 10 May 1996, and before the Verfassungsgerichtshof, which, by judgment of 25 February 1997, set aside the decision of 12 June 1995 on the ground that the whole of the TGVG 1993 had been declared unconstitutional. The effect of the latter judgment was to bring Mr Konle's application for authorisation back before the LGvK.

18 Without awaiting the LGvK's new decision on his application, Mr Konle also brought an action against the Republic of Austria before the Landesgericht für Zivilrechtssachen to establish the liability of the State for breach of Community law by the provisions of both the TGVG 1993 and the TGVG 1996.

19 In its defence, the Republic of Austria has relied, in particular, on Article 70 of the Act of Accession.

20 In those circumstances, the Landesgericht für Zivilrechtssachen Wien took the view that the solution of the dispute required an interpretation of the relevant provisions of the Treaty and the Act of Accession and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Does it follow from the interpretation of Article 6 of the EC Treaty, Article 52 et seq. (Part Three, Title III, Chapter 2) of the EC Treaty and Article 73b et seq. (Part Three, Title III, Chapter 4) of the EC Treaty and Article 70 of the Act of Accession (Act concerning the conditions of accession of... the Republic of Austria ... and the adjustments to the treaties on which the European Union is founded) that

- (a) in that, while the TGVG 1993 was in force, the plaintiff was required to prove that he would not establish a holiday residence, whereas in the case of an acquisition by an Austrian a mere declaration under Section 10(2) would have sufficed to obtain the authorisation of the land transactions authority, and he was refused such authorisation, and
- (b) in that, under the TGVG 1996, the plaintiff, even before his property right is entered in the land register, must - as is now also the case for Austrians - undergo an authorisation procedure, the possibility of making an effective declaration that no holiday residence is being created no longer existing for Austrians either,

Community law was infringed and the plaintiff injured in respect of a fundamental freedom guaranteed by provisions of Community law?

2. If Question 1 is answered in the affirmative, is it for the Court of Justice in proceedings under Article 177 of the EC Treaty also to decide whether a breach of Community law is "sufficiently serious" (as the phrase is used, for example, in the judgment in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame*)?

3. If Questions 1 and 2 are answered in the affirmative, is the breach "sufficiently serious"?

4. Is the principle of the liability of Member States for the damage caused to an individual by breaches of Community law complied with, on a proper interpretation of Article 5 of the EC Treaty, if the national law on liability of a Member State with a federal structure lays down that in the case of infringements attributable to a part of the State, the injured party may claim only against that part of the State, not the State as a whole?

The first question

21 By its first question, the national court seeks essentially to ascertain whether the freedom of establishment and free movement of capital guaranteed by the Treaty are ensured by schemes, such as those under the two national laws at issue in the main proceedings, which make acquisition

of land subject to prior administrative authorisation and which, in the case of one of those laws, exempt only nationals of the Member State concerned from the authorisation otherwise required. If the answer in respect of either scheme is in the negative, the national court also asks, in substance, whether the derogating clause in Article 70 of the Act of Accession, which allows the Republic of Austria to maintain its existing legislation regarding secondary residences for five years, is such as to permit national provisions such as those at issue in the main proceedings.

22 First of all, it is common ground that national legislation on the acquisition of land must comply with the provisions of the Treaty on freedom of establishment for nationals of Member States and the free movement of capital. The Court has already held that, as is apparent from Article 54(3)(e) of the Treaty, the right to acquire, use or dispose of immovable property on the territory of another Member State is the corollary of freedom of establishment (Case 305/87 Commission v Greece [1989] ECR 1461, paragraph 22). As for capital movements, they include investments in real estate on the territory of a Member State by non-residents, as is clear from the nomenclature of capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5).

The scheme established under the TGVG 1993

23 Section 10(2) of the TGVG 1993, which exempts only Austrian nationals from having to obtain authorisation before acquiring a plot of land which is built on and thus from having to demonstrate, to that end, that the planned acquisition will not be used to establish a secondary residence, creates a discriminatory restriction against nationals of other Member States in respect of capital movements between Member States.

24 Such discrimination is prohibited by Article 73b of the Treaty, unless it is justified on grounds permitted by the Treaty.

25 In this case, the Republic of Austria relies exclusively on Article 70 of the Act of Accession to justify the maintenance beyond the date of its accession, in the Land of Tyrol, of different schemes for the acquisition of land depending on the nationality of the acquirer, as laid down in the TGVG 1993.

26 However, as the Court has pointed out in paragraph 9 of this judgment, the TGVG 1993 was declared unconstitutional, at a time when it was already no longer in force, by a judgment of the Verfassungsgerichtshof of 10 December 1996. That court then used that judgment as the basis for setting aside the decision of refusal upheld against Mr Konle by the LGvK.

27 Determination of the content of the existing legislation regarding secondary residences on 1 January 1995, the date of the accession of the Republic of Austria, is, in principle, a matter for the national court. It is, however, for the Court of Justice to supply it with guidance on interpreting the Community concept of 'existing legislation' in order to enable it to carry out that determination.

28 The concept of 'existing legislation' within the meaning of Article 70 of the Act of Accession is based on a factual criterion, so that its application does not require an assessment of the validity in domestic law of the national provisions at issue. Thus, any rule regarding secondary residences which was in force in the Republic of Austria at the date of accession is, in principle, covered by the derogation laid down in Article 70 of the Act of Accession.

29 It would be otherwise if that rule were withdrawn from the domestic legal system by a decision subsequent to the date of accession but with retroactive effect from before that date, thereby eliminating the provision in question as regards the past.

30 In proceedings for a preliminary ruling, it is for the courts of the Member State concerned

to assess the temporal effects of declarations of unconstitutionality made by the constitutional court of that Member State.

31 The answer to the first part of the first question must therefore be that Article 73b of the Treaty and Article 70 of the Act of Accession do not preclude a scheme for acquiring land such as that introduced by the TGVG 1993, unless that Law was deemed not to form part of the domestic legal system of the Republic of Austria on 1 January 1995.

The scheme established under the TGVG 1996

32 The Austrian Government contends that the TGVG 1996 was not applied to the applicant's case before Mr Konle brought his action for damages against the Republic of Austria and that the question of the compatibility of that Law with Community law is, therefore, irrelevant to the outcome of the main proceedings.

33 However, as the Court has consistently held, it can refrain from giving a preliminary ruling on a question submitted by a national court only where it is quite obvious that the interpretation or assessment of validity of Community law sought by that court bears no relation to the actual facts of the main action or its purpose, or where the problem is hypothetical and 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, *inter alia*, Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v Bosman and Others* [1995] ECR I-4921, paragraph 61).

34 Since the TGVG 1996 entered into force before Mr Konle initiated his action for damages before the national court, it is not obvious that the interpretation of Community law sought is irrelevant to the assessment of the question whether the Republic of Austria is liable in respect of the refusal to grant the authorisation applied for by the applicant in the main proceedings. Furthermore, the question is not hypothetical and the Court has before it the factual and legal material necessary to give an answer.

