# ADVANCED EU LAW – DROI2055-2

## Cases & Materials

Faculté de Droit, de Science Politique et de Criminologie

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## WELCOME

Dear students,

The European Union (EU) is one of the most fascinating international organisations currently in operation. No other organisation over the past century succeeded in shaping, refining and structuring a truly autonomous *supranational* legal order that constantly keeps evolving towards a closer union between the States and peoples of Europe. At the same time, the EU remains a project under construction, which has become the object of ever more intense criticism.

This course will offer a panoramic perspective of the state of European Union law today. As the EU intervenes in ever more domains, we have to make a selection in doing so. Given their increasing importance, we made the choice in that respect to approach the European Union and its law from the particular point of view of 'fundamental rights'.

The importance of fundamental rights can no longer be denied at the European Union level. Having gained gradual recognition up to a point where an EU Charter of Fundamental Rights has been adopted, fundamental rights have come to play a major role in the design, interpretation and application of European Union law. This course uses the presence, possibilities and limits fundamental rights offer as an inroad into studying European Union law in a somewhat more advanced manner.

The course will comprise a general introduction on the role and status of fundamental rights in the European Union (sessions 1 and 2), before questioning whether a specific hierarchy exists between different types of fundamental rights as recognised throughout the European Union (sessions 3, 4 and 5). The final part of the course zooms in on specific fundamental rights that can be considered typical of the EU: the right to transparency and openness (sessions 6 and 7) and the right to the protection of one's personal data (sessions 8, 9 and 10). Materials covered in those sessions will form the object of an oral exam organised during the January 2019 exam session.

In addition to our class sessions, this course will have two written-work requirements. Two case notes have to be written on a judgment either discussed in class or another judgment of your own choice. This must allow you to improve your English writing skills. Individual feedback will be provided over the course of the semester in order to help you improve your writing.

This reader contains case law and legislation, which are meant to help you maintain some oversight in the materials covered in class sessions. In case of questions, do not hesitate to contact me at pieter.vancleynenbreugel@uliege.be or during class breaks. I look forward to meeting you in class every Friday of the first term!

Pieter Van Cleynenbreugel

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## COURSE SCHEDULE AND SETUP

Ten two hour lecture sessions will be organised, ten of which will take place during our regular time-slot on Fridays from 10.00 to 12.00.

In addition to the lectures, a visit to the Court of Justice in Luxemburg will be organised on Wednesday 21 November. The visit forms part of the course – for organisational purposes, you will be asked to register explicitly for this visit during the first class. More practical information on the visit and the programme will be communicated to you in due course.

The following classes will be organised. The exact location of the classes can be found on the ULiège Faculty of law website:

1. The emergence of fundamental rights in the European Union (21/09)
2. Fundamental rights in the European Union and beyond: the relationship between EU fundamental rights and other fundamental rights regimes (28/09)
3. Fundamental rights in the EU internal market (I): free movement rights as/and fundamental rights (5/10)
4. Fundamental rights in the EU internal market (II): economic freedoms and social rights in balance? (12/10)
5. Fundamental rights in the EU internal market (III): Citizenship rights as fundamental rights? (19/10)
6. EU-specific fundamental rights: openness and transparency (I) (26/10)

**Submission of first written assignment (31/10, 11h00 via eCampus and on paper at secretariat)**

7. EU-specific fundamental rights: openness and transparency (II) (9/11)

**Feedback on first written assignment (12/11, 13/11 or 16/11)**

8. EU-specific fundamental rights: data protection (I) (16/11)

Visit to the Court of Justice in Luxemburg (21/11)

9. EU-specific fundamental rights: data protection (II) (23/11)
10. EU-specific fundamental rights: data protection (III) = Q&A (30/11)

**Inaugural lectures in European Union law – (7/12, 17h00, Amphithéâtres de l'Europe – mandatory presence required)**

**Submission of second written assignment (12/12, 11h00 via eCampus and on paper at secretariat)**

Course materials consist in a reader containing course outlines, cases and materials, available at the Presses Universitaires. Additional materials may be posted on eCampus.

## PRACTICAL INFORMATION

a. Course format

This course is an advanced EU law course. "Advanced" should be understood to have two dimensions. On the one hand, the course will offer a more in-depth discussion of familiar materials from your introductory EU law courses, taking another starting point than the one usually offered in such courses. On the other hand, it will also cover more advanced materials not generally treated in those introductory courses. Its aim is to highlight themes that are important for anyone engaged in EU law practice or having a keen interest in the functioning and future of the European Union. As such, it envisages to provoke discussion, to incite lawyerly reflection and to introduce important institutional and substantive law themes to you.

As the EU is a complex organisation and as it is impossible to cover everything in this course, the selected themes – *capita selecta* approach has been opted for, centered around the issue of fundamental rights in the European Union.

b. Course materials – class preparation

This reader contains the materials that are essential and that will be used in detail during the lecture sessions. You can bring those materials to the exam preparation and you may add notes to them. Additional materials will be posted on e-Campus; you are free to print them, but you cannot take them with you during the course.

The TEU, TFEU and the Charter of Fundamental Rights have been posted on eCampus; you may print them as well and take them to the exam. In any case, printed versions will be made available to you when preparing your oral exam.

The course will be taught in an interactive way; that means that ex cathedra lecture moments will be complemented by discussion sessions on the materials. You are therefore expected to read the cases for each session in advance! That will not only facilitate our discussion, but will help you to come to class with questions that may be relevant to others as well. The aim is really to stimulate discussion, so you do not have to be afraid to interrupt the lecture and ask me a question if things happen to be unclear.

No particular textbook is assigned for this course. For your information, I propose some suggestions regarding textbooks, which may help you in structuring and framing the materials covered in class:

- K. Davies, *Understanding EU law*, Oxford, Routledge, 6th Edition, 2015, 184 pp. (a clear English-language introduction to European Union law).
- P. Craig and G. De Búrca, *EU law. Text, cases and materials*, Oxford, Oxford University Press, 6th Edition, 2015, 1380 p. (the standard textbook in the field, covers a lot of ground not necessarily covered in this class, yet it may also offer a background framework to help you in your studies).
- R. Schütze, *An introduction to European Law*, Cambridge, Cambridge University Press, 2015, 2nd Edition, 380 p. (another clear introduction to EU law, both from institutional and substantive law perspectives)

- K. Lenaerts and P. Van Nuffel, *European Union Law*, London, Sweet & Maxwell, 3rd Edition, 2011, 1334 p. (a very complete textbook, covering every area in an in-depth fashion; as such, it offers a true encyclopaedia for anyone wanting to understand a field of EU law in a detailed way).

Please bear in mind that this is a 6 ECTS course, which means that you will be expected to work above and beyond the 30 hours of class time. You are in principle expected to work three hours for each hour of class; take your preparations seriously and make sure to read materials in advance. This will help you more meaningfully to contribute to class discussions and prepare for the questions asked during the exam.

c. Time slots

As mentioned above, the regular course time slot is Friday morning from **10.00 to 12.00**. During that time slot, 10 classes will be organised over the course of the semester. In addition, the course comprises three types of additional activities:

- An individual feedback session on your first writing assignment in the week starting 12/11. More information will follow.
- A visit to the Court of Justice (21/11). More information will follow.
- Attendance of the Faculty of Law's 'inaugural lectures' event on 7/12 (no class will be organised on that day): the inaugural lectures give the opportunity to recently appointed (during the last three to four years) professors to deliver a subject-matter on their field. This year, all professors will be (part-time) lecturers in European Union law. As their lectures fit in an Advanced EU law course, attendance of this event will be compulsory and form part of the course. On the exam, a question may be asked regarding one of the inaugural lectures' content.

d. Written assignments – two case notes

As an English-language course, the Advanced EU law sessions also want to teach you how to write in a foreign language. In order to accomplish that aim, you will be required to prepare two short papers over the course of the semester. Those papers are set up as reflection papers in the format of a case note. The first case note will be on any judgment of your choice covered in lectures 1-2-3-4. The second case note covers any judgment of your choice covered in lectures 5-6-7-8-9-10.

Those case notes offer an opportunity to test your skills in identifying the key points in a judgment. I will ask you to pick one of the judgments covered in class and to prepare a five to eight pages case note on that judgment. In that case note, you are required to summarise and analyse the judgment according to the following structure:

I. Relevant facts
II. Judgment (+ potentially preceded by analysis of Advocate General's Opinion)
III. Analysis: questions covered include – yet are not limited to – the following:

a. Did the Court follow its earlier case law or did it establish a new precedent?
b. Did the Court take into account special factual circumstances?
c. What future questions does the judgment raise or neglect in being reasoned the way it is?
d. What kind of action is to be taken by either the Court or other institutions of the European Union in order to remedy some of the problems you have identified with the judgment?

The challenge of this assignment is to offer a clear and sharp analysis of a judgment covering the facts in five to eight pages covering all three elements. On eCampus, you will find a number of examples of *Common Market Law Review* case notes, which constitute the standard format in this respect. In the first class, I will give you a set of examples and provide you with more detailed instructions in this regard. It goes without saying that, whenever the cases have already been commented on in this venue, you are still expected to offer your proper – and somewhat original – analysis to the case.

Being able to summarise and structure a case is one of the key learning goals of this course. The case note therefore counts for a total of **8 points out of 20 to be awarded in this case note**. Both case notes will be graded individually on a scale of 20; the second case note will explicitly take into account any improvements made in terms of writing style and analysis and a bonus can be allocated if significant improvement can be noticed.

**Do not be afraid of the workload and challenges associated with this process.** The judgments to be summarised will have been discussed to some extent in the course sessions and the writing process will be supervised by me over the course of the semester. The main purpose of this course is to offer you guidance and supervision throughout this process. That is why I will correct the case notes and offer you individual feedback on your written work on two occasions. Doing so will allow you to receive **individual feedback** and to improve your English writing and analysis skills as part of this course. Over the course of the semester, a feedback moment will be scheduled. In a 15 minute feedback session, I will offer you points for improvement and give you guidance as to how to improve your writing skills in the future. More information on how to schedule those appointments will be communicated via eCampus. Upon request, feedback on your second case note will also be possible at the end of December or during the oral exam in January.

In terms of practical instructions, case notes have to be prepared in *Times New Roman*, font 12, spacing 1.15, and may not exceed eight pages. The structure to be followed is the above (roman numbers I, II and III, followed by a, b and c as subdivisions). You are expected to submit the written version via eCampus on **Wednesdays 31/10 and 12/12 at 11.00 am at the latest, accompanied by a written version to be deposited with Mme Caroline Langevin, B33, 2nd floor, secretariat Institut d'Etudes Juridiques Européennes.**

e. Exam

In addition to the two case notes, which count for 8 of your 20 final points, an oral exam will be organised during the January exam period, during which 12 points can be earned. At this stage, you will have 30 minutes of preparation time. You will receive two general questions relating to the course themes, which you can discuss during the oral exam session (which will

last about 20 minutes). I may also ask you small questions relating to other subject-matters covered in class. The purpose will be to have an informed discussion on the subject-matter of the course, which is why the exam questions will be kept vague. The point of those questions is to offer a starting point for an informed discussion on the topics covered by this course. Preparation will be open-book; you can bring your annotated course materials and legislation to the exam.

## HOW TO READ A JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION?

The cases and materials covered here include mainly judgments by the Court of Justice and the General Court. In order to smoothen the reading and preparation process, I would like to offer you five guidelines meant to help you in structuring your readings.

- Start by reading the operative part: the judgment always contains an operative part; in case of a reference for a preliminary ruling, the answer to the question asked by the national jurisdiction – or thought to be asked by it when the Court of Justice rephrases it – will be given. In actions for annulment, the Court will only dismiss or grant the application, leaving you with less information on what the legal issue in the case was. In that case, you will have to delve immediately into the whole of the Court's *obiter dicta* – i.e. the reasoning preceding the conclusion reached by the judges – to understand what was really at stake. In a preliminary reference procedure, you can already partially infer the question from the answer given by the Court; it therefore pays to start reading the operative part.
- Clearly distinguish and summarise the facts of a case: although many people tend to read high-level and general insights in Court judgments, always be aware that, in the mindset of the Court, it is resolving a particular case at hand. Judges are above all problem-solvers; when confronted with a specific question, they are tasked to answer it. As such, it is necessary for you to infer what the problem actually is that confronts the Court in a particular case. For that purpose, it is essential to consult the facts of the case and the legislation in issue. Even when the Court will eventually invoke an unwritten general principle of EU law, it is crucial to understand why the Court did so, why no other provision of EU law was/could have been invoked. I would therefore advise you to summarise the facts of the case and to distinguish the relevant legal question as apparent from them. It is often on the basis of peculiar facts that peculiar answers to legal questions are given, so link facts and law after having read the operative part!
- Distinguish between the arguments of the parties and the findings of the Court: in the obiter part of the judgment itself, you will find a lot of paragraphs restating the arguments made by the parties to the proceedings in writing and orally. That information is interesting, as it guides the Court to develop its own legal reasoning. However, as you are mainly interested in the Court's legal reasoning, I would encourage you to continue your reading – following a summary of the facts – with the findings of the Court. Only if those findings leave you with questions or if you want to understand what led the Court to this conclusion, the arguments of the parties are to be consulted. In more recent case law, the Court has begun to distinguish – using subtitles – between arguments of the parties and findings of the Court. That is not the case in earlier case law; it will then be up to you to make the distinction!
- Link the judgment to other cases: when reading the judgment – especially in later stages of the course – make explicit links to judgments studied earlier; how does the judgment fit earlier precedents? Does it deviate from them – and if so – to what extent? Although the Court does indeed solve individual cases, it has to be predictable to some extent. Assess for each case whether you could have predicted the answer on the basis of

precedent case law; asking yourself that question will enhance your understanding of legal reasoning and of how the Court actually works.

- Reflect critically on the legal reasoning developed by the Court: once you have found the Court's reasoning, the next step will be to reflect critically on what the Court said; did it make a general or generalizable statement or did it just address a specific situation? Why did the Court invoke a specific provision or principle? What are the effects of that decision, potentially, for Member States and individuals? Is the judgment workable in practice or does it pose difficulties for Member States, national jurisdictions or litigants? Could the Court have reasoned otherwise in your opinion? If available, try to read the Advocate General's Opinion in this context as well. The aim of your reading should be to question profoundly, on the basis of your previous knowledge of EU law or precedents established by the Court itself, the judicial reasoning or interpretation of EU legal instruments. In adopting a critical perspective on what the Court does, your understanding of EU law will improve.

## LEARNING GOALS

The course aims to increase your knowledge, practical and critical reflection skills with regard to themes of EU law.

In terms of knowledge,

- the course will expand your knowledge on selected themes that go beyond the traditional topics covered in basic EU law courses, introducing you to legal regimes aimed at making the EU work better;
- you will learn terminology you are familiar with in your native language in an English context;
- you will better understand the links between primary and secondary EU law and the role of the Court in outlining that relationship;
- you will identify bridges between substantive and institutional law problems that have been distinguished commonly, for pedagogical reasons, in EU law analysis;
- you will understand better how the European Union functions and how this functioning is grounded firmly in supranational law;
- you will be introduced to economic and monetary integration and its relationship to the more classical field of EU internal market law;
- you will analyse the legal implications of a "Brexit" in the wake of the United Kingdom's referendum.

In terms of practical skills,

- you will actively learn how to read, interpret and understand judgments by the Court of Justice;
- you will be able to summarise a judgment and prepare a case note on the matter; your progress in developing English writing skills will be supervised and monitored over the course of the semester;
- you will take part, in writing, in discussions on the subject matter in English;
- you will develop be able to follow, in a more informed way, debates on the future of the European Union.

In terms of critical reflection skills,

- you will learn to think critically about the role of the Court of Justice in EU legal integration;
- you will be able to read and critically assess points of view developed by legal scholars;
- you will develop your own point of view on the legal desirability of proposed solutions at the EU level;
- you will be able to put EU law debates in the perspective of more general political debates on the role and future of the European Union;
- you will be able to balance the advantages and disadvantages of the current EU integration through law setup.

## LECTURE 1: THE EMERGENCE OF FUNDAMENTAL RIGHTS IN THE EU LEGAL ORDER

What makes EU law special? How does it distinguish itself from public international law and from Member States' national or regional legal norms? The answer to that question lies in the "hybrid" nature of EU law, having features of both public international and national law. Those features have been conferred on EU law by means of two crucial judgments: *Van Gend & Loos* and *Costa/ENEL*. In this first session, we will *read* and *interpret* both judgments as starting points for a peculiar 'integration through law' framework underlying the European Union. That framework, it will be argued, is grounded in an understanding of EU law as comprising subjective rights to be invoked against EU institutions, Member States and even other individuals. The recognition of rights thus gave rise to later recognition of fundamental rights and of a fundamental rights discourse pervading the EU legal order. At the same time, however, fundamental rights have also always been present in political initiatives, shaping the EU's commitment to fundamental rights as we know it today.

*Materials to read:*

- Court of Justice, 5 February 1963, Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration,* ECLI:EU:C:1963:1.
- Court of Justice, 15 July 1964, Case 6/64, *Flaminio Costa v E.N.E.L.*, ECLI:EU:C:1964:66.
- Court of Justice, 17 December 1970, Case 11-70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114.
- Court of Justice, 13 December 1979, Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz*, ECLI:EU:C:1979:290.
- A. von Bogdandy, 'The European Union as a human rights' organisation? Human rights and the core of the European Union', 37 *Common Market Law Review* (2000), 1307-1338 (via eCampus).
- G. De Burca, 'The Road not taken: the EU as a global human rights actor', 105 *American Journal of International Law* (2011), 649-693 (via eCampus).
- Charter of Fundamental Rights of the European Union, 26 October 2012, [2012] *O.J.* C 326/391 (browse through the Charter – what kind of rights can you distinguish? Do you find any rights you would not normally have expected in a fundamental rights instrument?).

## Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*

*IN CASE 26/62*

*REFERENCE TO THE COURT UNDER SUBPARAGRAPH ( A ) OF THE FIRST PARAGRAPH AND UNDER THE THIRD PARAGRAPH OF ARTICLE 177 OF THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY BY THE TARIEFCOMMISSIE, A NETHERLANDS ADMINISTRATIVE TRIBUNAL HAVING FINAL JURISDICTION IN REVENUE CASES, FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN*

*N.V . ALGEMENE TRANSPORT - EN EXPEDITIE ONDERNEMING VAN GEND & LOOS, HAVING ITS REGISTERED OFFICE AT UTRECHT, REPRESENTED BY H.G . STIBBE AND L.F.D . TER KUILE, BOTH ADVOCATES OF AMSTERDAM, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE CONSULATE-GENERAL OF THE KINGDOM OF THE NETHERLANDS*

*AND*

*NEDERLANDSE ADMINISTRATIE DER BELASTINGEN ( NETHERLANDS INLAND REVENUE ADMINISTRATION ), REPRESENTED BY THE INSPECTOR OF CUSTOMS AND EXCISE AT ZAANDAM, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE NETHERLANDS EMBASSY,*

Subject of the case

*ON THE FOLLOWING QUESTIONS :*

*1 . WHETHER ARTICLE 12 OF THE EEC TREATY HAS DIRECT APPLICATION WITHIN THE TERRITORY OF A MEMBER STATE, IN OTHER WORDS, WHETHER NATIONALS OF SUCH A STATE CAN, ON THE BASIS OF THE ARTICLE IN QUESTION, LAY CLAIM TO INDIVIDUAL RIGHTS WHICH THE COURTS MUST PROTECT;*

*2 . IN THE EVENT OF AN AFFIRMATIVE REPLY, WHETHER THE APPLICATION OF AN IMPORT DUTY OF 8% TO THE IMPORT INTO THE NETHERLANDS BY THE APPLICANT IN THE MAIN ACTION OF UREAFORMALDEHYDE ORIGINATING IN THE FEDERAL REPUBLIC OF GERMANY REPRESENTED AN UNLAWFUL INCREASE WITHIN THE MEANING OF ARTICLE 12 OF THE EEC TREATY OR WHETHER IT WAS IN THIS CASE A REASONABLE ALTERATION OF THE DUTY APPLICABLE BEFORE 1 MARCH 1960, AN ALTERATION WHICH, ALTHOUGH AMOUNTING TO AN INCREASE FROM THE ARITHMETICAL POINT OF VIEW, IS NEVERTHELESS NOT TO BE REGARDED AS PROHIBITED UNDER THE TERMS OF ARTICLE 12;*

Grounds

*I - PROCEDURE*

*NO OBJECTION HAS BEEN RAISED CONCERNING THE PROCEDURAL VALIDITY OF THE REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE TARIEFCOMMISSIE, A COURT OR TRIBUNAL WITHIN THE MEANING OF THAT ARTICLE . FURTHER, NO GROUNDS EXIST FOR THE COURT TO RAISE THE MATTER OF ITS OWN MOTION .*

*II - THE FIRST QUESTION*

*A - JURISDICTION OF THE COURT*

*THE GOVERNMENT OF THE NETHERLANDS AND THE BELGIAN GOVERNMENT CHALLENGE THE JURISDICTION OF THE COURT ON THE GROUND THAT THE REFERENCE RELATES NOT TO THE INTERPRETATION BUT TO THE APPLICATION OF THE TREATY IN THE CONTEXT OF THE CONSTITUTIONAL LAW OF THE NETHERLANDS, AND THAT IN PARTICULAR THE COURT HAS NO JURISDICTION TO DECIDE, SHOULD THE OCCASION ARISE, WHETHER THE PROVISIONS OF THE EEC TREATY PREVAIL OVER NETHERLANDS LEGISLATION OR OVER OTHER AGREEMENTS ENTERED INTO BY THE NETHERLANDS AND INCORPORATED INTO DUTCH NATIONAL LAW . THE SOLUTION OF SUCH A PROBLEM, IT IS CLAIMED, FALLS WITHIN THE EXCLUSIVE JURISDICTION OF THE NATIONAL COURTS, SUBJECT TO AN APPLICATION IN ACCORDANCE WITH THE PROVISIONS LAID DOWN BY ARTICLES 169 AND 170 OF THE TREATY .*

*HOWEVER IN THIS CASE THE COURT IS NOT ASKED TO ADJUDICATE UPON THE APPLICATION OF THE TREATY ACCORDING TO THE PRINCIPLES OF THE NATIONAL LAW OF THE NETHERLANDS, WHICH REMAINS THE CONCERN OF THE NATIONAL COURTS, BUT IS ASKED, IN CONFORMITY WITH SUBPARAGRAPH ( A ) OF THE FIRST PARAGRAPH OF ARTICLE 177 OF THE TREATY, ONLY TO INTERPRET THE SCOPE OF ARTICLE 12 OF THE SAID TREATY WITHIN THE CONTEXT OF COMMUNITY LAW AND WITH REFERENCE TO ITS EFFECT ON INDIVIDUALS . THIS ARGUMENT HAS THEREFORE NO LEGAL FOUNDATION .*

*THE BELGIAN GOVERNMENT FURTHER ARGUES THAT THE COURT HAS NO JURISDICTION ON THE GROUND THAT NO ANSWER WHICH THE COURT COULD GIVE TO THE FIRST QUESTION OF THE TARIEFCOMMISSIE WOULD HAVE ANY BEARING ON THE RESULT OF THE PROCEEDINGS BROUGHT IN THAT COURT .*

*HOWEVER, IN ORDER TO CONFER JURISDICTION ON THE COURT IN THE PRESENT CASE IT IS NECESSARY ONLY THAT THE QUESTION RAISED SHOULD CLEARLY BE CONCERNED WITH THE INTERPRETATION OF THE TREATY . THE CONSIDERATIONS WHICH MAY HAVE LED A NATIONAL COURT OR TRIBUNAL TO ITS CHOICE OF QUESTIONS AS WELL AS THE RELEVANCE WHICH IT ATTRIBUTES TO SUCH QUESTIONS IN THE CONTEXT OF A CASE BEFORE IT ARE EXCLUDED FROM REVIEW BY THE COURT OF JUSTICE . IT APPEARS FROM THE WORDING OF THE QUESTIONS REFERRED THAT THEY RELATE TO THE INTERPRETATION OF THE TREATY . THE COURT THEREFORE HAS THE JURISDICTION TO ANSWER THEM .*

*THIS ARGUMENT, TOO, IS THEREFORE UNFOUNDED .*

*B - ON THE SUBSTANCE OF THE CASE*

*THE FIRST QUESTION OF THE TARIEFCOMMISSIE IS WHETHER ARTICLE 12 OF THE TREATY HAS DIRECT APPLICATION IN NATIONAL LAW IN THE SENSE THAT NATIONALS OF MEMBER STATES MAY ON THE BASIS OF THIS ARTICLE LAY CLAIM TO RIGHTS WHICH THE NATIONAL COURT MUST PROTECT .*

*TO ASCERTAIN WHETHER THE PROVISIONS OF AN INTERNATIONAL TREATY EXTEND SO FAR IN THEIR EFFECTS IT IS NECESSARY TO CONSIDER THE SPIRIT, THE GENERAL SCHEME AND THE WORDING OF THOSE PROVISIONS .*

*THE OBJECTIVE OF THE EEC TREATY, WHICH IS TO ESTABLISH A COMMON MARKET, THE FUNCTIONING OF WHICH IS OF DIRECT CONCERN TO INTERESTED PARTIES IN THE COMMUNITY, IMPLIES THAT THIS TREATY IS MORE THAN AN AGREEMENT WHICH MERELY CREATES MUTUAL OBLIGATIONS BETWEEN THE CONTRACTING STATES . THIS VIEW IS CONFIRMED BY THE PREAMBLE TO THE TREATY WHICH REFERS NOT ONLY TO GOVERNMENTS BUT TO PEOPLES . IT IS ALSO CONFIRMED MORE SPECIFICALLY BY THE ESTABLISHMENT OF INSTITUTIONS ENDOWED WITH SOVEREIGN RIGHTS, THE EXERCISE OF WHICH AFFECTS MEMBER STATES AND ALSO THEIR CITIZENS . FURTHERMORE, IT MUST BE NOTED THAT THE NATIONALS OF THE STATES BROUGHT TOGETHER IN THE COMMUNITY ARE CALLED UPON TO COOPERATE IN THE FUNCTIONING OF THIS COMMUNITY THROUGH THE INTERMEDIARY OF THE EUROPEAN PARLIAMENT AND THE ECONOMIC AND SOCIAL COMMITTEE .*

*IN ADDITION THE TASK ASSIGNED TO THE COURT OF JUSTICE UNDER ARTICLE 177, THE OBJECT OF WHICH IS TO SECURE UNIFORM INTERPRETATION OF THE TREATY BY NATIONAL COURTS AND TRIBUNALS, CONFIRMS THAT THE STATES HAVE ACKNOWLEDGED THAT COMMUNITY LAW HAS AN AUTHORITY WHICH CAN BE INVOKED BY THEIR NATIONALS BEFORE THOSE COURTS AND TRIBUNALS . THE CONCLUSION TO BE DRAWN FROM THIS IS THAT THE COMMUNITY CONSTITUTES A NEW LEGAL ORDER OF INTERNATIONAL LAW FOR THE BENEFIT OF WHICH THE STATES HAVE LIMITED THEIR SOVEREIGN RIGHTS, ALBEIT WITHIN LIMITED FIELDS, AND THE SUBJECTS OF WHICH COMPRISE NOT ONLY MEMBER STATES BUT ALSO THEIR NATIONALS . INDEPENDENTLY OF THE LEGISLATION OF MEMBER STATES, COMMUNITY LAW THEREFORE NOT ONLY IMPOSES OBLIGATIONS ON INDIVIDUALS BUT IS ALSO INTENDED TO CONFER UPON THEM RIGHTS WHICH BECOME PART OF THEIR LEGAL HERITAGE . THESE RIGHTS ARISE NOT ONLY WHERE THEY ARE EXPRESSLY GRANTED BY THE TREATY, BUT ALSO BY REASON OF OBLIGATIONS WHICH THE TREATY IMPOSES IN A CLEARLY DEFINED WAY UPON INDIVIDUALS AS WELL AS UPON THE MEMBER STATES AND UPON THE INSTITUTIONS OF THE COMMUNITY .*

*WITH REGARD TO THE GENERAL SCHEME OF THE TREATY AS IT RELATES TO CUSTOMS DUTIES AND CHARGES HAVING EQUIVALENT EFFECT IT MUST BE EMPHASIZED THAT ARTICLE 9, WHICH BASES THE COMMUNITY UPON A CUSTOMS UNION, INCLUDES AS AN ESSENTIAL PROVISION THE PROHIBITION OF THESE CUSTOMS DUTIES AND CHARGES . THIS PROVISION IS FOUND AT THE BEGINNING OF THE PART OF THE TREATY WHICH DEFINES THE 'FOUNDATIONS OF THE COMMUNITY '. IT IS APPLIED AND EXPLAINED BY ARTICLE 12 .*

*THE WORDING OF ARTICLE 12 CONTAINS A CLEAR AND UNCONDITIONAL PROHIBITION WHICH IS NOT A POSITIVE BUT A NEGATIVE OBLIGATION . THIS OBLIGATION, MOREOVER, IS NOT QUALIFIED BY ANY RESERVATION ON THE PART OF STATES WHICH WOULD MAKE ITS IMPLEMENTATION CONDITIONAL UPON A POSITIVE LEGISLATIVE MEASURE ENACTED UNDER NATIONAL LAW . THE VERY NATURE OF THIS PROHIBITION MAKES IT IDEALLY ADAPTED TO PRODUCE DIRECT EFFECTS IN THE LEGAL RELATIONSHIP BETWEEN MEMBER STATES AND THEIR SUBJECTS .*

*THE IMPLEMENTATION OF ARTICLE 12 DOES NOT REQUIRE ANY LEGISLATIVE INTERVENTION ON THE PART OF THE STATES . THE FACT THAT UNDER THIS ARTICLE IT IS THE MEMBER STATES WHO ARE MADE THE SUBJECT OF THE NEGATIVE OBLIGATION DOES NOT IMPLY THAT THEIR NATIONALS CANNOT BENEFIT FROM THIS OBLIGATION .*

*IN ADDITION THE ARGUMENT BASED ON ARTICLES 169 AND 170 OF THE TREATY PUT FORWARD BY THE THREE GOVERNMENTS WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT IN THEIR STATEMENTS OF CASE IS MISCONCEIVED . THE FACT THAT THESE ARTICLES OF THE TREATY ENABLE THE COMMISSION AND THE MEMBER STATES TO BRING BEFORE THE COURT A STATE WHICH HAS NOT FULFILLED ITS OBLIGATIONS DOES NOT MEAN THAT INDIVIDUALS CANNOT PLEAD THESE OBLIGATIONS, SHOULD THE OCCASION ARISE, BEFORE A NATIONAL COURT, ANY MORE THAN THE FACT THAT THE TREATY PLACES AT THE DISPOSAL OF THE COMMISSION WAYS OF ENSURING THAT OBLIGATIONS IMPOSED UPON THOSE SUBJECT TO THE TREATY ARE OBSERVED, PRECLUDES THE POSSIBILITY, IN ACTIONS BETWEEN INDIVIDUALS BEFORE A NATIONAL COURT, OF PLEADING INFRINGEMENTS OF THESE OBLIGATIONS .*

*A RESTRICTION OF THE GUARANTEES AGAINST AN INFRINGEMENT OF ARTICLE 12 BY MEMBER STATES TO THE PROCEDURES UNDER ARTICLE 169 AND 170 WOULD REMOVE ALL DIRECT LEGAL PROTECTION OF THE INDIVIDUAL RIGHTS OF THEIR NATIONALS . THERE IS THE RISK THAT RECOURSE TO THE PROCEDURE UNDER THESE ARTICLES WOULD BE INNEFFECTIVE IF IT WERE TO OCCUR AFTER THE IMPLEMENTATION OF A NATIONAL DECISION TAKEN CONTRARY TO THE PROVISIONS OF THE TREATY .*

*THE VIGILANCE OF INDIVIDUALS CONCERNED TO PROTECT THEIR RIGHTS AMOUNTS TO AN EFFECTIVE SUPERVISION IN ADDITION TO THE SUPERVISION ENTRUSTED BY ARTICLES 169 AND 170 TO THE DILIGENCE OF THE COMMISSION AND OF THE MEMBER STATES .*

*IT FOLLOWS FROM THE FOREGOING CONSIDERATIONS THAT, ACCORDING TO THE SPIRIT, THE GENERAL SCHEME AND THE WORDING OF THE TREATY, ARTICLE 12 MUST BE INTERPRETED AS*

*PRODUCING DIRECT EFFECTS AND CREATING INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT .*

*III - THE SECOND QUESTION*

*A - THE JURISDICTION OF THE COURT*

*ACCORDING TO THE OBSERVATIONS OF THE BELGIAN AND NETHERLANDS GOVERNMENTS, THE WORDING OF THIS QUESTION APPEARS TO REQUIRE, BEFORE IT CAN BE ANSWERED, AN EXAMINATION BY THE COURT OF THE TARIFF CLASSIFICATION OF UREAFORMALDEHYDE IMPORTED INTO THE NETHERLANDS, A CLASSIFICATION ON WHICH VAN GEND & LOOS AND THE INSPECTOR OF CUSTOMS AND EXCISE AT ZAANDAM HOLD DIFFERENT OPINIONS WITH REGARD TO THE 'TARIEFBESLUIT' OF 1947 . THE QUESTION CLEARLY DOES NOT CALL FOR AN INTERPRETATION OF THE TREATY BUT CONCERNS THE APPLICATION OF NETHERLANDS CUSTOMS LEGISLATION TO THE CLASSIFICATION OF AMINOPLASTS, WHICH IS OUTSIDE THE JURISDICTION CONFERRED UPON THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES BY SUBPARAGRAPH ( A ) OF THE FIRST PARAGRAPH OF ARTICLE 177 .*

*THE COURT HAS THEREFORE NO JURISDICTION TO CONSIDER THE REFERENCE MADE BY THE TARIEFCOMMISSIE .*

*HOWEVER, THE REAL MEANING OF THE QUESTION PUT BY THE TARIEFCOMMISSIE IS WHETHER, IN LAW, AN EFFECTIVE INCREASE IN CUSTOMS DUTIES CHARGED ON A GIVEN PRODUCT AS A RESULT NOT OF AN INCREASE IN THE RATE BUT OF A NEW CLASSIFICATION OF THE PRODUCT ARISING FROM A CHANGE OF ITS TARIFF DESCRIPTION CONTRAVENES THE PROHIBITION IN ARTICLE 12 OF THE TREATY .*

*VIEWED IN THIS WAY THE QUESTION PUT IS CONCERNED WITH AN INTERPRETATION OF THIS PROVISION OF THE TREATY AND MORE PARTICULARLY OF THE MEANING WHICH SHOULD BE GIVEN TO THE CONCEPT OF DUTIES APPLIED BEFORE THE TREATY ENTERED INTO FORCE .*

*THEREFORE THE COURT HAS JURISDICTION TO GIVE A RULING ON THIS QUESTION .*

*B - ON THE SUBSTANCE*

*IT FOLLOWS FROM THE WORDING AND THE GENERAL SCHEME OF ARTICLE 12 OF THE TREATY THAT, IN ORDER TO ASCERTAIN WHETHER CUSTOMS DUTIES OR CHARGES HAVING EQUIVALENT EFFECT HAVE BEEN INCREASED CONTRARY TO THE PROHIBITION CONTAINED IN THE SAID ARTICLE, REGARD MUST BE HAD TO THE CUSTOMS DUTIES AND CHARGES ACTUALLY APPLIED AT THE DATE OF THE ENTRY INTO FORCE OF THE TREATY .*

*FURTHER, WITH REGARD TO THE PROHIBITION IN ARTICLE 12 OF THE TREATY, SUCH AN ILLEGAL INCREASE MAY ARISE FROM A RE-ARRANGEMENT OF THE TARIFF RESULTING IN THE CLASSIFICATION OF THE PRODUCT UNDER A MORE HIGHLY TAXED HEADING AND FROM AN ACTUAL INCREASE IN THE RATE OF CUSTOMS DUTY .*

*IT IS OF LITTLE IMPORTANCE HOW THE INCREASE IN CUSTOMS DUTIES OCCURRED WHEN, AFTER THE TREATY ENTERED INTO FORCE, THE SAME PRODUCT IN THE SAME MEMBER STATE WAS SUBJECTED TO A HIGHER RATE OF DUTY .*

*THE APPLICATION OF ARTICLE 12, IN ACCORDANCE WITH THE INTERPRETATION GIVEN ABOVE, COMES WITHIN THE JURISDICTION OF THE NATIONAL COURT WHICH MUST ENQUIRE WHETHER THE DUTIABLE PRODUCT, IN THIS CASE UREAFORMALDEHYDE ORIGINATING IN THE FEDERAL REPUBLIC OF GERMANY, IS CHARGED UNDER THE CUSTOMS MEASURES BROUGHT INTO FORCE IN THE NETHERLANDS WITH AN IMPORT DUTY HIGHER THAN THAT WITH WHICH IT WAS CHARGED ON 1 JANUARY 1958 .*

*THE COURT HAS NO JURISDICTION TO CHECK THE VALIDITY OF THE CONFLICTING VIEWS ON THIS SUBJECT WHICH HAVE BEEN SUBMITTED TO IT DURING THE PROCEEDINGS BUT MUST LEAVE THEM TO BE DETERMINED BY THE NATIONAL COURTS .*

Decision on costs

*THE COSTS INCURRED BY THE COMMISSION OF THE EEC AND THE MEMBER STATES WHICH HAVE SUBMITTED THEIR OBSERVATIONS TO THE COURT ARE NOT RECOVERABLE, AND AS THESE PROCEEDINGS ARE, IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED, A STEP IN THE ACTION PENDING BEFORE THE TARIEFCOMMISSIE, THE DECISION AS TO COSTS IS A MATTER FOR THAT COURT .*

Operative part

*THE COURT*

*IN ANSWER TO THE QUESTIONS REFERRED TO IT FOR A PRELIMINARY RULING BY THE TARIEFCOMMISSIE BY DECISION OF 16 AUGUST 1962, HEREBY RULES :*