35 It is therefore necessary to answer the first question submitted for a preliminary ruling also in so far as it concerns the provisions of the TGVG 1996.

36 Mr Konle and the Commission submit that the general requirement of authorisation for the acquisition of land constitutes a restriction on the free movement of capital, can be applied in a discriminatory manner, is not justified by overriding reasons in the general interest and is not necessary in order to achieve the objective pursued, with the result that it is contrary to Article 73b of the Treaty.

37 The Austrian and Greek Governments observe that Article 222 of the EC Treaty (now Article 295 EC) leaves the Member States in control of the system of property ownership and that only a procedure of prior authorisation for the acquisition of land can enable the national and local authorities to retain control over town and country planning policies which are pursued in the general interest and which, according to the Austrian Government, are particularly necessary in a region such as the Tyrol, where only a very small proportion of the land can be built on.

38 In that regard, although the system of property ownership continues to be a matter for each Member State under Article 222 of the Treaty, that provision does not have the effect of exempting such a system from the fundamental rules of the Treaty (see Case 182/83 *Fearon v Irish Land Commission* [1984] ECR 3677, paragraph 7).

39 Accordingly, a procedure of prior authorisation, such as that under the TGVG 1996, which entails, by its very purpose, a restriction on the free movement of capital, can be regarded as compatible with Article 73b of the Treaty only on certain conditions.

40 In that regard, to the extent that a Member State can justify its requirement of prior authorisation by relying on a town and country planning objective such as maintaining, in the general interest,

a permanent population and an economic activity independent of the tourist sector in certain regions, the restrictive measure inherent in such a requirement can be accepted only if it is not applied in a discriminatory manner and if the same result cannot be achieved by other less restrictive procedures.

41 As to the first condition, it is not possible for the person seeking authorisation to provide incontrovertible proof of the future use of the land to be acquired. The administrative authorities thus have, in determining the probative value of the information received, considerable latitude which is closely related to a discretionary power. Furthermore, the explanatory memoranda drawn up by the administrative authorities of the Land of Tyrol on Section 25 of the TGVG 1996, which were produced by the applicant in the main proceedings and the significance of which for the interpretation of the Law has been accepted by the Republic of Austria, reveal the intention of using the means of assessment offered by the authorisation procedure in order to subject applications from foreigners, including nationals of Member States of the Community, to a more thorough check than applications from Austrian nationals. In addition, the accelerated authorisation procedure laid down in Section 25(2) is presented in that document as designed to replace the declaration procedure laid down in Section 10(2) of the TGVG 1993 and reserved for Austrians alone.

42 As to the second condition, the need for the prior authorisation procedure is not made out in this case.

43 Admittedly, as is stated in Article 73d of the Treaty, Article 73b of the Treaty is without prejudice to the right of Member States to take all requisite measures to prevent infringements of national law and regulations.

44 The Court of Justice has, however, taken the view that provisions making currency exports conditional upon prior authorisation, in order to allow Member States to exercise supervision, may not cause the exercise of a freedom guaranteed by the Treaty to be subject to the discretion of the administrative authorities and thus be such as to render that freedom illusory (Joined Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377, paragraph 34; Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 25; and Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraph 25). The Court has stated that the restriction on the free movement of capital resulting from the requirement of prior authorisation could be eliminated, by virtue of an adequate system of declaration, without thereby detracting from the effective pursuit of the aims of those rules (see *Bordessa and Others*, paragraph 27, and *Sanz de Lera and Others*, paragraphs 26 and 27).

45 That reasoning cannot be applied directly to a procedure prior to the acquisition of immoveable property, since the intervention of the administrative authorities does not, in that case, pursue the same objective. National administrative authorities cannot lawfully prevent a transfer of currency, with the result that their supervision, which reflects essentially a need for information, can also, in that field, take the form of a compulsory declaration. However, prior verification, in connection with the acquisition of property ownership, does not reflect merely a need for information, but can result in a refusal to grant authorisation, without necessarily being contrary to Community law.

46 A procedure simply involving a declaration does not, therefore, in itself enable the aim pursued to be achieved in the context of a procedure for prior authorisation. In order to ensure that the land is used in accordance with its intended purpose, as it appears from the national legislation in force, Member States must also be able to take measures where a breach of the agreed declaration is duly established after the property has been acquired.

47 It is sufficient to note in that regard that an infringement of national legislation on secondary residences such as that at issue in the main proceedings may be penalised by a fine, by a decision

requiring the acquirer to terminate the unlawful use of the land forthwith under penalty of its compulsory sale, or by a declaration that the sale is void resulting in the reinstatement in the land register of the entries prior to the acquisition of the property. Moreover, it is clear from the Austrian Government's replies to the questions from the Court that Austrian law provides for mechanisms of that kind.

48 Furthermore, by adopting the TGVG 1993, the legislature of the Tyrol had itself acknowledged that prior declaration, established for the benefit of Austrian nationals, constituted an effective means of supervision capable of preventing the property concerned from being acquired as a secondary residence.

49 In those circumstances, given the risk of discrimination inherent in a system of prior authorisation for the acquisition of land as in this case and the other possibilities at the disposal of the Member State concerned for ensuring compliance with its town and country planning guidelines, the authorisation procedure at issue constitutes a restriction on capital movements which is not essential if infringements of the national legislation on secondary residences are to be prevented.

50 The Republic of Austria also contends that Article 70 of the Act of Accession allows it, in any event, to maintain the provisions of the TGVG 1996 in force until 1 January 2000, by way of derogation.

51 As the Court stated in paragraph 27 of this judgment, it is, in principle, for the Austrian courts to determine the content of the national legislation existing at the date of accession of the Republic of Austria, for the purposes of Article 70 of the Act of Accession.

52 Any measure adopted after the date of accession is not, by that fact alone, automatically excluded from the derogation laid down in Article 70 of the Act of Accession. Thus, if it is, in substance, identical to the previous legislation or if it is limited to reducing or eliminating an obstacle to the exercise of Community rights and freedoms in the earlier legislation, it will be covered by the derogation.

53 On the other hand, legislation based on an approach which differs from that of the previous law and establishes new procedures cannot be treated as legislation existing at the time of accession. That is true of the TGVG 1996 which includes a number of significant differences when compared with the TGVG 1993 and which, even if it brings to an end, in principle, the dual scheme of land acquisition which existed before, does not thereby improve the treatment reserved for nationals of Member States other than the Republic of Austria, since it also lays down detailed rules for examining applications for authorisation which are designed, in practice, as the Court stated at paragraph 41 above, to favour applications from Austrian nationals.

54 Accordingly, the relevant provisions of the TGVG 1996 cannot, in any event, be covered by the derogation laid down in Article 70 of the Act of Accession.

55 In the light of all the foregoing considerations, there is no need to examine the questions concerning the interpretation of Articles 6 and 52 of the Treaty.

56 The answer to the second part of the first question must therefore be that Article 73b of the Treaty and Article 70 of the Act of Accession preclude a scheme such as that introduced by the TGVG 1996.

The second and third questions

57 By its second question, the national court seeks, in substance, to ascertain whether it is for the Court of Justice, in proceedings for a preliminary ruling, to assess whether a breach of Community law is sufficiently serious for a Member State to incur non-contractual liability vis-à-vis individuals who may be victims of that breach.

58 It is clear from the case-law of the Court that it is, in principle, for the national courts to apply the criteria to establish the liability of Member States for damage caused to individuals by breaches of Community law (Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 58), in accordance with the guidelines laid down by the Court for the application of those criteria (*Brasserie du Pêcheur and Factortame*, paragraphs 55 to 57; Case C-392/93 *The Queen v H.M. Treasury, ex parte British Telecommunications* [1996] ECR I-1631; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others v Federal Republic of Germany* [1996] ECR I-4845; and Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit Internationaal and Others v Bundesamt für Finanzen* [1996] ECR I-5063).

59 The answer to the second question must therefore be that it is in principle for the national courts to assess whether a breach of Community law is sufficiently serious for a Member State to incur non-contractual liability vis-à-vis an individual.

60 Having regard to the answer given to the second question, there is no need to answer the third question referred for a preliminary ruling.

The fourth question

61 By its fourth question, the national court seeks, in substance, to ascertain whether, in Member States with a federal structure, reparation for damage caused to individuals by national measures taken in breach of Community law must necessarily be provided by the federal State in order for the obligations of the Member State concerned under Community law to be fulfilled.

62 It is for each Member State to ensure that individuals obtain reparation for damage caused to them by non-compliance with Community law, whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation. A Member State cannot, therefore, plead the distribution of powers and responsibilities between the bodies which exist in its national legal order in order to free itself from liability on that basis.

63 Subject to that reservation, Community law does not require Member States to make any change in the distribution of powers and responsibilities between the public bodies which exist on their territory. So long as the procedural arrangements in the domestic system enable the rights which individuals derive from the Community legal system to be effectively protected and it is not more difficult to assert those rights than the rights which they derive from the domestic legal system, the requirements of Community law are fulfilled.

64 The answer to the fourth question must therefore be that, in Member States with a federal structure, reparation for damage caused to individuals by national measures taken in breach of Community law need not necessarily be provided by the federal State in order for the obligations of the Member State concerned under Community law to be fulfilled.

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NOTES	Simon, D.: Europe 1999 Août-Sept. Comm. no 281 p.11 Idot, Laurence: Europe 1999 Août-Sept. Comm. no 299 p.20 Van den Gronden, J.W.: Nederlands tijdschrift voor Europees recht 1999 p.251-257 Herzig, Günter: Wirtschaftsrechtliche Blätter 1999 p.395-400 Barone, A.: Il Foro italiano 1999 IV Col.459-462 Borraccetti, Marco: Rivista di diritto agrario 1999 p.270-276 Lengauer, Alina: Common Market Law Review 2000 p.181-190 Schneider, Christian F.: Zeitschrift für Verwaltung 2000 p.16-26 Jazottes, Gérard: Revue trimestrielle de droit commercial et de droit économique 2000 p.229-230 Luby, Monique: Journal du droit international 2000 p.496-497 Torresi, Tullia: Giurisprudenza italiana 2000 p.902-904 Fischer, Anne: Zeitschrift für europarechtliche Studien 2000 p.391-414 Weber, Claus: Neue Zeitschrift für Verwaltungsrecht 2001 p.287-289
PROCEDU	Reference for a preliminary ruling
ADVGEN	La Pergola
JUDGRAP	Puissochet
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**Judgment of the Court
of 6 June 2000**

Staatssecretaris van Financien v B.G.M. Verkooijen.

Reference for a preliminary ruling: Hoge Raad - Netherlands.

Free movement of capital - Direct taxation of share dividends - Exemption - Limitation to shares in companies whose seat is within national territory.

Case C-35/98.

Free movement of capital - Restrictions - Income tax exemption on dividends on shares paid to natural persons - Limited to shares in companies whose seat is on national territory - Not permissible - Justification - None

(Council Directive 88/361, Art. 1(1))

Article 1(1) of Directive 88/361 for the implementation of Article 67 of the Treaty precludes a legislative provision of a Member State which makes the grant of an exemption from the income tax payable on dividends paid to natural persons who are shareholders subject to the condition that those dividends are paid by a company whose seat is in that Member State.

Such a provision has the effect of dissuading Community nationals residing in the Member State concerned from investing their capital in companies which have their seat in another Member State and also has a restrictive effect as regards such companies in that it constitutes an obstacle to the raising of capital in the Member State concerned; the restriction cannot be justified by any overriding reason in the general interest such as the need to preserve the cohesion of the tax system.

The position is not in any way changed by the fact that the taxpayer applying for such a tax exemption is an ordinary shareholder or an employee who holds shares giving rise to the payment of dividends under an employees' savings plan.

(see paras 34-35, 56, 62, 67 and operative part)

In Case C-35/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Staatssecretaris van Financien

and

B.G.M. Verkooijen,

on the interpretation of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5) and of Articles 6 and 52 of the EC Treaty (now, after amendment, Articles 12 EC and 43 EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, L. Sevón and R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, P. Jann, H. Ragnemalm, M. Wathelet (Rapporteur) and F. Macken, Judges,

Advocate General: A. La Pergola,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Verkooijen, by F.E. Dekker, tax adviser,
- the Netherlands Government, by J.G. Lammers, Acting Legal Adviser, acting as Agent,
- the Italian Government, by G. De Bellis, Avvocato dello Stato,
- the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and R. Singh, Barrister,
- the Commission of the European Communities, by E. Mennens, Principal Legal Adviser, and H. Michard, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Netherlands Government, represented by M.A. Fierstra, Head of the European Law Department of the Ministry of Foreign Affairs, acting as Agent; of the French Government, represented by S. Seam, Secretary for Foreign Affairs in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; of the Italian Government, represented by G. De Bellis; of the United Kingdom Government, represented by J.E. Collins and R. Singh; and of the Commission, represented by E. Mennens and H. Michard, at the hearing on 23 March 1999,

after hearing the Opinion of the Advocate General at the sitting on 24 June 1999,

having regard to the order reopening the procedure of 17 September 1999,

after hearing the oral observations of Mr Verkooijen, represented by F.E. Dekker; of the Netherlands Government, represented by M.A. Fierstra; of the French Government, represented by S. Seam; of the Italian Government, represented by G. De Bellis; of the United Kingdom Government, represented by J.E. Collins and R. Singh; and of the Commission, represented by E. Mennens and H. Michard, at the hearing on 30 November 1999,

after hearing the Opinion of the Advocate General at the sitting on 14 December 1999,

gives the following

Judgment

Costs

68 The costs incurred by the Netherlands, French, Italian and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Hoge Raad der Nederlanden by order of 11 February 1998, hereby rules:

Article 1(1) of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty precludes a legislative provision of a Member State which, like the one at issue in the main proceedings, makes the grant of an exemption from the income tax payable on dividends paid to natural persons who are shareholders subject to the condition that those dividends are paid by a company whose seat is in that Member State.