*1 . ARTICLE 12 OF THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY PRODUCES DIRECT EFFECTS AND CREATES INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT .*

*2 . IN ORDER TO ASCERTAIN WHETHER CUSTOMS DUTIES OR CHARGES HAVING EQUIVALENT EFFECT HAVE BEEN INCREASED CONTRARY TO THE PROHIBITION CONTAINED IN ARTICLE 12 OF THE TREATY, REGARD MUST BE HAD TO THE DUTIES AND CHARGES ACTUALLY APPLIED BY THE MEMBER STATE IN QUESTION AT THE DATE OF THE ENTRY INTO FORCE OF THE TREATY .*

*SUCH AN INCREASE CAN ARISE BOTH FROM A RE-ARRANGEMENT OF THE TARIFF RESULTING IN THE CLASSIFICATION OF THE PRODUCT UNDER A MORE HIGHLY TAXED HEADING AND FROM AN INCREASE IN THE RATE OF CUSTOMS DUTY APPLIED . 3 . THE DECISION AS TO COSTS IN THESE PROCEEDINGS IS A MATTER FOR THE TARIEFCOMMISSIE.*

## Case 6/64, *Flaminio Costa v E.N.E.L.*

*IN CASE 6/64*

*REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE GIUDICE CONCILIATORE, MILAN, FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN*

*FLAMINIO COSTA AND*

*ENEL ( ENTE NAZIONALE ENERGIA ELETTRICA ( NATIONAL ELECTRICITY BOARD ), FORMERLY THE EDISON VOLTA UNDERTAKING )*

Subject of the case

*ON THE INTERPRETATION OF ARTICLES 102, 93, 53 AND 37 OF THE SAID TREATY*

Grounds

*BY ORDER DATED 16 JANUARY 1964, DULY SENT TO THE COURT, THE GIUDICE CONCILIATORE OF MILAN, ' HAVING REGARD TO ARTICLE 177 OF THE TREATY OF 25 MARCH 1957 ESTABLISHING THE EEC, INCORPORATED INTO ITALIAN LAW BY LAW N . 1203 OF 14 OCTOBER 1957, AND HAVING REGARD TO THE ALLEGATION THAT LAW N . 1643 OF 6 DECEMBER 1962 AND THE PRESIDENTIAL DECREES ISSUED IN EXECUTION OF THAT LAW...INFRINGE ARTICLES 102, 93, 53 AND 37 OF THE AFOREMENTIONED TREATY ', STAYED THE PROCEEDINGS AND ORDERED THAT THE FILE BE TRANSMITTED TO THE COURT OF JUSTICE .*

*ON THE APPLICATION OF ARTICLE 177*

*ON THE SUBMISSION REGARDING THE WORKING OF THE QUESTION*

*THE COMPLAINT IS MADE THAT THE INTENTION BEHIND THE QUESTION POSED WAS TO OBTAIN, BY MEANS OF ARTICLE 177, A RULING ON THE COMPATIBILITY OF A NATIONAL LAW WITH THE TREATY .*

*BY THE TERMS OF THIS ARTICLE, HOWEVER, NATIONAL COURTS AGAINST WHOSE DECISIONS, AS IN THE PRESENT CASE, THERE IS NO JUDICIAL REMEDY, MUST REFER THE MATTER TO THE COURT OF JUSTICE SO THAT A PRELIMINARY RULING MAY BE GIVEN UPON THE ' INTERPRETATION OF THE TREATY ' WHENEVER A QUESTION OF INTERPRETATION IS RAISED BEFORE THEM . THIS PROVISION GIVES THE COURT NO JURISDICTION EITHER TO APPLY THE TREATY TO A SPECIFIC CASE OR TO DECIDE UPON THE VALIDITY OF A PROVISION OF DOMESTIC LAW IN RELATION TO THE TREATY, AS IT WOULD BE POSSIBLE FOR IT TO DO UNDER ARTICLE 169 .*

*NEVERTHELESS, THE COURT HAS POWER TO EXTRACT FROM A QUESTION IMPERFECTLY FORMULATED BY THE NATIONAL COURT THOSE QUESTIONS WHICH ALONE PERTAIN TO THE INTERPRETATION OF THE TREATY . CONSEQUENTLY A DECISION SHOULD BE GIVEN BY THE COURT NOT UPON THE VALIDITY OF AN ITALIAN LAW IN RELATION TO THE TREATY, BUT ONLY UPON THE INTERPRETATION OF THE ABOVEMENTIONED ARTICLES IN THE CONTEXT OF THE POINTS OF LAW STATED BY THE GIUDICE CONCILIATORE .*

*ON THE SUBMISSION THAT AN INTERPRETATION IS NOT NECESSARY*

*THE COMPLAINT IS MADE THAT THE MILAN COURT HAS REQUESTED AN INTERPRETATION OF THE TREATY WHICH WAS NOT NECESSARY FOR THE SOLUTION OF THE DISPUTE BEFORE IT .*

*SINCE, HOWEVER, ARTICLE 177 IS BASED UPON A CLEAR SEPARATION OF FUNCTIONS BETWEEN NATIONAL COURTS AND THE COURT OF JUSTICE, IT CANNOT EMPOWER THE LATTER EITHER TO INVESTIGATE THE FACTS OF THE CASE OR TO CRITICIZE THE GROUNDS AND PURPOSE OF THE REQUEST FOR INTERPRETATION .*

*ON THE SUBMISSION THAT THE COURT WAS OBLIGED TO APPLY THE NATIONAL LAW*

*THE ITALIAN GOVERNMENT SUBMITS THAT THE REQUEST OF THE GIUDICE CONCILIATORE IS ' ABSOLUTELY INADMISSIBLE ', INASMUCH AS A NATIONAL COURT WHICH IS OBLIGED TO APPLY A NATIONAL LAW CANNOT AVAIL ITSELF OF ARTICLE 177 .*

*BY CONTRAST WITH ORDINARY INTERNATIONAL TREATIES, THE EEC TREATY HAS CREATED ITS OWN LEGAL SYSTEM WHICH, ON THE ENTRY INTO FORCE OF THE TREATY, BECAME AN INTEGRAL PART OF THE LEGAL SYSTEMS OF THE MEMBER STATES AND WHICH THEIR COURTS ARE BOUND TO APPLY .*

*BY CREATING A COMMUNITY OF UNLIMITED DURATION, HAVING ITS OWN INSTITUTIONS, ITS OWN PERSONALITY, ITS OWN LEGAL CAPACITY AND CAPACITY OF REPRESENTATION ON THE INTERNATIONAL PLANE AND, MORE PARTICULARLY, REAL POWERS STEMMING FROM A LIMITATION OF SOVEREIGNTY OR A TRANSFER OF POWERS FROM THE STATES TO THE COMMUNITY, THE MEMBER STATES HAVE LIMITED THEIR SOVEREIGN RIGHTS, ALBEIT WITHIN LIMITED FIELDS, AND HAVE THUS CREATED A BODY OF LAW WHICH BINDS BOTH THEIR NATIONALS AND THEMSELVES .*

*THE INTEGRATION INTO THE LAWS OF EACH MEMBER STATE OF PROVISIONS WHICH DERIVE FROM THE COMMUNITY, AND MORE GENERALLY THE TERMS AND THE SPIRIT OF THE TREATY, MAKE IT IMPOSSIBLE FOR THE STATES, AS A COROLLARY, TO ACCORD PRECEDENCE TO A UNILATERAL AND SUBSEQUENT MEASURE OVER A LEGAL SYSTEM ACCEPTED BY THEM ON A BASIS OF RECIPROCITY . SUCH A MEASURE CANNOT THEREFORE BE INCONSISTENT WITH THAT LEGAL SYSTEM . THE EXECUTIVE FORCE OF COMMUNITY LAW CANNOT VARY FROM ONE STATE TO ANOTHER IN DEFERENCE TO SUBSEQUENT DOMESTIC LAWS, WITHOUT JEOPARDIZING THE ATTAINMENT OF THE OBJECTIVES OF THE TREATY SET OUT IN ARTICLE 5 ( 2 ) AND GIVING RISE TO THE DISCRIMINATION PROHIBITED BY ARTICLE 7 .*

*THE OBLIGATIONS UNDERTAKEN UNDER THE TREATY ESTABLISHING THE COMMUNITY WOULD NOT BE UNCONDITIONAL, BUT MERELY CONTINGENT, IF THEY COULD BE CALLED IN QUESTION BY SUBSEQUENT LEGISLATIVE ACTS OF THE SIGNATORIES . WHEREVER THE TREATY GRANTS THE STATES THE RIGHT TO ACT UNILATERALLY, IT DOES THIS BY CLEAR AND PRECISE PROVISIONS ( FOR EXAMPLE ARTICLES 15, 93 ( 3 ), 223, 224 AND 225 ). APPLICATIONS, BY MEMBER STATES FOR AUTHORITY TO DEROGATE FROM THE TREATY ARE SUBJECT TO A SPECIAL AUTHORIZATION PROCEDURE ( FOR EXAMPLE ARTICLES 8 ( 4 ), 17 ( 4 ), 25, 26, 73, THE THIRD SUBPARAGRAPH OF ARTICLE 93 ( 2 ), AND 226 ) WHICH WOULD LOSE THEIR PURPOSE IF THE MEMBER STATES COULD RENOUNCE THEIR OBLIGATIONS BY MEANS OF AN ORDINARY LAW .*

*THE PRECEDENCE OF COMMUNITY LAW IS CONFIRMED BY ARTICLE 189, WHEREBY A REGULATION ' SHALL BE BINDING ' AND ' DIRECTLY APPLICABLE IN ALL MEMBER STATES '. THIS PROVISION, WHICH IS SUBJECT TO NO RESERVATION, WOULD BE QUITE MEANINGLESS IF A STATE COULD UNILATERALLY NULLIFY ITS EFFECTS BY MEANS OF A LEGISLATIVE MEASURE WHICH COULD PREVAIL OVER COMMUNITY LAW .*

*IT FOLLOWS FROM ALL THESE OBSERVATIONS THAT THE LAW STEMMING FROM THE TREATY, AN INDEPENDENT SOURCE OF LAW, COULD NOT, BECAUSE OF ITS SPECIAL AND ORIGINAL NATURE, BE OVERRIDDEN BY DOMESTIC LEGAL PROVISIONS, HOWEVER FRAMED, WITHOUT BEING DEPRIVED OF ITS CHARACTER AS COMMUNITY LAW AND WITHOUT THE LEGAL BASIS OF THE COMMUNITY ITSELF BEING CALLED INTO QUESTION .*

*THE TRANSFER BY THE STATES FROM THEIR DOMESTIC LEGAL SYSTEM TO THE COMMUNITY LEGAL SYSTEM OF THE RIGHTS AND OBLIGATIONS ARISING UNDER THE TREATY CARRIES WITH IT A PERMANENT LIMITATION OF THEIR SOVEREIGN RIGHTS, AGAINST WHICH A SUBSEQUENT UNILATERAL ACT INCOMPATIBLE WITH THE CONCEPT OF THE COMMUNITY CANNOT PREVAIL . CONSEQUENTLY ARTICLE 177 IS TO BE APPLIED REGARDLESS OF ANY DOMESTIC LAW, WHENEVER QUESTIONS RELATING TO THE INTERPRETATION OF THE TREATY ARISE .*

*THE QUESTIONS PUT BY THE GIUDICE CONCILIATORE REGARDING ARTICLES 102, 93, 53, AND 37 ARE DIRECTED FIRST TO ENQUIRING WHETHER THESE PROVISIONS PRODUCE DIRECT EFFECTS AND CREATE INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT, AND, IF SO, WHAT THEIR MEANING IS .*

*ON THE INTERPRETATION OF ARTICLE 102*

*ARTICLE 102 PROVIDES THAT, WHERE ' THERE IS REASON TO FEAR ' THAT A PROVISION LAID DOWN BY LAW MAY CAUSE ' DISTORTION ', THE MEMBER STATE DESIRING TO PROCEED THEREWITH SHALL ' CONSULT THE COMMISSION '; THE COMMISSION HAS POWER TO RECOMMEND TO THE MEMBER STATES THE ADOPTION OF SUITABLE MEASURES TO AVOID THE DISTORTION FEARED .*

*THIS ARTICLE, PLACED IN THE CHAPTER DEVOTED TO THE ' APPROXIMATION OF LAWS ', IS DESIGNED TO PREVENT THE DIFFERENCES BETWEEN THE LEGISLATION OF THE DIFFERENT NATIONS WITH REGARD TO THE OBJECTIVES OF THE TREATY FROM BECOMING MORE PRONOUNCED .*

*BY VIRTUE OF THIS PROVISION, MEMBER STATES HAVE LIMITED THEIR FREEDOM OF INITIATIVE BY AGREEING TO SUBMIT TO AN APPROPRIATE PROCEDURE OF CONSULTATION . BY BINDING THEMSELVES UNAMBIGUOUSLY TO PRIOR CONSULTATION WITH THE COMMISSION IN ALL THOSE CASES WHERE THEIR PROJECTED LEGISLATION MIGHT CREATE A RISK, HOWEVER SLIGHT, OF A POSSIBLE DISTORTION, THE STATES HAVE UNDERTAKEN AN OBLIGATION TO THE COMMUNITY WHICH BINDS THEM AS STATES, BUT WHICH DOES NOT CREATE INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT . FOR ITS PART, THE COMMISSION IS BOUND TO ENSURE RESPECT FOR THE PROVISIONS OF THIS ARTICLE, BUT THIS OBLIGATION DOES NOT GIVE INDIVIDUALS THE RIGHT TO ALLEGE, WITHIN THE FRAMEWORK OF COMMUNITY LAW AND BY MEANS OF ARTICLE 177 EITHER FAILURE BY THE STATE CONCERNED TO FULFIL ANY OF ITS OBLIGATIONS OR BREACH OF DUTY ON THE PART OF THE COMMISSION .*

*ON THE INTERPRETATION OF ARTICLE 93*

*UNDER ARTICLE 93 ( 1 ) AND ( 2 ), THE COMMISSION, IN COOPERATION WITH MEMBER STATES, IS TO ' KEEP UNDER CONSTANT REVIEW ALL SYSTEMS OF AID EXISTING IN THOSE STATES ' WITH A VIEW TO THE ADOPTION OF APPROPRIATE MEASURES REQUIRED BY THE FUNCTIONING OF THE COMMON MARKET .*

*BY VIRTUE OF ARTICLE 93 ( 3 ), THE COMMISSION IS TO BE INFORMED, IN SUFFICIENT TIME, OF ANY PLANS TO GRANT OR ALTER AID, THE MEMBER STATE CONCERNED NOT BEING ENTITLED TO PUT ITS PROPOSED MEASURES INTO EFFECT UNTIL THE COMMUNITY PROCEDURE, AND, IF NECESSARY, ANY PROCEEDINGS BEFORE THE COURT OF JUSTICE, HAVE BEEN COMPLETED .*

*THESE PROVISIONS, CONTAINED IN THE SECTION OF THE TREATY HEADED ' AIDS GRANTED BY STATES ', ARE DESIGNED, ON THE ONE HAND, TO ELIMINATE PROGRESSIVELY EXISTING AIDS AND, ON THE OTHER HAND, TO PREVENT THE INDIVIDUAL STATES IN THE CONDUCT OF THEIR INTERNAL AFFAIRS FROM INTRODUCING NEW AIDS ' IN ANY FORM WHATSOEVER ' WHICH ARE LIKELY DIRECTLY OR INDIRECTLY TO FAVOUR CERTAIN UNDERTAKINGS OR PRODUCTS IN AN APPRECIABLE WAY, AND WHICH THREATEN, EVEN POTENTIALLY, TO DISTORT COMPETITION . BY VIRTUE OF ARTICLE 92, THE MEMBER STATES HAVE ACKNOWLEDGED THAT SUCH AIDS ARE INCOMPATIBLE WITH THE COMMON MARKET AND HAVE THUS IMPLICITLY UNDERTAKEN NOT TO CREATE ANY MORE, SAVE AS OTHERWISE PROVIDED IN THE TREATY; IN ARTICLE 93, ON THE OTHER*

*HAND, THEY HAVE MERELY AGREED TO SUBMIT THEMSELVES TO APPROPRIATE PROCEDURES FOR THE ABOLITION OF EXISTING AIDS AND THE INTRODUCTION OF NEW ONES .*

*BY SO EXPRESSLY UNDERTAKING TO INFORM THE COMMISSION ' IN SUFFICIENT TIME ' OF ANY PLANS FOR AID, AND BY ACCEPTING THE PROCEDURES LAID DOWN IN ARTICLE 93, THE STATES HAVE ENTERED INTO AN OBLIGATION WITH THE COMMUNITY, WHICH BINDS THEM AS STATES BUT CREATES NO INDIVIDUAL RIGHTS EXCEPT IN THE CASE OF THE FINAL PROVISION OF ARTICLE 93 ( 3 ), WHICH IS NOT IN QUESTION IN THE PRESENT CASE .*

*FOR ITS PART, THE COMMISSION IS BOUND TO ENSURE RESPECT FOR THE PROVISIONS OF THIS ARTICLE, AND IS REQUIRED, IN COOPERATION WITH MEMBER STATES, TO KEEP UNDER CONSTANT REVIEW EXISTING SYSTEMS OF AIDS . THIS OBLIGATION DOES NOT, HOWEVER, GIVE INDIVIDUALS THE RIGHT TO PLEAD, WITHIN THE FRAMEWORK OF COMMUNITY LAW AND BY MEANS OF ARTICLE 177, EITHER FAILURE BY THE STATE CONCERNED TO FULFIL ANY OF ITS OBLIGATIONS OR BREACH OF DUTY ON THE PART OF THE COMMISSION .*

*ON THE INTERPRETATION OF ARTICLE 53*

*BY ARTICLE 53 THE MEMBER STATES UNDERTAKE NOT TO INTRODUCE ANY NEW RESTRICTIONS ON THE RIGHT OF ESTABLISHMENT IN THEIR TERRITORIES OF NATIONALS OF OTHER MEMBER STATES, SAVE AS OTHERWISE PROVIDED IN THE TREATY . THE OBLIGATION THUS ENTERED INTO BY THE STATES SIMPLY AMOUNTS LEGALLY TO A DUTY NOT TO ACT, WHICH IS NEITHER SUBJECT TO ANY CONDITIONS, NOR, AS REGARDS ITS EXECUTION OR EFFECT, TO THE ADOPTION OF ANY MEASURE EITHER BY THE STATES OR BY THE COMMISSION . IT IS THEREFORE LEGALLY COMPLETE IN ITSELF AND IS CONSEQUENTLY CAPABLE OF PRODUCING DIRECT EFFECTS ON THE RELATIONS BETWEEN MEMBER STATES AND INDIVIDUALS . SUCH AN EXPRESS PROHIBITION WHICH CAME INTO FORCE WITH THE TREATY THROUGHOUT THE COMMUNITY, AND THUS BECAME AN INTEGRAL PART OF THE LEGAL SYSTEM OF THE MEMBER STATES, FORMS PART OF THE LAW OF THOSE STATES AND DIRECTLY CONCERNS THEIR NATIONALS, IN WHOSE FAVOUR IT HAS CREATED INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT .*