The position is not in any way changed by the fact that the taxpayer applying for such a tax exemption

is an ordinary shareholder or an employee who holds shares giving rise to the payment of dividends under an employees' savings plan.

1 By order of 11 February 1998, received at the Court on 13 February 1998, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5) and of Articles 6 and 52 of the EC Treaty (now, after amendment, Articles 12 EC and 43 EC).

2 Those questions were raised in proceedings between the Staatssecretaris van Financien (State Secretary for Finance) and Mr Verkooijen, a Netherlands national, concerning the refusal to grant him exemption from income tax on share dividends received from a company established in a Member State other than the Kingdom of the Netherlands.

The national legislation

3 At the material time, income tax in the Netherlands was governed by the Wet op de Inkomstenbelasting 1964 (1964 Law on income tax, as in force prior to 1997, hereinafter the Income Tax Law).

4 Under Article 24 of the Income Tax Law, income from assets, including dividends and other payments associated with the holding of shares, was subject to income tax. Any taxpayer completing a Netherlands tax return was therefore obliged to include dividends as income from assets forming part of his taxable income.

5 Only natural persons are subject to Netherlands income tax (inkomstenbelasting) and this case is therefore concerned only with the distribution of dividends to natural persons.

6 When they are distributed by companies established in the Netherlands, dividends are subject to a deduction at source by way of income tax: the tax collected in that way is known as dividend tax. The rules for deduction of that tax are laid down in Article 1(1) of the Wet op de Dividendbelasting 1965 (1965 Law on the taxation of dividends, Stbl. 1965, p. 621, hereinafter the Dividend Tax Law), according to which:

A direct tax known as "dividend tax" shall be charged to any person who, directly or on the basis of certificates, receives income from shares, participation certificates, profit-sharing bonds of public limited companies, private limited companies, partnerships limited by shares and other companies all or part of whose capital is divided into shares, established in the Netherlands.

7 The dividend tax may be a definitive tax. In particular, that is so where dividends on shares in a company established in the Netherlands are paid to a person who is not subject to Netherlands income tax.

8 Conversely, where such dividends are paid to a person who is subject to Netherlands income tax, the dividend tax constitutes, by virtue of Article 63(1) of the Income Tax Law, a payment on account (voorheffing) of income tax. Under Article 15 of the Algemene Wet inzake Rijksbelastingen (General Law on State Taxes), when income tax on aggregate income is assessed, that payment on account is set off against the tax payable on aggregate income.

9 Article 47b of the Income Tax Law exempts income from shares, up to a specified amount, from income tax. That exemption applies to income from shares on which Netherlands dividend tax has been levied, which, under Article 1(1) of the Dividend Tax Law, is equivalent to income from shares in companies established in the Netherlands. The initial exemption of NLG 500 was raised to NLG 1 000 (an exemption of NLG 2000 being available for married persons) pursuant to the Law of 6 September 1985 (Stbl. 1985, p. 504).

10 As in force at the material time, Article 47b of the Income Tax Law provided:

1. The dividend exemption shall apply to income from shares in companies treated as income for the purpose of determining aggregate income from which a deduction for dividend tax has been made or has not been made pursuant to Article 4(1) of the *Wet op de Dividendbelasting 1965*. Dividends shall be exempted up to NLG 1 000, provided that they do not exceed the amount of the income indicated above, less the costs relating thereto other than interest on debts and costs relating to loans.

...

3. The sum of NLG 1 000 mentioned in paragraphs 1 and 2 shall be increased to NLG 2 000 for any taxpayer to whom his spouse's income, referred to in Article 5(1), is attributed.

11 It is clear from the legislative history of that provision that the dividend exemption (and its limitation to dividends paid by companies established in the Netherlands) fulfilled a twofold objective: first, the exemption was intended to raise the level of undertakings' equity capital and to stimulate interest on the part of private individuals in Netherlands shares; second, in particular for small investors, the exemption was intended to compensate in some measure for the double taxation which would otherwise result, under the Netherlands tax system, from the levying both of corporation tax on profits accruing to companies and of tax on the income of private shareholders imposed on the dividends distributed by those companies.

The main proceedings

12 In 1991 Mr Verkooijen resided in the Netherlands and was employed there by Fina Nederland BV, a distributor of petroleum products indirectly controlled by Petrofina NV, a public limited liability company established in Belgium and quoted on the stock exchange.

13 In the context of an employees' savings plan (*werknemersspaarplan*) open to all employees of the group, Mr Verkooijen acquired shares in Petrofina NV. In 1991 a dividend was distributed in respect of those shares of about NLG 2 337 (after conversion into Netherlands guilders) which was subject to a deduction at source of 25% in Belgium. In his Netherlands tax return for 1991, Mr Verkooijen included that dividend as part of his taxable income.

14 For the purpose of taxing Mr Verkooijen's income, the tax inspector did not apply the dividend exemption on the ground that Mr Verkooijen was not entitled to it since the dividends received by him from Petrofina had not been subject to the Netherlands dividend tax. The notice informing Mr Verkooijen of his liability to income tax and his contribution to the general social insurance scheme (*volksverzekeringen*) for 1991 therefore indicated taxable income of NLG 166 697, including the entire dividend paid to him by Petrofina.

15 Mr Verkooijen objected to that notice, contending that the first NLG 2 000 (he being married) of the dividend received by him should have been exempt from income tax under Article 47b(1) and (3) of the Income Tax Law.

16 The tax inspector dismissed that objection, whereupon Mr Verkooijen appealed against that decision to the *Gerechtshof te 's-Gravenhage*. That court held that the limitation of the dividend exemption to income from shares from which Netherlands dividend tax had been withheld was contrary to Articles 52 and 58 of the EC Treaty (now Article 48 EC) and to Directive 88/361. It therefore annulled the tax inspector's decision and amended the tax notice, so that the tax was then calculated on taxable income of NLG 164 697.

17 The *Staatssecretaris van Financien* applied for review of the judgment of the *Gerechtshof te 's-Gravenhage* to the court making the present reference.

The relevant Community legislation

18 The dispute in the main proceedings arose before the entry into force of the Treaty on European Union and therefore the Treaty provision concerning the free movement of capital which was applicable at the material time was Article 67 of the EEC Treaty (repealed by the Treaty of Amsterdam). It was worded as follows:

During the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in the Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested.

19 That provision was implemented by various directives, including Directive 88/361, which was applicable at the material time.

20 Article 1(1) of that directive provides:

Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.