*THE INTERPRETATION OF ARTICLE 53 WHICH IS SOUGHT REQUIRES THAT IT BE CONSIDERED IN THE CONTEXT OF THE CHAPTER RELATING TO THE RIGHT OF ESTABLISHMENT IN WHICH IT OCCURS . AFTER ENACTING IN ARTICLE 52 THAT ' RESTRICTIONS ON THE FREEDOM OF ESTABLISHMENT OF NATIONALS OF A MEMBER STATE IN THE TERRITORY OF ANOTHER MEMBER STATE SHALL BE ABOLISHED BY PROGRESSIVE STAGES ', THIS CHAPTER GOES ON IN ARTICLE 53 TO PROVIDE THAT ' MEMBER STATES SHALL NOT INTRODUCE ANY NEW RESTRICTIONS ON THE RIGHT OF ESTABLISHMENT IN THEIR TERRITORIES OF NATIONALS OF OTHER MEMBER STATES '. THE QUESTION IS, THEREFORE, ON WHAT CONDITIONS THE NATIONALS OF OTHER MEMBER STATES HAVE A RIGHT OF ESTABLISHMENT . THIS IS DEALT WITH BY THE SECOND PARAGRAPH OF ARTICLE 52, WHERE IT IS STATED THAT FREEDOM OF ESTABLISHMENT SHALL INCLUDE THE RIGHT TO TAKE UP AND PURSUE ACTIVITIES AS SELF-EMPLOYED PERSONS AND TO SET UP AND MANAGE UNDERTAKINGS ' UNDER THE CONDITIONS LAID DOWN FOR ITS OWN NATIONALS BY THE LAW OF THE COUNTRY WHERE SUCH ESTABLISHMENT IS EFFECTED '.*

*ARTICLE 53 IS THEREFORE SATISFIED SO LONG AS NO NEW MEASURE SUBJECTS THE ESTABLISHMENT OF NATIONALS OF OTHER MEMBER STATES TO MORE SEVERE RULES THAN THOSE PRESCRIBED FOR NATIONALS OF THE COUNTRY OF ESTABLISHMENT, WHATEVER THE LEGAL SYSTEM GOVERNING THE UNDERTAKING .*

*ON THE INTERPRETATION OF ARTICLE 37*

*ARTICLE 37 ( 1 ) PROVIDES THAT MEMBER STATES SHALL PROGRESSIVELY ADJUST ANY ' STATE MONOPOLIES OF A COMMERCIAL CHARACTER ' SO AS TO ENSURE THAT NO DISCRIMINATION REGARDING THE CONDITIONS UNDER WHICH GOODS ARE PROCURED AND MARKETED EXISTS BETWEEN NATIONALS OF MEMBER STATES . BY ARTICLE 37 ( 2 ), THE MEMBER STATES ARE UNDER AN OBLIGATION TO REFRAIN FROM INTRODUCING ANY NEW MEASURE WHICH IS CONTRARY TO THE PRINCIPLES LAID DOWN IN ARTICLE 37 ( 1 ).*

*THUS, MEMBER STATES HAVE UNDERTAKEN A DUAL OBLIGATION : IN THE FIRST PLACE, AN ACTIVE ONE TO ADJUST STATE MONOPOLIES, IN THE SECOND PLACE, A PASSIVE ONE TO AVOID ANY NEW MEASURES . THE INTERPRETATION REQUESTED IS OF THE SECOND OBLIGATION TOGETHER WITH ANY ASPECTS OF THE FIRST NECESSARY FOR THIS INTERPRETATION .*

*ARTICLE 37 ( 2 ) CONTAINS AN ABSOLUTE PROHIBITION : NOT AN OBLIGATION TO DO SOMETHING BUT AN OBLIGATION TO REFRAIN FROM DOING SOMETHING . THIS OBLIGATION IS NOT ACCOMPANIED BY ANY RESERVATION WHICH MIGHT MAKE ITS IMPLEMENTATION SUBJECT TO ANY POSITIVE ACT OF NATIONAL LAW . THIS PROHIBITION IS ESSENTIALLY ONE WHICH IS CAPABLE OF PRODUCING DIRECT EFFECTS ON THE LEGAL RELATIONS BETWEEN MEMBER STATES AND THEIR NATIONALS .*

*SUCH A CLEARLY EXPRESSED PROHIBITION WHICH CAME INTO FORCE WITH THE TREATY THROUGHOUT THE COMMUNITY, AND SO BECAME AN INTEGRAL PART OF THE LEGAL SYSTEM OF THE MEMBER STATES, FORMS PART OF THE LAW OF THOSE STATES AND DIRECTLY CONCERNS THEIR NATIONALS, IN WHOSE FAVOUR IT CREATES INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT . BY REASON OF THE COMPLEXITY OF THE WORDING AND THE FACT THAT ARTICLES 37 ( 1 ) AND 37 ( 2 ) OVERLAP, THE INTERPRETATION REQUESTED MAKES IT NECESSARY TO EXAMINE THEM AS PART OF THE CHAPTER IN WHICH THEY OCCUR . THIS CHAPTER DEALS WITH THE ' ELIMINATION OF QUANTITATIVE RESTRICTIONS BETWEEN MEMBER STATES '. THE OBJECT OF THE REFERENCE IN ARTICLE 37 ( 2 ) TO ' THE PRINCIPLES LAID DOWN IN PARAGRAPH ( 1 ) ' IS THUS TO PREVENT THE ESTABLISHMENT OF ANY NEW ' DISCRIMINATION REGARDING THE CONDITIONS UNDER WHICH GOODS ARE PROCURED AND MARKETED...BETWEEN NATIONALS OF MEMBER STATES '. HAVING SPECIFIED THE OBJECTIVE IN THIS WAY, ARTICLE 37 ( 1 ) SETS OUT THE WAYS IN WHICH THIS OBJECTIVE MIGHT BE THWARTED IN ORDER TO PROHIBIT THEM .*

*THUS, BY THE REFERENCE IN ARTICLE 37 ( 2 ), ANY NEW MONOPOLIES OR BODIES SPECIFIED IN ARTICLE 37 ( 1 ) ARE PROHIBITED IN SO FAR AS THEY TEND TO INTRODUCE NEW CASES OF DISCRIMINATION REGARDING THE CONDITIONS UNDER WHICH GOODS ARE PROCURED AND MARKETED . IT IS THEREFORE A MATTER FOR THE COURT DEALING WITH THE MAIN ACTION FIRST TO EXAMINE WHETHER THIS OBJECTIVE IS BEING HAMPERED, THAT IS WHETHER ANY NEW DISCRIMINATION BETWEEN NATIONALS OF MEMBER STATES REGARDING THE CONDITIONS UNDER WHICH GOODS ARE PROCURED AND MARKETED RESULTS FROM THE DISPUTED MEASURE ITSELF OR WILL BE THE CONSEQUENCE THEREOF .*

*THERE REMAIN TO BE CONSIDERED THE MEANS ENVISAGED BY ARTICLE 37 ( 1 ). IT DOES NOT PROHIBIT THE CREATION OF ANY STATE MONOPOLIES, BUT MERELY THOSE ' OF A COMMERCIAL CHARACTER ', AND THEN ONLY IN SO FAR AS THEY TEND TO INTRODUCE THE CASES OF DISCRIMINATION REFERRED TO . TO FALL UNDER THIS PROHIBITION THE STATE MONOPOLIES AND BODIES IN QUESTION MUST, FIRST, HAVE AS THEIR OBJECT TRANSACTIONS REGARDING A COMMERCIAL PRODUCT CAPABLE OF BEING THE SUBJECT OF COMPETITION AND TRADE BETWEEN MEMBER STATES, AND SECONDLY MUST PLAY AN EFFECTIVE PART IN SUCH TRADE .*

*IT IS A MATTER FOR THE COURT DEALING WITH THE MAIN ACTION TO ASSESS IN EACH CASE WHETHER THE ECONOMIC ACTIVITY UNDER REVIEW RELATES TO SUCH A PRODUCT WHICH, BY VIRTUE OF ITS NATURE AND THE TECHNICAL OR INTERNATIONAL CONDITIONS TO WHICH IT IS SUBJECT, IS CAPABLE OF PLAYING AN EFFECTIVE PART IN IMPORTS OR EXPORTS BETWEEN NATIONALS OF THE MEMBER STATES .*

Decision on costs

*THE COSTS INCURRED BY THE COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY AND THE ITALIAN GOVERNMENT, WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT, ARE NOT RECOVERABLE AND AS THESE PROCEEDINGS ARE, IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED, A STEP IN THE ACTION PENDING BEFORE THE GIUDICE CONCILIATORE, MILAN, THE DECISION ON COSTS IS A MATTER FOR THAT COURT .*

Operative part

*THE COURT*

*RULING UPON THE PLEA OF INADMISSIBILITY BASED ON ARTICLE 177 HEREBY DECLARES :*

*AS A SUBSEQUENT UNILATERAL MEASURE CANNOT TAKE PRECEDENCE OVER COMMUNITY LAW, THE QUESTIONS PUT BY THE GIUDICE CONCILIATORE, MILAN, ARE ADMISSIBLE IN SO FAR AS THEY RELATE IN THIS CASE TO THE INTERPRETATION OF PROVISIONS OF THE EEC TREATY;*

*AND ALSO RULES :*

*1 . ARTICLE 102 CONTAINS NO PROVISIONS WHICH ARE CAPABLE OF CREATING INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT;*

*2 . THOSE INDIVIDUAL PORTIONS OF ARTICLE 93 TO WHICH THE QUESTION RELATES EQUALLY CONTAIN NO SUCH PROVISIONS;*

*3 . ARTICLE 53 CONSTITUTES A COMMUNITY RULE CAPABLE OF CREATING INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT . IT PROHIBITS ANY NEW MEASURE WHICH SUBJECTS THE ESTABLISHMENT OF NATIONALS OF OTHER MEMBER STATES TO MORE SEVERE RULES THAN THOSE PRESCRIBED FOR NATIONALS OF THE COUNTRY OF ESTABLISHMENT, WHATEVER THE LEGAL SYSTEM GOVERNING THE UNDERTAKINGS .*

*4 . ARTICLE 37 ( 2 ) IS IN ALL ITS PROVISIONS A RULE OF COMMUNITY LAW CAPABLE OF CREATING INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT .*

*IN SO FAR AS THE QUESTION PUT TO THE COURT IS CONCERNED, IT PROHIBITS THE INTRODUCTION OF ANY NEW MEASURE CONTRARY TO THE PRINCIPLES OF ARTICLE 37 ( 1 ), THAT IS, ANY MEASURE HAVING AS ITS OBJECT OR EFFECT A NEW DISCRIMINATION BETWEEN NATIONALS OF MEMBER STATES REGARDING THE CONDITIONS IN WHICH GOODS ARE PROCURED AND MARKETED, BY MEANS OF MONOPOLIES OR BODIES WHICH MUST, FIRST, HAVE AS THEIR OBJECT TRANSACTIONS REGARDING A COMMERCIAL PRODUCT CAPABLE OF BEING THE SUBJECT OF COMPETITION AND TRADE BETWEEN MEMBER STATES, AND SECONDLY MUST PLAY AN EFFECTIVE PART IN SUCH TRADE;*

*AND FURTHER DECLARES :*

*THE DECISION ON THE COSTS OF THE PRESENT ACTION IS A MATTER FOR THE GUIDICE CONCILIATORE, MILAN .*

## Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*

*IN CASE 11/70*

*REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE VERWALTUNGSGERICHT ( ADMINISTRATIVE COURT ) FRANKFURT-AM-MAIN, FOR A PRELIMINARY RULING IN THE CASE PENDING BEFORE THAT COURT BETWEEN*

*INTERNATIONALE HANDELSGESELLSCHAFT MBH, THE REGISTERED OFFICE OF WHICH IS AT FRANKFURT-AM-MAIN,*

*AND*

*EINFUHR - UND VORRATSSTELLE FUER GETREIDE UND FUTTERMITTEL, FRANKFURT-AM-MAIN,*

**Subject of the case**

*ON THE VALIDITY OF THE THIRD SUBPARAGRAPH OF ARTICLE 12 ( 1 ) OF REGULATION NO 120/67/EEC OF THE COUNCIL OF 13 JUNE 1967 ON THE COMMON ORGANIZATION OF THE MARKET IN CEREALS AND ARTICLE 9 OF REGULATION NO 473/67/EEC OF THE COMMISSION OF 21 AUGUST 1967 ON IMPORT AND EXPORT LICENCES FOR CEREALS AND PROCESSED CEREAL PRODUCTS, RICE, BROKEN RICE AND PROCESSED RICE PRODUCTS,*

**Grounds**

*1 BY ORDER OF 18 MARCH 1970 RECEIVED AT THE COURT ON 26 MARCH 1970, THE VERWALTUNGSGERICHT FRANKFURT-AM-MAIN, PURSUANT TO ARTICLE 177 OF THE EEC TREATY, HAS REFERRED TO THE COURT OF JUSTICE TWO QUESTIONS ON THE VALIDITY OF THE SYSTEM OF EXPORT LICENCES AND OF THE DEPOSIT ATTACHING TO THEM - HEREINAFTER REFERRED TO AS " THE SYSTEM OF DEPOSITS " - PROVIDED FOR BY REGULATION NO 120/67/EEC OF THE COUNCIL OF 13 JUNE 1967 ON THE COMMON ORGANIZATION OF THE MARKET IN CEREALS ( OJ SPECIAL EDITION 1967, P . 33 ) AND REGULATION NO 473/67/EEC OF THE COMMISSION OF 21 AUGUST 1967 ON IMPORT AND EXPORT LICENCES ( OJ 1967, NO 204, P . 16 ).*

*2 IT APPEARS FROM THE GROUNDS OF THE ORDER REFERRING THE MATTER THAT THE VERWALTUNGSGERICHT HAS UNTIL NOW REFUSED TO ACCEPT THE VALIDITY OF THE PROVISIONS IN QUESTION AND THAT FOR THIS REASON IT CONSIDERS IT TO BE ESSENTIAL TO PUT AN END TO THE EXISTING LEGAL UNCERTAINTY . ACCORDING TO THE EVALUATION OF THE VERWALTUNGSGERICHT, THE SYSTEM OF DEPOSITS IS CONTRARY TO CERTAIN STRUCTURAL PRINCIPLES OF NATIONAL CONSTITUTIONAL LAW WHICH MUST BE PROTECTED WITHIN THE FRAMEWORK OF COMMUNITY LAW, WITH THE RESULT THAT THE PRIMACY OF SUPRANATIONAL LAW MUST YIELD BEFORE THE PRINCIPLES OF THE GERMAN BASIC LAW . MORE PARTICULARLY, THE SYSTEM OF DEPOSITS RUNS COUNTER TO THE PRINCIPLES OF FREEDOM OF ACTION AND OF DISPOSITION, OF ECONOMIC LIBERTY AND OF PROPORTIONALITY ARISING IN PARTICULAR FROM ARTICLES 2 ( 1 ) AND 14 OF THE BASIC LAW . THE OBLIGATION TO IMPORT OR EXPORT RESULTING FROM THE ISSUE OF THE LICENCES, TOGETHER WITH THE DEPOSIT ATTACHING THERETO, CONSTITUTES AN EXCESSIVE INTERVENTION IN THE FREEDOM OF DISPOSITION IN TRADE, AS THE OBJECTIVE OF THE REGULATIONS COULD HAVE BEEN ATTAINED BY METHODS OF INTERVENTION HAVING LESS SERIOUS CONSEQUENCES .*

*THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE COMMUNITY LEGAL SYSTEM*

*3 RECOURSE TO THE LEGAL RULES OR CONCEPTS OF NATIONAL LAW IN ORDER TO JUDGE THE VALIDITY OF MEASURES ADOPTED BY THE INSTITUTIONS OF THE COMMUNITY WOULD HAVE AN ADVERSE EFFECT ON THE UNIFORMITY AND EFFICACY OF COMMUNITY LAW . THE VALIDITY OF SUCH MEASURES CAN ONLY BE JUDGED IN THE LIGHT OF COMMUNITY LAW . IN FACT, THE LAW STEMMING FROM THE TREATY, AN INDEPENDENT SOURCE OF LAW, CANNOT BECAUSE OF ITS VERY NATURE BE OVERRIDDEN BY RULES OF NATIONAL LAW, HOWEVER FRAMED, WITHOUT BEING DEPRIVED OF ITS CHARACTER AS COMMUNITY LAW AND WITHOUT THE LEGAL BASIS OF THE COMMUNITY ITSELF BEING CALLED IN QUESTION . THEREFORE THE VALIDITY OF A COMMUNITY MEASURE OR ITS EFFECT WITHIN A MEMBER STATE CANNOT BE AFFECTED BY ALLEGATIONS THAT IT RUNS COUNTER TO EITHER FUNDAMENTAL RIGHTS AS FORMULATED BY THE CONSTITUTION OF THAT STATE OR THE PRINCIPLES OF A NATIONAL CONSTITUTIONAL STRUCTURE .*

*4 HOWEVER, AN EXAMINATION SHOULD BE MADE AS TO WHETHER OR NOT ANY ANALOGOUS GUARANTEE INHERENT IN COMMUNITY LAW HAS BEEN DISREGARDED . IN FACT, RESPECT FOR FUNDAMENTAL RIGHTS FORMS AN INTEGRAL PART OF THE GENERAL PRINCIPLES OF LAW PROTECTED BY THE COURT OF JUSTICE . THE PROTECTION OF SUCH RIGHTS, WHILST INSPIRED BY THE CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES, MUST BE ENSURED WITHIN THE FRAMEWORK OF THE STRUCTURE AND OBJECTIVES OF THE COMMUNITY . IT MUST THEREFORE BE ASCERTAINED, IN THE LIGHT OF THE DOUBTS EXPRESSED BY THE VERWALTUNGSGERICHT, WHETHER THE SYSTEM OF DEPOSITS HAS INFRINGED RIGHTS OF A FUNDAMENTAL NATURE, RESPECT FOR WHICH MUST BE ENSURED IN THE COMMUNITY LEGAL SYSTEM .*

*THE FIRST QUESTION ( LEGALITY OF THE SYSTEM OF DEPOSITS )*

*5 BY THE FIRST QUESTION THE VERWALTUNGSGERICHT ASKS WHETHER THE UNDERTAKING TO EXPORT BASED ON THE THIRD SUBPARAGRAPH OF ARTICLE 12 ( 1 ) OF REGULATION NO 120/67, THE LODGING OF A DEPOSIT WHICH ACCOMPANIES THAT UNDERTAKING AND FORFEITURE OF THE DEPOSIT SHOULD EXPORTATION NOT OCCUR DURING THE PERIOD OF VALIDITY OF THE EXPORT LICENCE COMPLY WITH THE LAW .*

*6 ACCORDING TO THE TERMS OF THE THIRTEENTH RECITAL OF THE PREAMBLE TO REGULATION NO 120/67, " THE COMPETENT AUTHORITIES MUST BE IN A POSITION CONSTANTLY TO FOLLOW TRADE MOVEMENTS IN ORDER TO ASSESS MARKET TRENDS AND TO APPLY THE MEASURES ... AS NECESSARY " AND " TO THAT END, PROVISION SHOULD BE MADE FOR THE ISSUE OF IMPORT AND EXPORT LICENCES ACCOMPANIED BY THE LODGING OF A DEPOSIT GUARANTEEING THAT THE TRANSACTIONS FOR WHICH SUCH LICENCES ARE REQUESTED ARE EFFECTED ". IT FOLLOWS FROM THESE CONSIDERATIONS AND FROM THE GENERAL SCHEME OF THE REGULATION THAT THE SYSTEM OF DEPOSITS IS INTENDED TO GUARANTEE THAT THE IMPORTS AND EXPORTS FOR WHICH THE LICENCES ARE REQUESTED ARE ACTUALLY EFFECTED IN ORDER TO ENSURE BOTH FOR THE COMMUNITY AND FOR THE MEMBER STATES PRECISE KNOWLEDGE OF THE INTENDED TRANSACTIONS .*

*7 THIS KNOWLEDGE, TOGETHER WITH OTHER AVAILABLE INFORMATION ON THE STATE OF THE MARKET, IS ESSENTIAL TO ENABLE THE COMPETENT AUTHORITIES TO MAKE JUDICIOUS USE OF THE INSTRUMENTS OF INTERVENTION, BOTH ORDINARY AND EXCEPTIONAL, WHICH ARE AT THEIR DISPOSAL FOR GUARANTEEING THE FUNCTIONING OF THE SYSTEM OF PRICES INSTITUTED BY THE REGULATION, SUCH AS PURCHASING, STORING AND DISTRIBUTING, FIXING DENATURING PREMIUMS AND EXPORT REFUNDS, APPLYING PROTECTIVE MEASURES AND CHOOSING MEASURES INTENDED TO AVOID DEFLECTIONS OF TRADE . THIS IS ALL THE MORE IMPERATIVE IN THAT THE IMPLEMENTATION OF THE COMMON AGRICULTURAL POLICY INVOLVES HEAVY FINANCIAL RESPONSIBILITIES FOR THE COMMUNITY AND THE MEMBER STATES .*

*8 IT IS NECESSARY, THEREFORE, FOR THE COMPETENT AUTHORITIES TO HAVE AVAILABLE NOT ONLY STATISTICAL INFORMATION ON THE STATE OF THE MARKET BUT ALSO PRECISE FORECASTS ON FUTURE IMPORTS AND EXPORTS . SINCE THE MEMBER STATES ARE OBLIGED BY ARTICLE 12 OF REGULATION NO 120/67 TO ISSUE IMPORT AND EXPORT LICENCES TO ANY APPLICANT, A FORECASE WOULD LOSE ALL SIGNIFICANCE IF THE LICENCES DID NOT INVOLVE THE RECIPIENTS IN AN*

*UNDERTAKING TO ACT ON THEM . AND THE UNDERTAKING WOULD BE INEFFECTUAL IF OBSERVANCE OF IT WERE NOT ENSURED BY APPROPRIATE MEANS .*

*9 THE CHOICE FOR THAT PURPOSE BY THE COMMUNITY LEGISLATURE OF THE DEPOSIT CANNOT BE CRITICIZED IN VIEW OF THE FACT THAT THAT MACHINERY IS ADAPTED TO THE VOLUNTARY NATURE OF REQUESTS FOR LICENCES AND THAT IT HAS THE DUAL ADVANTAGE OVER OTHER POSSIBLE SYSTEMS OF SIMPLICITY AND EFFICACY .*

*10 A SYSTEM OF MERE DECLARATION OF EXPORTS EFFECTED AND OF UNUSED LICENCES, AS PROPOSED BY THE PLAINTIFF IN THE MAIN ACTION, WOULD, BY REASON OF ITS RETROSPECTIVE NATURE AND LACK OF ANY GUARANTEE OF APPLICATION, BE INCAPABLE OF PROVIDING THE COMPETENT AUTHORITIES WITH SURE DATA ON TRENDS IN THE MOVEMENT OF GOODS .*

*11 LIKEWISE, A SYSTEM OF FINES IMPOSED A POSTERIORI WOULD INVOLVE CONSIDERABLE ADMINISTRATIVE AND LEGAL COMPLICATIONS AT THE STAGE OF DECISION AND OF EXECUTION, AGGRAVATED BY THE FACT THAT THE TRADERS CONCERNED MAY BE BEYOND THE REACH OF THE INTERVENTION AGENCIES BY REASON OF THEIR RESIDENCE IN ANOTHER MEMBER STATE, SINCE ARTICLE 12 OF THE REGULATION IMPOSES ON MEMBER STATES THE OBLIGATION TO ISSUE THE LICENCES TO ANY APPLICANT " IRRESPECTIVE OF THE PLACE OF HIS ESTABLISHMENT IN THE COMMUNITY . "*

*12 IT THEREFORE APPEARS THAT THE REQUIREMENT OF IMPORT AND EXPORT LICENCES INVOLVING FOR THE LICENSEES AN UNDERTAKING TO EFFECT THE PROPOSED TRANSACTIONS UNDER THE GUARANTEE OF A DEPOSIT CONSTITUTES A METHOD WHICH IS BOTH NECESSARY AND APPROPRIATE TO ENABLE THE COMPETENT AUTHORITIES TO DETERMINE IN THE MOST EFFECTIVE MANNER THEIR INTERVENTIONS ON THE MARKET IN CEREALS .*

*13 THE PRINCIPLE OF THE SYSTEM OF DEPOSITS CANNOT THEREFORE BE DISPUTED .*

*14 HOWEVER, EXAMINATION SHOULD BE MADE AS TO WHETHER OR NOT CERTAIN DETAILED RULES OF THE SYSTEM OF DEPOSITS MIGHT BE CONTESTED IN THE LIGHT OF THE PRINCIPLES ENOUNCED BY THE VERWALTUNGSGERICHT, ESPECIALLY IN VIEW OF THE ALLEGATION OF THE PLAINTIFF IN THE MAIN ACTION THAT THE BURDEN OF THE DEPOSIT IS EXCESSIVE FOR TRADE, TO THE EXTENT OF VIOLATING FUNDAMENTAL RIGHTS .*

*15 IN ORDER TO ASSESS THE REAL BURDEN OF THE DEPOSIT ON TRADE, ACCOUNT SHOULD BE TAKEN NOT SO MUCH OF THE AMOUNT OF THE DEPOSIT WHICH IS REPAYABLE - NAMELY 0.5 UNIT OF ACCOUNT PER 1 000 KG - AS OF THE COSTS AND CHARGES INVOLVED IN LODGING IT . IN ASSESSING THIS BURDEN, ACCOUNT CANNOT BE TAKEN OF FORFEITURE OF THE DEPOSIT ITSELF, SINCE TRADERS ARE ADEQUATELY PROTECTED BY THE PROVISIONS OF THE REGULATION RELATING TO CIRCUMSTANCES RECOGNIZED AS CONSTITUTING FORCE MAJEURE .*

*16 THE COSTS INVOLVED IN THE DEPOSIT DO NOT CONSTITUTE AN AMOUNT DISPROPORTIONATE TO THE TOTAL VALUE OF THE GOODS IN QUESTION AND OF THE OTHER TRADING COSTS . IT APPEARS THEREFORE THAT THE BURDENS RESULTING FROM THE SYSTEM OF DEPOSITS ARE NOT EXCESSIVE AND ARE THE NORMAL CONSEQUENCE OF A SYSTEM OF ORGANIZATION OF THE MARKETS CONCEIVED TO MEET THE REQUIREMENTS OF THE GENERAL INTEREST, DEFINED IN ARTICLE 39 OF THE TREATY, WHICH AIMS AT ENSURING A FAIR STANDARD OF LIVING FOR THE AGRICULTURAL COMMUNITY WHILE ENSURING THAT SUPPLIES REACH CONSUMERS AT REASONABLE PRICES .*

*17 THE PLAINTIFF IN THE MAIN ACTION ALSO POINTS OUT THAT FORFEITURE OF THE DEPOSIT IN THE EVENT OF THE UNDERTAKING TO IMPORT OR EXPORT NOT BEING FULFILLED REALLY CONSTITUTES A FINE OR A PENALTY WHICH THE TREATY HAS NOT AUTHORIZED THE COUNCIL AND THE COMMISSION TO INSTITUTE .*

*18 THIS ARGUMENT IS BASED ON A FALSE ANALYSIS OF THE SYSTEM OF DEPOSITS WHICH CANNOT BE EQUATED WITH A PENAL SANCTION, SINCE IT IS MERELY THE GUARANTEE THAT AN UNDERTAKING VOLUNTARILY ASSUMED WILL BE CARRIED OUT .*

*19 FINALLY, THE ARGUMENTS RELIED UPON BY THE PLAINTIFF IN THE MAIN ACTION BASED FIRST ON THE FACT THAT THE DEPARTMENTS OF THE COMMISSION ARE NOT TECHNICALLY IN A POSITION TO EXPLOIT THE INFORMATION SUPPLIED BY THE SYSTEM CRITICIZED, SO THAT IT IS DEVOID OF ALL PRACTICAL USEFULNESS, AND SECONDLY ON THE FACT THAT THE GOODS WITH WHICH THE DISPUTE IS CONCERNED ARE SUBJECT TO THE SYSTEM OF INWARD PROCESSING ARE IRRELEVANT . THESE ARGUMENTS CANNOT PUT IN ISSUE THE ACTUAL PRINCIPLE OF THE SYSTEM OF DEPOSITS .*

*20 IT FOLLOWS FROM ALL THESE CONSIDERATIONS THAT THE FACT THAT THE SYSTEM OF LICENCES INVOLVING AN UNDERTAKING, BY THOSE WHO APPLY FOR THEM, TO IMPORT OR EXPORT, GUARANTEED BY A DEPOSIT, DOES NOT VIOLATE ANY RIGHT OF A FUNDAMENTAL NATURE . THE MACHINERY OF DEPOSITS CONSTITUTES AN APPROPRIATE METHOD, FOR THE PURPOSES OF ARTICLE 40 ( 3 ) OF THE TREATY, FOR CARRYING OUT THE COMMON ORGANIZATION OF THE AGRICULTURAL MARKETS AND ALSO CONFORMS TO THE REQUIREMENTS OF ARTICLE 43 .*

*THE SECOND QUESTION ( CONCEPT OF " FORCE MAJEURE " )*

*21 BY THE SECOND QUESTION THE VERWALTUNGSGERICHT ASKS WHETHER, IN THE EVENT OF THE COURT' S CONFIRMING THE VALIDITY OF THE DISPUTED PROVISION OF REGULATION NO 120/67, ARTICLE 9 OF REGULATION NO 473/67 OF THE COMMISSION, ADOPTED IN IMPLEMENTATION OF THE FIRST REGULATION, IS IN CONFORMITY WITH THE LAW, IN THAT IT ONLY EXCLUDES FORFEITURE OF THE DEPOSIT IN CASES OF FORCE MAJEURE .*

*22 IT APPEARS FROM THE GROUNDS OF THE ORDER REFERRING THE MATTER THAT THE COURT CONSIDERS EXCESSIVE AND CONTRARY TO THE ABOVEMENTIONED PRINCIPLES THE PROVISION IN ARTICLE 1 ( SIC ) OF REGULATION NO 473/67, THE EFFECT OF WHICH IS TO LIMIT THE CANCELLATION OF THE OBLIGATION TO IMPORT OR EXPORT AND RELEASE OF THE DEPOSIT ONLY TO " CIRCUMSTANCES WHICH MAY BE CONSIDERED TO BE A CASE OF FORCE MAJEURE " . IN THE LIGHT OF ITS EXPERIENCE, THE VERWALTUNGSGERICHT CONSIDERS THAT PROVISION TO BE TOO NARROW, LEAVING EXPORTERS OPEN TO FORFEITURE OF THE DEPOSIT IN CIRCUMSTANCES IN WHICH EXPORTATION WOULD NOT HAVE TAKEN PLACE FOR REASONS WHICH WERE JUSTIFIABLE BUT NOT ASSIMILABLE TO A CASE OF FORCE MAJEURE IN THE STRICT MEANING OF THE TERM . FOR ITS PART, THE PLAINTIFF IN THE MAIN ACTION CONSIDERS THIS PROVISION TO BE TOO SEVERE BECAUSE IT LIMITS THE RELEASE OF THE DEPOSIT TO CASES OF FORCE MAJEURE WITHOUT TAKING INTO ACCOUNT THE ARRANGEMENTS OF IMPORTERS OR EXPORTERS WHICH ARE JUSTIFIED BY CONSIDERATIONS OF A COMMERCIAL NATURE .*

*23 THE CONCEPT OF FORCE MAJEURE ADOPTED BY THE AGRICULTURAL REGULATIONS TAKES INTO ACCOUNT THE PARTICULAR NATURE OF THE RELATIONSHIPS IN PUBLIC LAW BETWEEN TRADERS AND THE NATIONAL ADMINISTRATION, AS WELL AS THE OBJECTIVES OF THOSE REGULATIONS . IT FOLLOWS FROM THOSE OBJECTIVES AS WELL AS FROM THE POSITIVE PROVISIONS OF THE REGULATIONS IN QUESTION THAT THE CONCEPT OF FORCE MAJEURE IS NOT LIMITED TO ABSOLUTE IMPOSSIBILITY BUT MUST BE UNDERSTOOD IN THE SENSE OF UNUSUAL CIRCUMSTANCES, OUTSIDE THE CONTROL OF THE IMPORTER OR EXPORTER, THE CONSEQUENCES OF WHICH, IN SPITE OF THE EXERCISE OF ALL DUE CARE, COULD NOT HAVE BEEN AVOIDED EXCEPT AT THE COST OF EXCESSIVE SACRIFICE . THIS CONCEPT IMPLIES A SUFFICIENT FLEXIBILITY REGARDING NOT ONLY THE NATURE OF THE OCCURRENCE RELIED UPON BUT ALSO THE CARE WHICH THE EXPORTER SHOULD HAVE EXERCISED IN ORDER TO MEET IT AND THE EXTENT OF THE SACRIFICES WHICH HE SHOULD HAVE ACCEPTED TO THAT END .*

*24 THE CASES OF FORFEITURE CITED BY THE COURT AS IMPOSING AN UNJUSTIFIED AND EXCESSIVE BURDEN ON THE EXPORTER APPEAR TO CONCERN SITUATIONS IN WHICH EXPORTATION HAS NOT TAKEN PLACE EITHER THROUGH THE FAULT OF THE EXPORTER HIMSELF OR AS A RESULT OF AN ERROR ON HIS PART OR FOR PURELY COMMERCIAL CONSIDERATIONS . THE CRITICISMS MADE AGAINST ARTICLE 9 OF REGULATION NO 473/67 LEAD THEREFORE IN REALITY*

*TO THE SUBSTITUTION OF CONSIDERATIONS BASED SOLELY ON THE INTEREST AND BEHAVIOUR OF CERTAIN TRADERS FOR A SYSTEM LAID DOWN IN THE PUBLIC INTEREST OF THE COMMUNITY . THE SYSTEM ESTABLISHED, UNDER THE PRINCIPLES OF REGULATION NO 120/67, BY IMPLEMENTING REGULATION NO 473/67 IS INTENDED TO RELEASE TRADERS FROM THEIR UNDERTAKING ONLY IN CASES IN WHICH THE IMPORT OR EXPORT TRANSACTION WAS NOT ABLE TO BE CARRIED OUT DURING THE PERIOD OF VALIDITY OF THE LICENCE AS A RESULT OF THE OCCURRENCES REFERRED TO BY THE SAID PROVISIONS . BEYOND SUCH OCCURRENCES, FOR WHICH THEY CANNOT BE HELD RESPONSIBLE, IMPORTERS AND EXPORTERS ARE OBLIGED TO COMPLY WITH THE PROVISIONS OF THE AGRICULTURAL REGULATIONS AND MAY NOT SUBSTITUTE FOR THEM CONSIDERATIONS BASED UPON THEIR OWN INTERESTS .*

*25 IT THEREFORE APPEARS THAT BY LIMITING THE CANCELLATION OF THE UNDERTAKING TO EXPORT AND THE RELEASE OF THE DEPOSIT TO CASES OF FORCE MAJEURE THE COMMUNITY LEGISLATURE ADOPTED A PROVISION WHICH, WITHOUT IMPOSING AN UNDUE BURDEN ON IMPORTERS OR EXPORTERS, IS APPROPRIATE FOR ENSURING THE NORMAL FUNCTIONING OF THE ORGANIZATION OF THE MARKET IN CEREALS, IN THE GENERAL INTEREST AS DEFINED IN ARTICLE 39 OF THE TREATY . IT FOLLOWS THAT NO ARGUMENT AGAINST THE VALIDITY OF THE SYSTEM OF DEPOSITS CAN BE BASED ON THE PROVISIONS LIMITING RELEASE OF THE DEPOSIT TO CASES OF FORCE MAJEURE .*

**Decision on costs**

[…]
**Operative part**

*THE COURT*

*IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE VERWALTUNGSGERICHT FRANKFURT-AM-MAIN, BY ORDER OF THAT COURT OF 18 MARCH 1970, HEREBY RULES :*

*EXAMINATION OF THE QUESTIONS PUT REVEALS NO FACTOR CAPABLE OF AFFECTING THE VALIDITY OF :*

*( 1 ) THE THIRD SUBPARAGRAPH OF ARTICLE 12 ( 1 ) OF REGULATION NO 120/67/EEC OF THE COUNCIL OF 13 JUNE 1967 MAKING THE ISSUE OF IMPORT AND EXPORT LICENCES CONDITIONAL ON THE LODGING OF A DEPOSIT GUARANTEEING PERFORMANCE OF THE UNDERTAKING TO IMPORT OR EXPORT DURING THE PERIOD OF VALIDITY OF THE LICENCE;*

*( 2 ) ARTICLE 9 OF REGULATION NO 473/67/EEC OF THE COMMISSION OF 21 AUGUST 1967, THE EFFECT OF WHICH IS TO LIMIT THE CANCELLATION OF THE UNDERTAKING TO IMPORT OR EXPORT AND THE RELEASE OF THE DEPOSIT ONLY TO CIRCUMSTANCES WHICH MAY BE CONSIDERED TO BE A CASE OF " FORCE MAJEURE " .*

## Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz*

*IN CASE 44/79*

*REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE VERWALTUNGSGERICHT ( ADMINISTRATIVE COURT ) NEUSTADT AN DER WEINSTRASSE FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN*

*LISELOTTE HAUER , RESIDING AT BAD DURKHEIM*

*AND*

*LAND RHEINLAND-PFALZ*

**Subject of the case**

*ON THE INTERPRETATION OF ARTICLE 2 OF COUNCIL REGULATION ( EEC ) NO 1162/76 OF 17 MAY 1976 ON MEASURES DESIGNED TO ADJUST WINE-GROWING POTENTIAL TO MARKET REQUIREMENTS , AS AMENDED BY COUNCIL REGULATION ( EEC ) NO 2776/78 OF 23 NOVEMBER 1978 , WITH REGARD TO ARTICLE 1 OF THE GESETZ UBER MASSNAHMEN AUF DEM GEBIETE DER WEINWIRTSCHAFT ( WEINWIRTSCHAFTSGESETZ ),*