21 The capital movements listed in Annex I to Directive 88/361 include:

I. Direct investment

...

2. Participation in new or existing undertaking with a view to establishing or maintaining lasting economic links.

...

III. Operations in securities normally dealt in on the capital market (not included under I, IV and V)

...

A - transactions in securities on the capital market

...

2. Acquisition by residents of foreign securities dealt in on a stock exchange.

...

22 The last paragraph of the introduction to Annex I states that the list of capital movements is not exhaustive:

This nomenclature is not an exhaustive list for the notion of capital movements - whence a Heading XIII - F. "Other capital movements - Miscellaneous". It should not therefore be interpreted as restricting the scope of the principle of full liberalisation of capital movements as referred to in Article 1 of the directive.

23 Article 6(1) of Directive 88/361 provides:

Member States shall take the measures necessary to comply with this directive no later than 1 July 1990. They shall forthwith inform the Commission thereof. They shall also make known, by the date of their entry into force at the latest, any new measure or any amendment made to the provisions governing the capital movements listed in Annex I.

The questions referred to the Court

24 In those circumstances, the Hoge Raad der Nederlanden stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

1. Is Article 1(1) of Directive 88/361/EEC in conjunction with Heading I(2) in Annex I to that directive to be interpreted as meaning that a restriction arising from a provision of the income tax legislation of a Member State which exempts shareholders, up to a certain amount, from liability to income tax on dividends, but restricts that exemption to dividends paid in respect of shares in companies established in that Member State, has been prohibited since 1 July 1990 pursuant to Article 6(1) of that directive?

2. If the answer to Question 1 is in the negative, are Articles 6 and/or 52 of the EC Treaty to be interpreted as meaning that a restriction of the kind referred to in that question is incompatible with one or both of those articles?

3. Do the answers to the questions set out above differ depending on whether the person seeking the benefit of such an exemption is an ordinary shareholder or an employee (of a subsidiary company) who holds the shares in question in the context of an employees' savings plan ("werknemersspaarplan")?

The first question

25 By its first question, the national court seeks essentially to ascertain whether Article 1(1) of Directive 88/361 precludes a legislative provision of a Member State which, like the provision at issue in the main proceedings, makes the grant of exemption from income tax payable on dividends paid to natural persons who are shareholders subject to the condition that those dividends are paid by a company whose seat is in that Member State.

26 It is necessary first to consider whether the fact that a national of a Member State residing in that Member State receives dividends on shares in a company whose seat is in another Member State is covered by Directive 88/361, which implements Article 67 of the Treaty.

27 Although the Treaty does not define the term capital movements, Annex I to Directive 88/361 contains a non-exhaustive list of the operations which constitute capital movements within the meaning of Article 1 of the directive.

28 Although receipt of dividends is not expressly mentioned in the nomenclature annexed to Directive 88/361 as capital movements, it necessarily presupposes participation in new or existing undertakings referred to in Heading I(2) of the nomenclature.

29 Moreover, since, in the main proceedings, the company distributing dividends has its seat in a Member State other than the Kingdom of the Netherlands and is quoted on the stock exchange, receipt of dividends on shares in that company by a Netherlands national may also be linked to Acquisition by residents of foreign securities dealt in on a stock exchange as referred to in Heading III.A(2) of the nomenclature annexed to Directive 88/361, as Mr Verkooijen, the United Kingdom Government and the Commission contend. Such an operation is thus indissociable from a capital movement.

30 Consequently, the receipt by a national of a Member State residing in that Member State of dividends on shares in a company whose seat is in another Member State is covered by Directive 88/361.

31 Second, it is necessary to consider whether the fact that a Member State refuses to exempt its taxpayers who receive dividends on shares in a company whose seat is in another Member State from liability to tax on those dividends constitutes a restriction of capital movements within the meaning of Article 1 of Directive 88/361.

32 It must be borne in mind at the outset that, although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law (Case C-80/94 Wielockx [1995] ECR I-2493, paragraph 16; Case C-264/96 ICI v Colmer (HMIT) [1998] ECR I-4695, paragraph 19; and Case C-311/97 Royal Bank of Scotland [1999] ECR I-2651, paragraph 19).

33 Second, Directive 88/361, which applied at the material time, brought about complete liberalisation of capital movements and to that end Article 1(1) thereof required the Member States to abolish all restrictions on such movements. The direct effect of that provision was recognised by the Court in Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 33.

34 A legislative provision such as the one at issue in the main proceedings has the effect of dissuading nationals of a Member State residing in the Netherlands from investing their capital in companies which have their seat in another Member State. It is also clear from the legislative history of that provision that the exemption of dividends, accompanied by the limitation of that exemption to dividends on shares in companies which have their seat in the Netherlands, was intended specifically to promote investments by individuals in companies so established in the Netherlands in order to increase their equity capital.

35 Such a provision also has a restrictive effect as regards companies established in other Member States: it constitutes an obstacle to the raising of capital in the Netherlands since the dividends which such companies pay to Netherlands residents receive less favourable tax treatment than dividends distributed by a company established in the Netherlands, so that their shares are less attractive to investors residing in the Netherlands than shares in companies which have their seat in that Member State.

36 It follows that to make the grant of a tax advantage, such as the dividend exemption, relating to taxation of the income of natural persons who are shareholders subject to the condition that the dividends are paid by companies established within national territory constitutes a restriction on capital movements prohibited by Article 1 of Directive 88/361.

37 According to the governments which have submitted observations, even if a national provision such as that relating to the dividend exemption were assumed to constitute a restriction within the meaning of Directive 88/361, it would be necessary to take account, in interpreting the Community law applicable at the material time, of the Community rules which entered into force on 1 January 1994, in particular Article 73d(1)(a) of the EC Treaty (now Article 58(1)(a) EC).

38 The Netherlands Government states, first, that that provision grants the Member States, by way of exception to the prohibition of any restriction of capital movements between Member States laid down in Article 73b of the EC Treaty (now Article 56 EC), the right to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested. It is clear from Declaration No 7 annexed to the Final Act of the Treaty on European Union that Article 73d(1)(a) of the Treaty allows national tax provisions which were in force in the Member States before it came into effect to continue to distinguish between taxpayers according to their place of residence or the place where their capital is invested.

39 Next, both the Netherlands Government and the United Kingdom Government maintain that Articles 73b to 73g of the EC Treaty (Article 73c of the EC Treaty has become Article 57 EC, Article 73e of the EC Treaty was repealed by the Treaty of Amsterdam and Articles 73f and 73g of the EC Treaty have become Articles 59 EC and 60 EC) which were introduced by the Treaty on European Union must be regarded as marking an advance in the process of liberalisation of capital or, at least, as reproducing the law as it was by constitutionalising or codifying the existing principles;

they cannot be a step backwards.

40 Consequently, according to those same governments, the possibility under Article 73d(1)(a) of the Treaty of applying national tax provisions distinguishing between taxpayers according to their place of residence or the place where their capital is invested existed before that provision entered into force, in particular by virtue of Directive 88/361.

41 According to those same governments, a legislative provision of the kind at issue in the main proceedings which, for the purpose of exempting dividends, draws a distinction between taxpayers who are not in the same situation with regard to the place where their capital is invested is not contrary to Community law.

42 In that connection, since the facts of the main proceedings antedate the entry into force of the Treaty on European Union, it is necessary to consider the compatibility of a legislative provision of the kind at issue in the main proceedings solely with reference to the provisions of the EEC Treaty and Directive 88/361.

43 In addition, the possibility granted to the Member States by Article 73d(1)(a) of the Treaty of applying the relevant provisions of their tax legislation which distinguish between taxpayers according to their place of residence or the place where their capital is invested has already been upheld by the Court. According to that case-law, before the entry into force of Article 73d(1)(a) of the Treaty, national tax provisions of the kind to which that article refers, in so far as they establish certain distinctions based, in particular, on the residence of taxpayers, could be compatible with Community law provided that they applied to situations which were not objectively comparable (see, in particular, Case C-279/93 Schumacker [1995] ECR I-225) or could be justified by overriding reasons in the general interest, in particular in relation to the cohesion of the tax system (Case C-204/90 Bachmann v Belgian State [1992] ECR I-249 and Case C-300/90 Commission v Belgium [1992] ECR I-305).

44 In any event, Article 73d(3) of the Treaty states specifically that the national provisions referred to by Article 73d(1)(a) are not to constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments, as defined in Article 73b.

45 Furthermore, the argument that the measures and procedures referred to in Article 73 (d) (3) of the Treaty do not relate to Article 73 (d) (1)(a), in which the term provisions is used, is irrelevant. Apart from the fact that it is difficult to distinguish between measures and provisions, the term measures and procedures does not appear at all in paragraph 2 even though Article 73d(3) refers expressly to that paragraph.

46 Accordingly, it is necessary to examine whether the restriction on capital movements arising from a legislative provision such as that at issue in the main proceedings may be objectively justified by any overriding reason in the general interest.

47 The United Kingdom Government submits, first, that a legislative provision such as the one at issue in the main proceedings may be objectively justified by the intention to promote the economy of the country by encouraging investment by individuals in companies with their seat in the Netherlands.

48 In that connection, it need merely be pointed out that, according to settled case-law, aims of a purely economic nature cannot constitute an overriding reason in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty (Case C-120/95 Decker v Caisse de Maladie des Employés Privés [1998] ECR I-1831, paragraph 39, and Case C-158/96 Kohll v Union des Caisses de Maladie [1998] ECR I-1931, paragraph 41).

49 Second, all the governments which submitted observations maintain that the fact of restricting the exemption of dividends to those distributed by companies with their seat in the Netherlands

was justified by the need to preserve the cohesion of the Netherlands tax system.

50 In their submission, the exemption of dividends is intended to mitigate the effects of double taxation - in economic terms - resulting from the levying on the company of corporation tax in respect of its profits and the taxation of the same profits distributed in the form of dividends borne by natural persons who are shareholders, by way of income tax.

51 The exemption of dividends is, they say, reserved to those shareholders who receive dividends on shares in companies with their seat in the Netherlands because only the latter are taxed in the Netherlands on the profits they have realised. Where the company which distributes the dividends is established in another Member State, profits are taxed in that Member State with the result that, in the Netherlands, there is no double taxation to be compensated for.

52 The Netherlands Government also submitted at the hearing that the tax levied on company profits by the tax authorities of a State other than the Kingdom of the Netherlands cannot be offset by granting an exemption in respect of dividends to persons residing in the Netherlands who are shareholders of such companies since that would automatically entail a loss of revenue for the Netherlands tax authorities in that they would not receive any tax on the profits of the companies distributing dividends.

53 Similarly, the United Kingdom Government argued that if the Netherlands tax authorities were to grant an exemption for dividends on shares in a company established outside the Netherlands, such dividends would entirely escape taxation in the Netherlands.

54 The Netherlands Government added that to apply the dividend exemption to taxpayers who are shareholders in companies with their seat in other Member States would enable such taxpayers to secure a twofold advantage since they could enjoy tax reliefs both in the Member State in which the dividend was paid and in the Member State where it was received, namely the Netherlands.

55 Those arguments cannot be upheld.

56 As regards the need to preserve the cohesion of the Netherlands tax system, although the Court has held that the need to ensure the cohesion of a tax system may justify rules liable to restrict fundamental freedoms (*Bachmann and Commission v Belgium*, cited above), that is not the position here.

57 In *Bachmann and Commission v Belgium*, a direct link existed, in the case of one and the same taxpayer, between the grant of a tax advantage and the offsetting of that advantage by a fiscal levy, both of which related to the same tax. In those cases, there was a link between the deductibility of contributions and the taxation of sums payable by insurers under old-age insurance and life assurance policies, which it was necessary to preserve in order to safeguard the cohesion of the tax system at issue.

58 No such direct link exists in this case between the grant to shareholders residing in the Netherlands of income tax exemption in respect of dividends received and taxation of the profits of companies with their seat in another Member State. They are two separate taxes levied on different taxpayers.

59 As regards the arguments concerning the loss of revenue for the Kingdom of the Netherlands that would result from exemption of dividends received by its residents who are shareholders of companies with their seat in other Member States, it need merely be pointed out that reduction in such tax revenue cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is in principle contrary to a fundamental freedom (see, to that effect, in relation to Article 52 of the Treaty, the *ICI* judgment cited above, paragraph 28).

60 Moreover, as regards the United Kingdom Government's argument mentioned in paragraph 53 of

this judgment, the income received by a natural person residing in the Netherlands from shares in companies having their seat in another Member State does not systematically escape Netherlands taxation as a result of exemption of dividends; that would be the case only if the shareholder subject to Netherlands income tax received from a company established in another Member State dividends of an amount which, after conversion if necessary, did not exceed the exempted NLG 1 000 or 2 000, which would place him in the same situation as if he had received dividends from companies established in the Netherlands.

61 As regards, finally, the argument based on a possible tax advantage for taxpayers receiving in the Netherlands dividends from companies with their seat in another Member State, it is clear from settled case-law that unfavourable tax treatment contrary to a fundamental freedom cannot be justified by the existence of other tax advantages, even supposing that such advantages exist (see to that effect, in relation to Article 52 of the Treaty, Case 270/83 *Commission v France* [1986] ECR 273, paragraph 21; Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 53; and Case C-307/97 *Saint-Gobin ZN* [1999] ECR I-6161, paragraph 54; see, in relation to Article 59 of the EC Treaty (now, after amendment, Article 49 EC), Case C-294/97 *Eurowings Luftverkehrs* [1999] ECR I-7447, paragraph 44).