**Grounds**

*1 BY AN ORDER OF 14 DECEMBER 1978 , RECEIVED AT THE COURT ON 20 MARCH 1979 , THE VERWALTUNGSGERICHT NEUSTADT AN DER WEINSTRASSE SUBMITTED TWO QUESTIONS TO THE COURT FOR A PRELIMINARY RULING , PURSUANT TO ARTICLE 177 OF THE EEC TREATY , ON THE INTERPRETATION OF COUNCIL REGULATION ( EEC ) NO 1162/76 OF 17 MAY 1976 ON MEASURES DESIGNED TO ADJUST WINE-GROWING POTENTIAL TO MARKET REQUIREMENTS ( OFFICIAL JOURNAL L 135 , P . 32 ), AMENDED BY COUNCIL REGULATION ( EEC ) NO 2776/78 OF 23 NOVEMBER 1978 ( OFFICIAL JOURNAL L 333 , P . 1 ).*

*2 THE FILE ON THE CASE SHOWS THAT ON 6 JUNE 1975 THE PLAINTIFF IN THE MAIN ACTION APPLIED TO THE COMPETENT ADMINISTRATIVE AUTHORITY OF THE LAND RHEINLAND-PFALZ FOR AUTHORIZATION TO PLANT VINES ON A PLOT OF LAND WHICH SHE OWNS IN THE REGION OF BAD DURKHEIM . THAT AUTHORIZATION WAS REFUSED INITIALLY OWING TO THE FACT THAT UNDER THE PROVISIONS OF THE GERMAN LEGISLATION APPLICABLE TO THAT SPHERE , NAMELY THE LAW RELATING TO THE WINE INDUSTRY ( WEINWIRTSCHAFTSGESETZ ) OF 10 MARCH 1977 , THE PLOT OF LAND IN QUESTION WAS NOT CONSIDERED SUITABLE FOR WINE-GROWING . ON 22 JANUARY 1976 THE PERSON CONCERNED LODGED AN OBJECTION AGAINST THAT DECISION . WHILE PROCEEDINGS RELATING TO THAT OBJECTION WERE PENDING BEFORE THE COMPETENT ADMINISTRATIVE AUTHORITY , REGULATION NO 1162/76 OF 17 MAY 1976 WAS ADOPTED , ARTICLE 2 OF WHICH IMPOSES A PROHIBITION FOR A PERIOD OF THREE YEARS ON ALL NEW PLANTING OF VINES . ON 21 OCTOBER OF THAT YEAR THE ADMINISTRATIVE AUTHORITY OVERRULED THE OBJECTION , STATING TWO GROUNDS : ON THE ONE HAND , THE UNSUITABILITY OF THE LAND AND , ON THE OTHER HAND , THE PROHIBITION ON PLANTING AS A RESULT OF THE COMMUNITY REGULATION REFERRED TO .*

*3 THE PERSON CONCERNED APPEALED TO THE VERWALTUNGSGERICHT . AS A RESULT OF EXPERTS ' REPORTS ON THE GRAPES GROWN IN THE SAME AREA AND TAKING INTO ACCOUNT A SETTLEMENT REACHED WITH VARIOUS OTHER OWNERS OF PLOTS OF LAND ADJACENT TO THAT OF THE APPLICANT , THE ADMINISTRATIVE AUTHORITY ACCEPTED THAT THE PLAINTIFF ' S LAND MAY BE CONSIDERED SUITABLE FOR WINE-GROWING IN ACCORDANCE WITH THE MINIMUM*

*REQUIREMENTS LAID DOWN BY NATIONAL LEGISLATION . CONSEQUENTLY , THE AUTHORITY STATED ITS WILLINGNESS TO GRANT THE AUTHORIZATION AS FROM THE END OF THE PROHIBITION ON NEW PLANTING IMPOSED BY THE COMMUNITY RULES . THUS IT APPEARS THAT THE DISPUTE BETWEEN THE PARTIES IS HENCEFORTH SOLELY CONCERNED WITH QUESTIONS OF COMMUNITY LAW .*

*4 FOR HER PART , THE PLAINTIFF IN THE MAIN ACTION CONSIDERS THAT THE AUTHORIZATION APPLIED FOR SHOULD BE GRANTED TO HER ON THE GROUND THAT THE PROVISIONS OF REGULATION NO 1162/76 ARE NOT APPLICABLE IN THE CASE OF AN APPLICATION INTRODUCED LONG BEFORE THE ENTRY INTO FORCE OF THAT REGULATION . EVEN SUPPOSING THAT THE REGULATION IS APPLICABLE IN THE CASE OF APPLICATIONS SUBMITTED BEFORE ITS ENTRY INTO FORCE , ITS PROVISIONS MAY IN THE APPLICANT ' S SUBMISSION STILL NOT BE RELIED UPON AGAINST HER BECAUSE THEY ARE CONTRARY TO HER RIGHT TO PROPERTY AND TO HER RIGHT FREELY TO PURSUE A TRADE OR PROFESSION RIGHTS WHICH ARE GUARANTEED BY ARTICLES 12 AND 14 OF THE GRUNDGESETZ OF THE FEDERAL REPUBLIC OF GERMANY .*

*5 IN ORDER TO RESOLVE THAT DISPUTE , THE VERWALTUNGSGERICHT DRAFTED TWO QUESTIONS WORDED AS FOLLOWS :*

*1 . IS COUNCIL REGULATION ( EEC ) NO 1162/76 OF 17 MAY 1976 AS AMENDED BY COUNCIL REGULATION ( EEC ) NO 2776/78 OF 23 NOVEMBER 1978 TO BE INTERPRETED AS MEANING THAT ARTICLE 2 ( 1 ) THEREOF ALSO APPLIES TO THOSE APPLICATIONS FOR AUTHORIZATION OF NEW PLANTING OF VINEYARDS WHICH HAD ALREADY BEEN MADE BEFORE THE SAID REGULATION ENTERED INTO FORCE?*

*AND IF THE ANSWER TO QUESTION 1 IS IN THE AFFIRMATIVE*

*2 . IS ARTICLE 2 ( 1 ) OF THE SAID REGULATION TO BE INTERPRETED AS MEANING THAT THE PROHIBITION LAID DOWN THEREIN ON THE GRANTING OF AUTHORIZATIONS FOR NEW PLANTING - DISREGARDING THE EXCEPTIONS SPECIFIED IN ARTICLES 2 ( 2 ) OF THE REGULATION - IS OF INCLUSIVE APPLICATION , THAT IS TO SAY , IS IN PARTICULAR UNAFFECTED BY THE QUESTION OF THE UNSUITABILITY OF THE LAND AS PROVIDED IN ARTICLE 1 ( 2 ) AND ARTICLE 2 OF THE GERMAN LAW ON MEASURES APPLICABLE IN THE WINE INDUSTRY ( WEINWIRTSCHAFTSGESETZ ( LAW RELATING TO THE WINE INDUSTRY))?*

*THE FIRST QUESTION ( APPLICATION OF REGULATION NO 1162/76 IN TIME )*

*6 IN THIS REGARD , THE PLAINTIFF IN THE MAIN ACTION CLAIMS THAT HER APPLICATION , SUBMITTED TO THE COMPETENT ADMINISTRATIVE AUTHORITY ON 6 JUNE 1975 , SHOULD IN THE NORMAL COURSE OF EVENTS HAVE LED TO A DECISION IN HER FAVOUR BEFORE THE ENTRY INTO FORCE OF THE COMMUNITY REGULATION IF THE ADMINISTRATIVE PROCEDURE HAD TAKEN ITS USUAL COURSE AND IF THE ADMINISTRATION HAD RECOGNIZED WITHOUT DELAY THE FACT THAT HER PLOT OF LAND IS SUITABLE FOR WINE-GROWING IN ACCORDANCE WITH THE REQUIREMENTS OF NATIONAL LAW . IT IS , SHE ARGUES , NECESSARY TO TAKE ACCOUNT OF THAT SITUATION IN DECIDING THE TIME FROM WHICH THE COMMUNITY REGULATION IS APPLICABLE , THE MORE SO AS THE PRODUCTION OF THE VINEYARD IN QUESTION WOULD NOT HAVE HAD ANY APPRECIABLE INFLUENCE ON MARKET CONDITIONS , IN VIEW OF THE TIME WHICH ELAPSES BETWEEN THE PLANTING OF A VINEYARD AND ITS FIRST PRODUCTION .*

*7 THE ARGUMENTS ADVANCED BY THE PLAINTIFF IN THE MAIN ACTION CANNOT BE UPHELD . INDEED THE SECOND SUBPARAGRAPH OF ARTICLE 2 ( 1 ) OF REGULATION NO 1162/76 EXPRESSLY PROVIDES THAT MEMBER STATES SHALL NO LONGER GRANT AUTHORIZATIONS FOR NEW PLANTING ' ' AS FROM THE DATE ON WHICH THIS REGULATION ENTERS INTO FORCE ' ' . BY REFERRING TO THE ACT OF GRANTING AUTHORIZATION , THAT PROVISION RULES OUT THE POSSIBILITY OF TAKING INTO CONSIDERATION THE TIME AT WHICH AN APPLICATION WAS SUBMITTED . IT INDICATES THE INTENTION TO GIVE IMMEDIATE EFFECT TO THE REGULATION , TO SUCH AN EXTENT THAT EVEN THE EXERCISE OF RIGHTS TO PLANT OR RE-PLANT ACQUIRED PRIOR TO THE ENTRY INTO FORCE*

*OF THE REGULATION IS SUSPENDED DURING THE PERIOD OF THE PROHIBITION AS A RESULT OF ARTICLE 4 OF THE SAME REGULATION .*

*8 AS IS STATED IN THE SIXTH RECITAL OF THE PREAMBLE , WITH REGARD TO THE LAST-MENTIONED PROVISION , THE PROHIBITION ON NEW PLANTINGS IS REQUIRED BY AN ' ' UNDENIABLE PUBLIC INTEREST ' ' , MAKING IT NECESSARY TO PUT A BRAKE ON THE OVERPRODUCTION OF WINE IN THE COMMUNITY , TO RE-ESTABLISH THE BALANCE OF THE MARKET AND TO PREVENT THE FORMATION OF STRUCTURAL SURPLUSES . THUS IT APPEARS THAT THE OBJECT OF REGULATION NO 1162/76 IS THE IMMEDIATE PREVENTION OF ANY EXTENSION IN THE AREA COVERED BY VINEYARDS . THEREFORE NO EXCEPTION MAY BE MADE IN FAVOUR OF AN APPLICATION SUBMITTED BEFORE ITS ENTRY INTO FORCE .*

*9 IT IS THEREFORE NECESSARY TO REPLY TO THE FIRST QUESTION THAT COUNCIL REGULATION NO 1162/76 OF 17 MAY 1976 , AMENDED BY REGULATION NO 2776/78 OF 23 NOVEMBER 1978 , MUST BE INTERPRETED AS MEANING THAT ARTICLE 2 ( 1 ) THEREOF ALSO APPLIES TO APPLICATIONS FOR AUTHORIZATION OF NEW PLANTING OF VINES MADE BEFORE THE ENTRY INTO FORCE OF THE FIRST REGULATION .*

*THE SECOND QUESTION ( THE SUBSTANTIVE SCOPE OF REGULATION NO 1162/76 )*

*10 IN ITS SECOND QUESTION THE VERWALTUNGSGERICHT ASKS THE COURT TO RULE WHETHER THE PROHIBITION ON GRANTING AUTHORIZATIONS FOR NEW PLANTING LAID DOWN BY ARTICLE 2 ( 1 ) OF REGULATION NO 1162/76 IS OF INCLUSIVE APPLICATION , THAT IS TO SAY WHETHER IT ALSO INCLUDES LAND RECOGNIZED AS SUITABLE FOR WINE-GROWING IN ACCORDANCE WITH THE CRITERIA APPLIED BY NATIONAL LEGISLATION .*

*11 IN THIS REGARD , THE TEXT OF THE REGULATION IS EXPLICIT IN SO FAR AS ARTICLE 2 PROHIBITS ' ' ALL NEW PLANTING ' ' WITHOUT MAKING ANY DISTINCTION ACCORDING TO THE QUALITY OF THE LAND CONCERNED . IT IS CLEAR FROM BOTH THE TEXT AND THE STATED OBJECTIVES OF REGULATION NO 1162/76 THAT THE PROHIBITION MUST APPLY TO NEW PLANTINGS IRRESPECTIVE OF THE NATURE OF THE LAND AND OF THE CLASSIFICATION THEREOF UNDER NATIONAL LEGISLATION . IN FACT , THE OBJECT OF THE REGULATION , AS IS CLEAR IN PARTICULAR FROM THE SECOND RECITAL OF THE PREAMBLE THERETO , IS TO BRING TO AN END THE SURPLUS IN EUROPEAN WINE PRODUCTION AND TO RE-ESTABLISH THE BALANCE OF THE MARKET BOTH IN THE SHORT AND IN THE LONG TERM . ONLY ARTICLE 2 ( 2 ) OF THE REGULATION PROVIDES FOR SOME EXCEPTIONS TO THE GENERAL NATURE OF THE PROHIBITION LAID DOWN BY PARAGRAPH ( 1 ) OF THE SAME ARTICLE , BUT IT IS COMMON GROUND THAT NONE OF THOSE EXCEPTIONS APPLIES IN THIS CASE .*

*12 THEREFORE THE REPLY TO THE SECOND QUESTION MUST BE THAT ARTICLE 2 ( 1 ) OF REGULATION NO 1162/76 MUST BE INTERPRETED AS MEANING THAT THE PROHIBITION LAID DOWN THEREIN ON THE GRANTING OF AUTHORIZATIONS FOR NEW PLANTING - DISREGARDING THE EXCEPTIONS SPECIFIED IN ARTICLE 2 ( 2 ) OF THE REGULATION - IS OF INCLUSIVE APPLICATION , THAT IS TO SAY , IS IN PARTICULAR UNAFFECTED BY THE QUESTION OF THE SUITABILITY OR OTHERWISE OF A PLOT OF LAND FOR WINE-GROWING , AS DETERMINED BY THE PROVISIONS OF A NATIONAL LAW .*

*THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE COMMUNITY LEGAL ORDER*

*13 IN ITS ORDER MAKING THE REFERENCE , THE VERWALTUNGSGERICHT STATES THAT IF REGULATION NO 1162/76 MUST BE INTERPRETED AS MEANING THAT IT LAYS DOWN A PROHIBITION OF GENERAL APPLICATION , SO AS TO INCLUDE EVEN LAND APPROPRIATE FOR WINE GROWING , THAT PROVISION MIGHT HAVE TO BE CONSIDERED INAPPLICABLE IN THE FEDERAL REPUBLIC OF GERMANY OWING TO DOUBTS EXISTING WITH REGARD TO ITS COMPATIBILITY WITH THE FUNDAMENTAL RIGHTS GUARANTEED BY ARTICLES 14 AND 12 OF THE GRUNDGESETZ CONCERNING , RESPECTIVELY , THE RIGHT TO PROPERTY AND THE RIGHT FREELY TO PURSUE TRADE AND PROFESSIONAL ACTIVITIES .*

*14 AS THE COURT DECLARED IN ITS JUDGMENT OF 17 DECEMBER 1970 , INTERNATIONALE HANDELSGESELLSCHAFT ( 1970 ) ECR 1125 , THE QUESTION OF A POSSIBLE INFRINGEMENT OF FUNDAMENTAL RIGHTS BY A MEASURE OF THE COMMUNITY INSTITUTIONS CAN ONLY BE JUDGED IN THE LIGHT OF COMMUNITY LAW ITSELF . THE INTRODUCTION OF SPECIAL CRITERIA FOR ASSESSMENT STEMMING FROM THE LEGISLATION OR CONSTITUTIONAL LAW OF A PARTICULAR MEMBER STATE WOULD , BY DAMAGING THE SUBSTANTIVE UNITY AND EFFICACY OF COMMUNITY LAW , LEAD INEVITABLY TO THE DESTRUCTION OF THE UNITY OF THE COMMON MARKET AND THE JEOPARDIZING OF THE COHESION OF THE COMMUNITY .*

*15 THE COURT ALSO EMPHASIZED IN THE JUDGMENT CITED , AND LATER IN THE JUDGMENT OF 14 MAY 1974 , NOLD ( 1974 ) ECR 491 , THAT FUNDAMENTAL RIGHTS FORM AN INTEGRAL PART OF THE GENERAL PRINCIPLES OF THE LAW , THE OBSERVANCE OF WHICH IT ENSURES ; THAT IN SAFEGUARDING THOSE RIGHTS , THE COURT IS BOUND TO DRAW INSPIRATION FROM CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES , SO THAT MEASURES WHICH ARE INCOMPATIBLE WITH THE FUNDAMENTAL RIGHTS RECOGNIZED BY THE CONSTITUTIONS OF THOSE STATES ARE UNACCEPTABLE IN THE COMMUNITY ; AND THAT , SIMILARLY , INTERNATIONAL TREATIES FOR THE PROTECTION OF HUMAN RIGHTS ON WHICH THE MEMBER STATES HAVE COLLABORATED OR OF WHICH THEY ARE SIGNATORIES , CAN SUPPLY GUIDELINES WHICH SHOULD BE FOLLOWED WITHIN THE FRAMEWORK OF COMMUNITY LAW . THAT CONCEPTION WAS LATER RECOGNIZED BY THE JOINT DECLARATION OF THE EUROPEAN PARLIAMENT , THE COUNCIL AND THE COMMISSION OF 5 APRIL 1977 , WHICH , AFTER RECALLING THE CASE-LAW OF THE COURT , REFERS ON THE ONE HAND TO THE RIGHTS GUARANTEED BY THE CONSTITUTIONS OF THE MEMBER STATES AND ON THE OTHER HAND TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF 4 NOVEMBER 1950 ( OFFICIAL JOURNAL C 103 , 1977 , P . 1 ).*

*16 IN THESE CIRCUMSTANCES , THE DOUBTS EVINCED BY THE VERWALTUNGSGERICHT AS TO THE COMPATIBILITY OF THE PROVISIONS OF REGULATION NO 1162/76 WITH THE RULES CONCERNING THE PROTECTION OF FUNDAMENTAL RIGHTS MUST BE UNDERSTOOD AS QUESTIONING THE VALIDITY OF THE REGULATION IN THE LIGHT OF COMMUNITY LAW . IN THIS REGARD , IT IS NECESSARY TO DISTINGUISH BETWEEN , ON THE ONE HAND , A POSSIBLE INFRINGEMENT OF THE RIGHT TO PROPERTY AND , ON THE OTHER HAND , A POSSIBLE LIMITATION UPON THE FREEDOM TO PURSUE A TRADE OR PROFESSION .*