62 The answer to the first question must therefore be that Article 1(1) of Directive 88/361 precludes a legislative provision of a Member State which, like the provision at issue in the main proceedings, makes the grant of exemption from income tax payable on dividends paid to natural persons who are shareholders subject to the condition that those dividends are paid by a company whose seat is in that Member State.

The second question

63 In view of the answer given to the first question, it is unnecessary to answer the second.

The third question

64 By its third question, the national court seeks essentially to ascertain how the answer given to the first question might be affected by the fact that the taxpayer seeking the benefit of such a tax exemption is an ordinary shareholder or an employee holding shares on which dividends are received under an employees' savings plan.

65 All the parties which have submitted observations maintain that the fact that a natural person applying for a tax advantage such as the dividend exemption is an ordinary shareholder or an employee who has acquired shares on which dividends are payable under a company employees' savings plan (*werknemersspaarplan*) does not affect the answer given to the first two questions.

66 A national legislative provision of the kind at issue in this case withholds the exemption of dividends from all taxpayers subject to income tax in the Netherlands in respect of dividends received from a company established in another Member State, without distinguishing between taxpayers who are ordinary shareholders and those who are employees whose shares were acquired under an employees' savings plan.

67 Since the answer to the first question is that such a provision constitutes a restriction on the free movement of capital contrary to Community law regardless of the status of the shareholder, the answer to the third question must be that the position is not in any way changed by the fact that the taxpayer applying for such a tax exemption is an ordinary shareholder or an employee who holds shares giving rise to the payment of dividends under an employees' savings plan.

AUTHOR Court of Justice of the European Communities

FORM Judgment

TREATY European Communities

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NATIONA Netherlands

NATCOUR *A8* Gerechtshof 's-Gravenhage, 1e meervoudige belastingkamer, uitspraak van 10/04/1996 (93/2636)
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PROCEDU Reference for a preliminary ruling
ADVGEN La Pergola
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**Judgment of the Court (Sixth Chamber)
of 13 July 2000
Alfredo Albore.**

Reference for a preliminary ruling: Corte d'appello di Napoli - Italy.

Freedom of establishment - Free movement of capital - Articles 52 of the EC Treaty (now, after amendment, Article 43 EC) and 73b of the EC Treaty (now Article 56 EC) - Authorisation procedure for the purchase of immovable property - Areas of military importance - Discrimination on grounds of nationality.

Case C-423/98.

1. Free movement of capital - Treaty provisions - Scope - Purchase of immovable property - Included

(EC Treaty, Art. 73b (now Art. 56 EC))

2. Free movement of capital - Restrictions on the acquisition of immovable property - Requirement of prior authorisation for the purchase of real estate situated in areas of military importance - Exemption only for nationals - Not permissible - Justification - Conditions

(EC Treaty, Art 73b (now Art. 56 EC))

1. Whatever the reasons for it, the purchase of immovable property in a Member State by a non-resident constitutes an investment in real estate which falls within the category of capital movements between Member States. Freedom for such movements is guaranteed by Article 73b of the Treaty (now Article 56 EC).

(see para. 14)

2. Article 73b of the Treaty (now Article 56 EC) precludes national legislation of a Member State which, on grounds relating to the requirements of defence of the national territory, exempts the nationals of that Member State, and only them, from the obligation to apply for an administrative authorisation for any purchase of real estate situated within an area of the national territory designated as being of military importance.

The position would be different only if it could be demonstrated to the competent national court that, in a particular area, non-discriminatory treatment of the nationals of all the Member States would expose the military interests of the Member State concerned to real, specific and serious risks which could not be countered by less restrictive procedures.

(see para. 24 and operative part)

In Case C-423/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by Corte d'Appello di Napoli, Italy, for a preliminary ruling in the proceedings pending before that court brought by

Alfredo Albore

on the interpretation of Articles 6, 52 and 56 of the EC Treaty (now, after amendment, Articles 12 EC, 43 EC and 46 EC) and Article 67 of the EC Treaty (repealed by the Treaty of Amsterdam),

THE COURT (Sixth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, C. Gulmann, J.-P. Puissochet (Rapporteur), V. Skouris and F. Macken, Judges,

Advocate General: G. Cosmas,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Albore, by himself,
- the Italian Government, by Professor U. Leanza, Head of the Legal Department in the Ministry of Foreign Affairs, acting as Agent, assisted by P.G. Ferri, *Avvocato dello Stato*,
- the Greek Government, by K. Paraskevopoulou-Gregoriou, Legal Representative in the State Legal Service, and S. Vodina, Assistant Lawyer in the Department for European Affairs of the Ministry of Foreign Affairs, acting as Agents,
- the Commission of the European Communities, by A. Aresu and M. Patakia, both of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Italian government, represented by P.G. Ferri, of the Greek Government, represented by K. Paraskevopoulou-Gregoriou, and of the Commission, represented by E. Traversa, Legal Adviser, acting as Agent, at the hearing on 26 January 2000,

after hearing the Opinion of the Advocate General at the sitting on 23 March 2000,

gives the following

Judgment

1 By order of 29 October 1998, received at the Court on 25 November 1998, the *Corte d'Appello di Napoli* (Court of Appeal, Naples) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now article 234 EC) a question on the interpretation of Articles 6, 52 and 56 of the EC Treaty (now, after amendment, Articles 12 EC, 43 EC and 46 EC) and Article 67 of the EC Treaty (repealed by the Treaty of Amsterdam).

2 That question was raised in an appeal brought by Mr Albore, a notary, against a decision of the *Tribunale Civile e Penale di Napoli* (Civil and Criminal District Court, Naples) dismissing his action against the refusal by the Naples Registrar of Property to register the sale of two immovable properties to German nationals on the ground that they had not applied for the prefectural authorisation prescribed by Italian law where property is situated in areas of the territory designated as being of military importance.

The national legislation

3 Article 1 of Italian Law No 1095 of 3 June 1935 laying down specific rules on the transfer of immovable property situated in the provinces adjoining land frontiers (GURI No 154 of 4 July 1935), as amended by Law No 2207 of 22 December 1939 (GURI No 53 of 2 March 1939), provides:

All instruments transferring wholly or in part ownership of immovable property situated in areas of provinces adjacent to land frontiers shall be subject to approval by the Prefect of the province.

4 Under Article 2 of that Law, instruments of transfer may not be entered in the public registers by the competent officials unless evidence is produced that the Prefect has given his approval.

5 Under Article 18 of Law No 898 of 24 December 1976 laying down new rules on military easements (GURI No 8 of 11 January 1977), as amended by Law No 104 of 2 May 1990 (GURI No 105 of 8 May 1990, hereinafter Law No 898/76):

The provisions laid down in Articles 1 and 2 of Law No 1095 of 3 June 1935, as amended by Law No 2207 of 22 December 1939, shall also apply in the areas of the national territory designated as being of military importance by decree of the Minister for Defence, jointly with the Minister

for the Interior, and published in the *Gazzetta Ufficiale*.

Neither the Prefect's authorisation nor the opinion of the military authorities provided for by Law No 1095 of 3 June 1935, as amended by Law No 2207 of 22 December 1939, in respect of the disposal in whole or in part of immovable property shall be required where such disposal in whole or in part is to Italian nationals or to the authorities of the State, including autonomous agencies, to municipalities, provinces or other public economic bodies, or to any other legal person, whether governed by public or private law, of Italian nationality.

The main proceedings

6 Two properties at Barano d'Ischia, in an area of Italy designated as being of military importance, were purchased on 14 January 1998 by two German nationals, Uwe Rudolf Heller and Rolf Adolf Kraas, who did not apply for prefectural authorisation. In the absence of such authorisation, the Naples Registrar of Property refused to register the sale of the properties.

7 Mr Albore, the notary before whom the transaction was concluded, appealed against that refusal to the Tribunale Civile e Penale di Napoli, claiming that the sale at issue, concluded for the benefit of nationals of a Member State of the Community, should not be subject to the national legislation which required only foreigners to obtain prefectural authorisation.

8 Following the dismissal of his action by the Tribunale on 20 May 1998, Mr Albore appealed to the Corte d'Appello, Naples.

9 The Corte d'Appello, having observed that it was inappropriate to apply domestic provisions that were contrary to Community law, stated that the national legislation at issue, applied to nationals of Member States of the Community, appeared to be contrary to the provisions of the EC Treaty on the prohibition of all discrimination on grounds of nationality, on freedom of establishment and on free movement of capital and did not appear, in view of its general nature and scope, to relate to matters of public policy, public security or public health such as to justify, under the Treaty, such discrimination.

10 In view of the differences of opinion between the various judicial authorities in Italy with jurisdiction in that sphere, the Corte d'Appello considered it necessary to seek a preliminary ruling from the Court of Justice.

11 It therefore stayed proceedings pending a preliminary ruling from the Court as to whether Articles 6, 52, 56 and 67 of the Treaty precluded provisions such as Article 18 of Law No 898/76 which require prefectural authorisation to be obtained for the purchase of property situated in an area of the national territory designated as being of military importance unless the purchaser is a public or private person of Italian nationality.

The question referred to the Court

12 The national court seeks essentially to ascertain whether the provisions of the Treaty concerning prohibition of discrimination on grounds of nationality, freedom of establishment and free movement of capital preclude national legislation of a Member State which releases the nationals of that Member State, and only them, from the obligation to seek an administrative authorisation for any purchase of real property in an area of the country designated as being of military importance.

13 The Italian Government contends that that question is inadmissible because the German nationality of the purchasers of the property is not sufficient to establish that the transaction at issue was entered into in the exercise of a freedom guaranteed by Community law and that none of the facts of the case indicates that it might fall within the scope of Community law.

14 The Italian Government's submission as to the admissibility of the question is unfounded. Whatever

the reasons for it, the purchase of immovable property in a Member State by a non-resident constitutes an investment in real estate which falls within the category of capital movements between Member States. Freedom for such movements is guaranteed by Article 73b of the EC Treaty (now Article 56 EC) (see Case C-302/97 *Konle v Austria* [1999] ECR I-3099, paragraph 22).

15 An answer must therefore be given to the question submitted.

16 In so far as it exempts only Italian nationals from the requirement of obtaining an authorisation to buy a property in certain parts of the national territory, Article 18 of Law No 898/76 imposes on nationals of the other Member States a discriminatory restriction on capital movements between Member States (to that effect, see *Konle*, paragraph 23).

17 Such discrimination is prohibited by Article 73b of the Treaty unless it is justified on grounds permitted by the Treaty.

18 Although no justification is mentioned in the order for reference and the Italian Government likewise has not mentioned any in its written observations, it is clear from the object of the legislation at issue that the contested measure may be regarded as having been adopted in relation to public security, a concept which, within the meaning of the Treaty, includes the external security of a Member State (see Case C-367/89 *Richardt and Les Accessoires Scientifiques* [1991] ECR I-4621, paragraph 22).

19 However, the requirements of public security cannot justify derogations from the Treaty rules such as the freedom of capital movements unless the principle of proportionality is observed, which means that any derogation must remain within the limits of what is appropriate and necessary for achieving the aim in view (see Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 38).

20 Furthermore, under Article 73d(3) of the EC Treaty (now Article 58(3) EC), such requirements may not be relied on to justify measures constituting a means of arbitrary discrimination or a disguised restriction on the free movement of capital.

21 In that regard, a mere reference to the requirements of defence of the national territory, where the situation of the Member State concerned does not fall within the scope of Article 224 of the EC Treaty (now Article 297 EC), cannot suffice to justify discrimination on grounds of nationality against nationals of other Member States regarding access to immovable property on all or part of the national territory of the first State.

22 The position would be different only if it were demonstrated, for each area to which the restriction applies, that non-discriminatory treatment of the nationals of all the Member States would expose the military interests of the Member State concerned to real, specific and serious risks which could not be countered by less restrictive procedures.

23 In the absence of any evidence enabling the Court to examine whether the existence of such circumstances might be demonstrated in relation to the island of Ischia, it is for the national court to decide, in the case before it, whether or not there is sufficient justification within the meaning of the foregoing paragraph.

24 The answer to the question submitted must therefore be that Article 73b of the Treaty precludes national legislation of a Member State which, on grounds relating to the requirements of defence of the national territory, exempts the nationals of that Member State, and only them, from the obligation to apply for an administrative authorisation for any purchase of real estate situated within an area of the national territory designated as being of military importance. The position would be different only if it could be demonstrated to the competent national court that, in a particular area, non-discriminatory treatment of the nationals of all the Member States would expose the military

interests of the Member State concerned to real, specific and serious risks which could not be countered by less restrictive procedures.

25 In view of the foregoing, it is unnecessary to consider the questions relating to the interpretation of Articles 6 and 52 of the Treaty.

Costs

26 The costs incurred by the Italian and Greek Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Corte d'Appello di Napoli by order of 29 October 1998, hereby rules:

Article 73b of the EC Treaty (now Article 56 EC) precludes national legislation of a Member State which, on grounds relating to the requirements of defence of the national territory, exempts the nationals of that Member State, and only them, from the obligation to apply for an administrative authorisation for any purchase of real estate situated within an area of the national territory designated as being of military importance.

The position would be different only if it could be demonstrated to the competent national court that, in a particular area, non-discriminatory treatment of the nationals of all the Member States would expose the military interests of the Member State concerned to real, specific and serious risks which could not be countered by less restrictive procedures.

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NATIONA Italy

NATCOUR *A9* Corte d'Appello di Napoli, Sezione I civile, ordinanza del 29/10/1998 16/11/1998 (250/98)
- Il Foro italiano 1999 I Col.1004-1006
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ADVGEN Cosmas

JUDGRAP Puissochet

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