*THE QUESTION OF THE RIGHT TO PROPERTY*

*17 THE RIGHT TO PROPERTY IS GUARANTEED IN THE COMMUNITY LEGAL ORDER IN ACCORDANCE WITH THE IDEAS COMMON TO THE CONSTITUTIONS OF THE MEMBER STATES , WHICH ARE ALSO REFLECTED IN THE FIRST PROTOCOL TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS .*

*18 ARTICLE 1 OF THAT PROTOCOL PROVIDES AS FOLLOWS :*

*' ' EVERY NATURAL OR LEGAL PERSON IS ENTITLED TO THE PEACEFUL ENJOYMENT OF HIS POSSESSIONS . NO ONE SHALL BE DEPRIVED OF HIS POSSESSIONS EXCEPT IN THE PUBLIC INTEREST AND SUBJECT TO THE CONDITIONS PROVIDED FOR BY LAW AND BY THE GENERAL PRINCIPLES OF INTERNATIONAL LAW .*

*THE PRECEDING PROVISIONS SHALL NOT , HOWEVER , IN ANY WAY IMPAIR THE RIGHT OF A STATE TO ENFORCE SUCH LAWS AS IT DEEMS NECESSARY TO CONTROL THE USE OF PROPERTY IN ACCORDANCE WITH THE GENERAL INTEREST OR TO SECURE THE PAYMENT OF TAXES OR OTHER CONTRIBUTIONS OR PENALTIES . ' '*

*19 HAVING DECLARED THAT PERSONS ARE ENTITLED TO THE PEACEFUL ENJOYMENT OF THEIR PROPERTY , THAT PROVISION ENVISAGES TWO WAYS IN WHICH THE RIGHTS OF A PROPERTY OWNER MAY BE IMPAIRED , ACCORDING AS THE IMPAIRMENT IS INTENDED TO DEPRIVE THE OWNER OF HIS RIGHT OR TO RESTRICT THE EXERCISE THEREOF . IN THIS CASE IT IS INCONTESTABLE THAT THE PROHIBITION ON NEW PLANTING CANNOT BE CONSIDERED TO BE AN ACT DEPRIVING THE*

*OWNER OF HIS PROPERTY , SINCE HE REMAINS FREE TO DISPOSE OF IT OR TO PUT IT TO OTHER USES WHICH ARE NOT PROHIBITED . ON THE OTHER HAND , THERE IS NO DOUBT THAT THAT PROHIBITION RESTRICTS THE USE OF THE PROPERTY . IN THIS REGARD , THE SECOND PARAGRAPH OF ARTICLE 1 OF THE PROTOCOL PROVIDES AN IMPORTANT INDICATION IN SO FAR AS IT RECOGNIZES THE RIGHT OF A STATE ' ' TO ENFORCE SUCH LAWS AS IT DEEMS NECESSARY TO CONTROL THE USE OF PROPERTY IN ACCORDANCE WITH THE GENERAL INTEREST ' ' . THUS THE PROTOCOL ACCEPTS IN PRINCIPLE THE LEGALITY OF RESTRICTIONS UPON THE USE OF PROPERTY , WHILST AT THE SAME TIME LIMITING THOSE RESTRICTIONS TO THE EXTENT TO WHICH THEY ARE DEEMED ' ' NECESSARY ' ' BY A STATE FOR THE PROTECTION OF THE ' ' GENERAL INTEREST ' ' . HOWEVER , THAT PROVISION DOES NOT , ENABLE A SUFFICIENTLY PRECISE ANSWER TO BE GIVEN TO THE QUESTION SUBMITTED BY THE VERWALTUNGSGERICHT .*

*20 THEREFORE , IN ORDER TO BE ABLE TO ANSWER THAT QUESTION , IT IS NECESSARY TO CONSIDER ALSO THE INDICATIONS PROVIDED BY THE CONSTITUTIONAL RULES AND PRACTICES OF THE NINE MEMBER STATES . ONE OF THE FIRST POINTS TO EMERGE IN THIS REGARD IS THAT THOSE RULES AND PRACTICES PERMIT THE LEGISLATURE TO CONTROL THE USE OF PRIVATE PROPERTY IN ACCORDANCE WITH THE GENERAL INTEREST . THUS SOME CONSTITUTIONS REFER TO THE OBLIGATIONS ARISING OUT OF THE OWNERSHIP OF PROPERTY ( GERMAN GRUNDGESETZ , ARTICLE 14 ( 2 ), FIRST SENTENCE ), TO ITS SOCIAL FUNCTION ( ITALIAN CONSTITUTION , ARTICLE 42 ( 2 )), TO THE SUBORDINATION OF ITS USE TO THE REQUIREMENTS OF THE COMMON GOOD ( GERMAN GRUNDGESETZ , ARTICLE 14 ( 2 ), SECOND SENTENCE , AND THE IRISH CONSTITUTION , ARTICLE 43.2.2* ), OR OF SOCIAL JUSTICE ( IRISH CONSTITUTION , ARTICLE 43.2.1* ). IN ALL THE MEMBER STATES , NUMEROUS LEGISLATIVE MEASURES HAVE GIVEN CONCRETE EXPRESSION TO THAT SOCIAL FUNCTION OF THE RIGHT TO PROPERTY . THUS IN ALL THE MEMBER STATES THERE IS LEGISLATION ON AGRICULTURE AND FORESTRY , THE WATER SUPPLY , THE PROTECTION OF THE ENVIRONMENT AND TOWN AND COUNTRY PLANNING , WHICH IMPOSES RESTRICTIONS , SOMETIMES APPRECIABLE , ON THE USE OF REAL PROPERTY .*

*21 MORE PARTICULARLY , ALL THE WINE-PRODUCING COUNTRIES OF THE COMMUNITY HAVE RESTRICTIVE LEGISLATION , ALBEIT OF DIFFERING SEVERITY , CONCERNING THE PLANTING OF VINES , THE SELECTION OF VARIETIES AND THE METHODS OF CULTIVATION . IN NONE OF THE COUNTRIES CONCERNED ARE THOSE PROVISIONS CONSIDERED TO BE INCOMPATIBLE IN PRINCIPLE WITH THE REGARD DUE TO THE RIGHT TO PROPERTY .*

*22 THUS IT MAY BE STATED , TAKING INTO ACCOUNT THE CONSTITUTIONAL PRECEPTS COMMON TO THE MEMBER STATES AND CONSISTENT LEGISLATIVE PRACTICES , IN WIDELY VARYING SPHERES , THAT THE FACT THAT REGULATION NO 1162/76 IMPOSED RESTRICTIONS ON THE NEW PLANTING OF VINES CANNOT BE CHALLENGED IN PRINCIPLE . IT IS A TYPE OF RESTRICTION WHICH IS KNOWN AND ACCEPTED AS LAWFUL , IN IDENTICAL OR SIMILAR FORMS , IN THE CONSTITUTIONAL STRUCTURE OF ALL THE MEMBER STATES .*

*23 HOWEVER , THAT FINDING DOES NOT DEAL COMPLETELY WITH THE PROBLEM RAISED BY THE VERWALTUNGSGERICHT . EVEN IF IT IS NOT POSSIBLE TO DISPUTE IN PRINCIPLE THE COMMUNITY ' S ABILITY TO RESTRICT THE EXERCISE OF THE RIGHT TO PROPERTY IN THE CONTEXT OF A COMMON ORGANIZATION OF THE MARKET AND FOR THE PURPOSES OF A STRUCTURAL POLICY , IT IS STILL NECESSARY TO EXAMINE WHETHER THE RESTRICTIONS INTRODUCED BY THE PROVISIONS IN DISPUTE IN FACT CORRESPOND TO OBJECTIVES OF GENERAL INTEREST PURSUED BY THE COMMUNITY OR WHETHER , WITH REGARD TO THE AIM PURSUED , THEY CONSTITUTE A DISPROPORTIONATE AND INTOLERABLE INTERFERENCE WITH THE RIGHTS OF THE OWNER , IMPINGING UPON THE VERY SUBSTANCE OF THE RIGHT TO PROPERTY . SUCH IN FACT IS THE PLEA SUBMITTED BY THE PLAINTIFF IN THE MAIN ACTION , WHO CONSIDERS THAT ONLY THE PURSUIT OF A QUALITATIVE POLICY WOULD PERMIT THE LEGISLATURE TO RESTRICT THE USE OF WINE-GROWING PROPERTY , WITH THE RESULT THAT SHE POSSESSES AN UNASSAILABLE RIGHT FROM THE MOMENT THAT IT IS RECOGNIZED THAT HER LAND IS SUITABLE FOR WINE GROWING . IT IS THEREFORE NECESSARY TO IDENTIFY THE AIM PURSUED BY THE DISPUTED REGULATION AND TO DETERMINE WHETHER THERE EXISTS A REASONABLE RELATIONSHIP BETWEEN THE MEASURES PROVIDED FOR BY THE REGULATION AND THE AIM PURSUED BY THE COMMUNITY IN THIS CASE .*

*24 THE PROVISIONS OF REGULATION NO 1162/76 MUST BE CONSIDERED IN THE CONTEXT OF THE COMMON ORGANIZATION OF THE MARKET IN WINE WHICH IS CLOSELY LINKED TO THE STRUCTURAL POLICY ENVISAGED BY THE COMMUNITY IN THE AREA IN QUESTION . THE AIMS OF THAT POLICY ARE STATED IN REGULATION ( EEC ) NO 816/70 OF 28 APRIL 1970 LAYING DOWN ADDITIONAL PROVISIONS FOR THE COMMON ORGANIZATION OF THE MARKET IN WINE ( OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION 1970 ( 1 ), P . 234 ), WHICH PROVIDES THE BASIS FOR THE DISPUTED REGULATION , AND IN REGULATION NO 337/79 OF 5 FEBRUARY 1979 ON THE COMMON ORGANIZATION OF THE MARKET IN WINE ( OFFICIAL JOURNAL L 54 , P . 1 ), WHICH CODIFIES ALL THE PROVISIONS GOVERNING THE COMMON ORGANIZATION OF THE MARKET . TITLE III OF THAT REGULATION , LAYING DOWN ' ' RULES CONCERNING PRODUCTION AND FOR CONTROLLING PLANTING ' ' , NOW FORMS THE LEGAL FRAMEWORK IN THAT SPHERE . ANOTHER FACTOR WHICH MAKES IT POSSIBLE TO PERCEIVE THE COMMUNITY POLICY PURSUED IN THAT FIELD IS THE COUNCIL RESOLUTION OF 21 APRIL 1975 CONCERNING NEW GUIDELINES TO BALANCE THE MARKET IN TABLE WINES ( OFFICIAL JOURNAL C 90 , P . 1 ).*

*25 TAKEN AS A WHOLE , THOSE MEASURES SHOW THAT THE POLICY INITIATED AND PARTIALLY IMPLEMENTED BY THE COMMUNITY CONSISTS OF A COMMON ORGANIZATION OF THE MARKET IN CONJUNCTION WITH A STRUCTURAL IMPROVEMENT IN THE WINE-PRODUCING SECTOR . WITHIN THE FRAMEWORK OF THE GUIDELINES LAID DOWN BY ARTICLE 39 OF THE EEC TREATY THAT ACTION SEEKS TO ACHIEVE A DOUBLE OBJECTIVE , NAMELY , ON THE ONE HAND , TO ESTABLISH A LASTING BALANCE ON THE WINE MARKET AT A PRICE LEVEL WHICH IS PROFITABLE FOR PRODUCERS AND FAIR TO CONSUMERS AND , SECONDLY , TO OBTAIN AN IMPROVEMENT IN THE QUALITY OF WINES MARKETED . IN ORDER TO ATTAIN THAT DOUBLE OBJECTIVE OF QUANTITATIVE BALANCE AND QUALITATIVE IMPROVEMENT , THE COMMUNITY RULES RELATING TO THE MARKET IN WINE PROVIDE FOR AN EXTENSIVE RANGE OF MEASURES WHICH APPLY BOTH AT THE PRODUCTION STAGE AND AT THE MARKETING STAGE FOR WINE .*

*26 IN THIS REGARD , IT IS NECESSARY TO REFER IN PARTICULAR TO THE PROVISIONS OF ARTICLE 17 OF REGULATION NO 816/70 , RE-ENACTED IN AN EXTENDED FORM BY ARTICLE 31 OF REGULATION NO 337/79 , WHICH PROVIDE FOR THE ESTABLISHMENT BY THE MEMBER STATES OF FORECASTS OF PLANTING AND PRODUCTION , CO-ORDINATED WITHIN THE FRAMEWORK OF A COMPULSORY COMMUNITY PLAN . FOR THE PURPOSE OF IMPLEMENTING THAT PLAN MEASURES MAY BE ADOPTED CONCERNING THE PLANTING , RE-PLANTING , GRUBBING-UP OR CESSATION OF CULTIVATION OF VINEYARDS .*

*27 IT IS IN THIS CONTEXT THAT REGULATION NO 1162/76 WAS ADOPTED . IT IS APPARENT FROM THE PREAMBLE TO THAT REGULATION AND FROM THE ECONOMIC CIRCUMSTANCES IN WHICH IT WAS ADOPTED , A FEATURE OF WHICH WAS THE FORMATION AS FROM THE 1974 HARVEST OF PERMANENT PRODUCTION SURPLUSES , THAT THAT REGULATION FULFILS A DOUBLE FUNCTION : ON THE ONE HAND , IT MUST ENABLE AN IMMEDIATE BRAKE TO BE PUT ON THE CONTINUED INCREASE IN THE SURPLUSES ; ON THE OTHER HAND , IT MUST WIN FOR THE COMMUNITY INSTITUTIONS THE TIME NECESSARY FOR THE IMPLEMENTATION OF A STRUCTURAL POLICY DESIGNED TO ENCOURAGE HIGH-QUALITY PRODUCTION , WHILST RESPECTING THE INDIVIDUAL CHARACTERISTICS AND NEEDS OF THE DIFFERENT WINE-PRODUCING REGIONS OF THE COMMUNITY , THROUGH THE SELECTION OF LAND FOR GRAPE GROWING AND THE SELECTION OF GRAPE VARIETIES , AND THROUGH THE REGULATION OF PRODUCTION METHODS .*

*28 IT WAS IN ORDER TO FULFIL THAT TWOFOLD PURPOSE THAT THE COUNCIL INTRODUCED BY REGULATION NO 1162/76 A GENERAL PROHIBITION ON NEW PLANTINGS , WITHOUT MAKING ANY DISTINCTION , APART FROM CERTAIN NARROWLY DEFINED EXCEPTIONS , ACCORDING TO THE QUALITY OF THE LAND . IT SHOULD BE NOTED THAT , AS REGARDS ITS SWEEPING SCOPE , THE MEASURE INTRODUCED BY THE COUNCIL IS OF A TEMPORARY NATURE . IT IS DESIGNED TO DEAL IMMEDIATELY WITH A CONJUNCTURAL SITUATION CHARACTERIZED BY SURPLUSES , WHILST AT THE SAME TIME PREPARING PERMANENT STRUCTURAL MEASURES .*

*29 SEEN IN THIS LIGHT , THE MEASURE CRITICIZED DOES NOT ENTAIL ANY UNDUE LIMITATION UPON THE EXERCISE OF THE RIGHT TO PROPERTY . INDEED , THE CULTIVATION OF NEW VINEYARDS IN A SITUATION OF CONTINUOUS OVER-PRODUCTION WOULD NOT HAVE ANY EFFECT , FROM THE ECONOMIC POINT OF VIEW , APART FROM INCREASING THE VOLUME OF THE*

*SURPLUSES ; FURTHER , SUCH AN EXTENSION AT THAT STAGE WOULD ENTAIL THE RISK OF MAKING MORE DIFFICULT THE IMPLEMENTATION OF A STRUCTURAL POLICY AT THE COMMUNITY LEVEL IN THE EVENT OF SUCH A POLICY RESTING ON THE APPLICATION OF CRITERIA MORE STRINGENT THAN THE CURRENT PROVISIONS OF NATIONAL LEGISLATION CONCERNING THE SELECTION OF LAND ACCEPTED FOR WINE-GROWING .*

*30 THEREFORE IT IS NECESSARY TO CONCLUDE THAT THE RESTRICTION IMPOSED UPON THE USE OF PROPERTY BY THE PROHIBITION ON THE NEW PLANTING OF VINES INTRODUCED FOR A LIMITED PERIOD BY REGULATION NO 1162/76 IS JUSTIFIED BY THE OBJECTIVES OF GENERAL INTEREST PURSUED BY THE COMMUNITY AND DOES NOT INFRINGE THE SUBSTANCE OF THE RIGHT TO PROPERTY IN THE FORM IN WHICH IT IS RECOGNIZED AND PROTECTED IN THE COMMUNITY LEGAL ORDER .*

*THE QUESTION OF THE FREEDOM TO PURSUE TRADE OR PROFESSIONAL ACTIVITIES*

*31 THE APPLICANT IN THE MAIN ACTION ALSO SUBMITS THAT THE PROHIBITION ON NEW PLANTINGS IMPOSED BY REGULATION NO 1162/76 INFRINGES HER FUNDAMENTAL RIGHTS IN SO FAR AS ITS EFFECT IS TO RESTRICT HER FREEDOM TO PURSUE HER OCCUPATION AS A WINE-GROWER .*

*32 AS THE COURT HAS ALREADY STATED IN ITS JUDGMENT OF 14 MAY 1974 , NOLD , REFERRED TO ABOVE , ALTHOUGH IT IS TRUE THAT GUARANTEES ARE GIVEN BY THE CONSTITUTIONAL LAW OF SEVERAL MEMBER STATES IN RESPECT OF THE FREEDOM TO PURSUE TRADE OR PROFESSIONAL ACTIVITIES , THE RIGHT THEREBY GUARANTEED , FAR FROM CONSTITUTING AN UNFETTERED PREROGATIVE , MUST LIKEWISE BE VIEWED IN THE LIGHT OF THE SOCIAL FUNCTION OF THE ACTIVITIES PROTECTED THEREUNDER . IN THIS CASE , IT MUST BE OBSERVED THAT THE DISPUTED COMMUNITY MEASURE DOES NOT IN ANY WAY AFFECT ACCESS TO THE OCCUPATION OF WINE-GROWING , OR THE FREEDOM TO PURSUE THAT OCCUPATION ON LAND AT PRESENT DEVOTED TO WINE-GROWING . TO THE EXTENT TO WHICH THE PROHIBITION ON NEW PLANTINGS AFFECTS THE FREE PURSUIT OF THE OCCUPATION OF WINE-GROWING , THAT LIMITATION IS NO MORE THAN THE CONSEQUENCE OF THE RESTRICTION UPON THE EXERCISE OF THE RIGHT TO PROPERTY , SO THAT THE TWO RESTRICTIONS MERGE . THUS THE RESTRICTION UPON THE FREE PURSUIT OF THE OCCUPATION OF WINE-GROWING , ASSUMING THAT IT EXISTS , IS JUSTIFIED BY THE SAME REASONS WHICH JUSTIFY THE RESTRICTION PLACED UPON THE USE OF PROPERTY .*

*33 THUS IT IS APPARENT FROM THE FOREGOING THAT CONSIDERATION OF REGULATION NO 1162/76 , IN THE LIGHT OF THE DOUBTS EXPRESSED BY THE VERWALTUNGSGERICHT , HAS DISCLOSED NO FACTOR OF SUCH A KIND AS TO AFFECT THE VALIDITY OF THAT REGULATION ON ACCOUNT OF ITS BEING CONTRARY TO THE REQUIREMENTS FLOWING FROM THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE COMMUNITY .*

**Decision on costs**

*COSTS*

*[...]*

**Operative part**

*ON THOSE GROUNDS ,*

*THE COURT ,*

*IN ANSWER TO THE QUESTIONS SUBMITTED TO IT BY THE VERWALTUNGSGERICHT NEUSTADT AN DER WEINSTRASSE BY ORDER OF 14 DECEMBER 1978 , HEREBY RULES :*

*1 . COUNCIL REGULATION ( EEC ) NO 1162/76 OF 17 MAY 1976 ON MEASURES DESIGNED TO ADJUST WINE-GROWING POTENTIAL TO MARKET REQUIREMENTS , AS AMENDED BY COUNCIL REGULATION ( EEC ) NO 2776/78 OF 23 NOVEMBER 1978 , AMENDING FOR THE SECOND TIME REGULATION NO 1162/76 , MUST BE INTERPRETED AS MEANING THAT ARTICLE 2 ( 1 ) THEREOF ALSO APPLIES TO APPLICATIONS FOR AUTHORIZATION OF NEW PLANTING OF VINES SUBMITTED BEFORE THE ENTRY INTO FORCE OF THAT REGULATION .*

*2 . ARTICLE 2 ( 1 ) OF REGULATION NO 1162/76 MUST BE INTERPRETED AS MEANING THAT THE PROHIBITION LAID DOWN THEREIN ON THE GRANTING OF AUTHORIZATIONS FOR NEW PLANTING - DISREGARDING THE EXCEPTIONS SPECIFIED IN ARTICLE 2 ( 2 ) OF THE REGULATION - IS OF INCLUSIVE APPLICATION , THAT IS TO SAY , IS IN PARTICULAR UNAFFECTED BY THE QUESTION OF THE SUITABILITY OR OTHERWISE OF A PLOT OF LAND FOR WINE-GROWING , AS DETERMINED BY THE PROVISIONS OF A NATIONAL LAW .*

# Charter of Fundamental Rights of the European Union, 26 October 2012

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

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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

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

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

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

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

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

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

TITLE I

DIGNITY

Article 1

Human dignity

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

Article 2

Right to life

1. Everyone has the right to life.

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

Article 3

Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.

2. In the fields of medicine and biology, the following must be respected in particular:

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

Article 4

Prohibition of torture and inhuman or degrading treatment or punishment

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

Article 5

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. Trafficking in human beings is prohibited.

TITLE II

FREEDOMS

Article 6

Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7

Respect for private and family life

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

Article 8

Protection of personal data

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

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

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

Article 9

Right to marry and right to found a family

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

Article 10

Freedom of thought, conscience and religion

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

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

Article 11

Freedom of expression and information

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

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

Article 12

Freedom of assembly and of association

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

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

Article 13

Freedom of the arts and sciences

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

Article 14

Right to education

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

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

3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and

pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Article 15

Freedom to choose an occupation and right to engage in work

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

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

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

Article 16

Freedom to conduct a business

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

Article 17

Right to property

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

2. Intellectual property shall be protected.

Article 18

Right to asylum

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

Article 19

Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.

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

TITLE III

EQUALITY

Article 20

Equality before the law

Everyone is equal before the law.

Article 21

Non-discrimination

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

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

Article 22

Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23

Equality between women and men

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

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

Article 24

The rights of the child

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

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

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

Article 25

The rights of the elderly

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

Article 26

Integration of persons with disabilities

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

TITLE IV

SOLIDARITY

Article 27

Workers' right to information and consultation within the undertaking

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

Article 28

Right of collective bargaining and action

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

Article 29

Right of access to placement services

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

Article 30

Protection in the event of unjustified dismissal

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

Article 31

Fair and just working conditions

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

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

Article 32

Prohibition of child labour and protection of young people at work

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

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

Article 33

Family and professional life

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

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

Article 34

Social security and social assistance

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

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

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

Article 35

Health care

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

Article 36

Access to services of general economic interest

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

Article 37

Environmental protection

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

Article 38

Consumer protection

Union policies shall ensure a high level of consumer protection.

TITLE V

CITIZENS' RIGHTS

Article 39

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

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

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

Article 40

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

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

Article 41

Right to good administration

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

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
(c) the obligation of the administration to give reasons for its decisions.

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

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

Article 42

Right of access to documents

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

Article 43

European Ombudsman

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

Article 44

Right to petition

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

Article 45

Freedom of movement and of residence

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

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

Article 46

Diplomatic and consular protection

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

TITLE VI

JUSTICE

Article 47

Right to an effective remedy and to a fair trial

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

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

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

Article 48

Presumption of innocence and right of defence

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

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

Article 49

Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier

penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

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

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

Article 50

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

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

TITLE VII

GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

Article 51

Field of application

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

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

Article 52

Scope and interpretation of rights and principles

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

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

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

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

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are

implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

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

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

Article 53

Level of protection

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

Article 54

Prohibition of abuse of rights

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

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°°

The above text adapts the wording of the Charter proclaimed on 7 December 2000, and will replace it as from the date of entry into force of the Treaty of Lisbon.

## LECTURE 2: FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION AND BEYOND: THE RELATIONSHIP BETWEEN EU FUNDAMENTAL RIGHTS AND OTHER FUNDAMENTAL RIGHTS REGIMES

As shown during the previous lecture, fundamental rights have played a consistent and important part in the EU's institutional setup, without however turning the European Union directly in a human rights organisation. Indeed, the Court of Justice has recognised their importance as unwritten general principles of EU law, inspired by national constitutional traditions and the ECHR. In 2000, this commitment was complemented by a written yet non-binding Charter of Fundamental Rights, which was declared binding by virtue of Article 6 TEU upon the entry into force of the Lisbon Treaty. The importance attached to fundamental rights did not imply, however, that their application was free from legal problems. Two parallel issues can be discerned in that regard. Firstly, the scope and applicability of different human rights instruments (national, international and supranational) to EU action or inaction has remained unclear for a long time. Is the ECHR applicable to EU legislation or decisions? Can a national constitutional court resist against EU initiatives for incompatibility with national fundamental rights? The Court of Justice has intervened quickly in this regard, maintaining that the EU legal order is an autonomous legal order, which operates in accordance with its own logic. As such, EU fundamental rights should be taken as the starting point when falling within the scope of EU law. In practice, this posture remains problematic in particular cases, as this lecture will highlight, even with a written Charter in place. Secondly, the actual streamlining of EU and ECHR fundamental rights has given rise to on-going debates on the accession of the EU to the ECHR Treaty system. Whereas the Council of Europe (the ECHR's home institution) rendered such accession possible and Article 6(2) TEU mandates it, the Court of Justice advised against it in the current format, as sufficient guarantees to maintain the autonomy of the EU legal order have to be in place. As a result, EU and ECHR fundamental rights continue to operate in parallel. The purpose of this lecture will be to outline the fundamental rights instruments in EU law and to analyse how they interact. At the same time, we will focus on how EU law enables and restrains simultaneously a better streamlining of EU and ECHR law. That will allow us critically to assess the interaction between legal rules and political realities of today's EU institutional functioning.

*Materials to read:*

- Charter of Fundamental Rights of the European Union, 26 October 2012, [2012] *O.J.* C 326/391 (see Lecture 1).
- Court of Justice, 26 February 2013, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105.
- Court of Justice, 26 February 2013, Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, ECLI:EU:C:2013:107.
- Court of Justice, 18 December 2014, Opinion 2/13, ECLI:EU:C:2014:2454.
- Court of Justice, 5 December 2017, Case C-42/17, *Criminal proceedings against M.A.S. and M.B. (Taricco II)*, ECLI:EU:C:2017:936
- L. Storgaard, "EU law autonomy versus European Fundamental Rights protection – On Opinion 2/13 on EU accession to the ECHR", 15 *Human Rights Law Review* (2015), 485-521 (via eCampus).

## Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*

In Case C-617/10,

REQUEST for a preliminary ruling under Article 267 TFEU from the Haparanda tingsrätt (Sweden), made by decision of 23 December 2010, received at the Court on 27 December 2010, in the proceedings

**Åklagaren**

v

**Hans Åkerberg Fransson,**

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, M. Ilešič, G. Arestis, J. Malenovský, Presidents of Chambers, A. Borg Barthet, J.-C. Bonichot, C. Toader, J.-J. Kasel and M. Safjan (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,

Registrar: C. Strömholm, Administrator,

[…]

after hearing the Opinion of the Advocate General at the sitting on 12 June 2012,

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of the *ne bis in idem* principle in European Union law.

2 The request has been made in the context of a dispute between the Åklagaren (Public Prosecutor's Office) and Mr Åkerberg Fransson concerning proceedings brought by the Public Prosecutor's Office for serious tax offences.

**Legal context**

*European Convention for the Protection of Human Rights and Fundamental Freedoms*

3 In Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was signed in Strasbourg on 22 November 1984 ('Protocol No 7 to the ECHR'), Article 4, headed 'Right not to be tried or punished twice', provides as follows:

'1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950; "the ECHR"].'

*European Union law*

Charter of Fundamental Rights of the European Union

4 Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), which is headed 'Right not to be tried or punished twice in criminal proceedings for the same criminal offence', reads as follows:

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

5 Article 51 defines the Charter's field of application in the following terms:

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

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

Sixth Directive 77/388/EEC

6 Article 22 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive'), in the version resulting from Article 28h thereof, states:

'...

4. (a) Every taxable person shall submit a return by a deadline to be determined by Member States. ...

...

8. Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion …

...'

*Swedish law*

7 Paragraph 2 of Law 1971:69 on tax offences (skattebrottslagen (1971:69); 'the skattebrottslagen') is worded as follows:

'Any person who intentionally provides false information to the authorities, other than orally, or fails to submit to the authorities declarations, statements of income or other required information and thereby creates the risk that tax will be withheld from the community or will be wrongly credited or repaid to him or a third party shall be sentenced to a maximum of two years' imprisonment for tax offences.'

8 Paragraph 4 of the skattebrottslagen states:

'If an offence within the meaning of Paragraph 2 is to be regarded as serious, the sentence for such a tax offence shall be a minimum of six months' imprisonment and a maximum of six years.

In determining whether the offence is serious, particular regard shall be had to whether it relates to very large amounts, whether the perpetrator used false documents or misleading accounts or whether the conduct formed part of a criminal activity which was committed systematically or on a large scale or was otherwise particularly grave.'

9 Law 1990:324 on tax assessment (taxeringslagen (1990:324); 'the taxeringslagen') provides, in Paragraph 1 of Chapter 5:

'If, during the procedure, the taxable person has provided false information, other than orally, for the purposes of the tax assessment, a special charge (tax surcharge) shall be levied. The same shall apply if the taxable person has provided such information in legal proceedings relating to taxation and the information has not been accepted following a substantive examination.

Information shall be regarded as false if it is clear that information provided by the taxable person is inaccurate or that the taxable person has omitted information for the purposes of the tax assessment which he was required to provide. However, information shall not be regarded as false if the information, together with other information provided, constitutes a sufficient basis for a correct decision. Information also shall not be regarded as false if the information is so unreasonable that it manifestly cannot form the basis for a decision.'

10 Paragraph 4 of Chapter 5 of the taxeringslagen states:

'If false information has been provided, the tax surcharge shall be 40% of the tax referred to in points 1 to 5 of the first subparagraph of Paragraph 1 of Chapter 1 which, if the false information had been accepted, would not have been charged to the taxable person or his spouse. With regard to value added tax, the tax surcharge shall be 20% of the tax which would have been wrongly credited to the taxable person.

The tax surcharge shall be calculated at 10% or, with regard to value added tax, 5% where the false information was corrected or could have been corrected with the aid of confirming documents which are normally available to the Skatteverket [(Tax Board)] and which were available to the Skatteverket before the end of November of the tax year.'

11 Paragraph 14 of Chapter 5 of the taxeringslagen states:

'The taxable person shall be exempted wholly or partially from special charges if errors or omissions become evident which are excusable or if it would be otherwise unreasonable to levy the charge at the full amount. If the taxable person is exempted partially from the charge, it shall be reduced to a half or a quarter.

...

In assessing whether it would be otherwise unreasonable to levy the charge at the full amount, particular regard shall be had to whether:

...

3. errors or omissions have also resulted in the taxable person becoming liable for offences under the skattebrottslagen … or becoming the subject of forfeiture of proceeds of criminal activity within the meaning of Paragraph 1b of Chapter 36 of the Criminal Code (brottsbalken).'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

12 Mr Åkerberg Fransson was summoned to appear before the Haparanda tingsrätt (Haparanda District Court) on 9 June 2009, in particular on charges of serious tax offences. He was accused of having provided, in his tax returns for 2004 and 2005, false information which exposed the national exchequer to a loss of revenue linked to the levying of income tax and value added tax ('VAT'), amounting to SEK 319 143 for 2004, of which SEK 60 000 was in respect of VAT, and to SEK 307 633 for 2005, of which SEK 87 550 was in respect of VAT. Mr Åkerberg Fransson was also prosecuted for failing to declare employers' contributions for the accounting periods from October 2004 and October 2005, which exposed the social security bodies to a loss of revenue

amounting to SEK 35 690 and SEK 35 862 respectively. According to the indictment, the offences were to be regarded as serious, first, because they related to very large amounts and, second, because they formed part of a criminal activity committed systematically on a large scale.

13 By decision of 24 May 2007, the Skatteverket had ordered Mr Åkerberg Fransson to pay, for the 2004 tax year, a tax surcharge of SEK 35 542 in respect of income from his economic activity, of SEK 4 872 in respect of VAT and of SEK 7 138 in respect of employers' contributions. By the same decision it had also imposed for the 2005 tax year a tax surcharge of SEK 54 240 in respect of income from his economic activity, of SEK 3 255 in respect of VAT and of SEK 7 172 in respect of employers' contributions. Interest was payable on those penalties. Proceedings challenging the penalties were not brought before the administrative courts, the period prescribed for this purpose expiring on 31 December 2010 in relation to the 2004 tax year and on 31 December 2011 in relation to the 2005 tax year. The decision imposing the penalties was based on the same acts of providing false information as those relied upon by the Public Prosecutor's Office in the criminal proceedings.

14 Before the referring court, the question arises as to whether the charges brought against Mr Åkerberg Fransson must be dismissed on the ground that he has already been punished for the same acts in other proceedings, as the prohibition on being punished twice laid down by Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter would be infringed.

15 It is in those circumstances that the Haparanda tingsrätt decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Under Swedish law there must be clear support in the [ECHR] or the case-law of the European Court of Human Rights for a national court to be able to disapply national provisions which may be suspected of infringing the *ne bis in idem* principle under Article 4 of Protocol No 7 to the ECHR and may also therefore be suspected of infringing Article 50 of the [Charter]. Is such a condition under national law for disapplying national provisions compatible with European Union law and in particular its general principles, including the primacy and direct effect of European Union law?

2. Does the admissibility of a charge of tax offences come under the *ne bis in idem* principle under Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter where a certain financial penalty (tax surcharge) was previously imposed on the defendant in administrative proceedings by reason of the same act of providing false information?

3. Is the answer to Question 2 affected by the fact that there must be coordination of these sanctions in such a way that ordinary courts are able to reduce the penalty in the criminal proceedings because a tax surcharge has also been imposed on the defendant by reason of the same act of providing false information?

4. Under certain circumstances it may be permitted, within the scope of the *ne bis in idem* principle …, to order further sanctions in fresh proceedings in respect of the same conduct which was examined and led to a decision to impose sanctions on the individual. If Question 2 is answered in the affirmative, are the conditions under the *ne bis in idem* principle for the imposition of several sanctions in separate proceedings satisfied where in the later proceedings there is an examination of the circumstances of the case which is fresh and independent of the earlier proceedings?

5. The Swedish system of imposing tax surcharges and examining liability for tax offences in separate proceedings is motivated by a number of reasons of general interest … If Question 2 is answered in the affirmative, is a system like the Swedish one compatible with the *ne bis in idem* principle when it would be possible to establish a system which would not come under the *ne bis in idem* principle without it being necessary to refrain from either imposing tax surcharges or ruling on liability for tax offences by, if liability for tax offences is relevant, transferring the decision on the imposition of tax surcharges from the Skatteverket and, where appropriate, administrative courts to ordinary courts in connection with their examination of the charge of tax offences?'

**Jurisdiction of the Court**

16 The Swedish, Czech and Danish Governments, Ireland, the Netherlands Government and the European Commission dispute the admissibility of the questions referred for a preliminary ruling. In their submission, the Court would have jurisdiction to answer them only if the tax penalties imposed on Mr Åkerberg Fransson and the

criminal proceedings brought against him that are the subject-matter of the main proceedings arose from implementation of European Union law. However, that is not so in the case of either the national legislation on whose basis the tax penalties were ordered to be paid or the national legislation upon which the criminal proceedings are founded. In accordance with Article 51(1) of the Charter, those penalties and proceedings therefore do not come under the *ne bis in idem* principle secured by Article 50 of the Charter.

17 It is to be recalled in respect of those submissions that the Charter's field of application so far as concerns action of the Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing European Union law.

18 That article of the Charter thus confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union.

19 The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures (see inter alia, to this effect, Case C-260/89 *ERT* [1991] I-2925, paragraph 42; Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 15; Case C-309/96 *Annibaldi* [2007] ECR I-7493, paragraph 13; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-349/07 *Sopropé* [2008] ECR I-10369, paragraph 34; Case C-256/11 *Dereci and Others* [2011] ECR I-11315, paragraph 72; and Case C-27/11 *Vinkov* [2012] ECR, paragraph 58).

20 That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it (see, to this effect, Case C-279/09 *DEB* [2010] ECR I-13849, paragraph 32). According to those explanations, 'the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'.

21 Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.

22 Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (see, to this effect, the order in Case C-466/11 *Currà and Others* [2012] ECR, paragraph 26).

23 These considerations correspond to those underlying Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of European Union law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties (see *Dereci and Others*, paragraph 71).

24 In the case in point, it is to be noted at the outset that the tax penalties and criminal proceedings to which Mr Åkerberg Fransson has been or is subject are connected in part to breaches of his obligations to declare VAT.

25 In relation to VAT, it follows, first, from Articles 2, 250(1) and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), which reproduce inter alia the provisions of Article 2 of the Sixth Directive and of Article 22(4) and (8) of that directive in the version resulting from Article 28h thereof, and second, from Article 4(3) TEU that every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT

due on its territory and for preventing evasion (see Case C-132/06 *Commission* v *Italy* [2008] ECR I-5457, paragraphs 37 and 46).

26 Furthermore, Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests (see, to this effect, Case C-367/09 *SGS Belgium and Others* [2010] ECR I-10761, paragraphs 40 to 42). Given that the European Union's own resources include, as provided in Article 2(1) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17), revenue from application of a uniform rate to the harmonised VAT assessment bases determined according to European Union rules, there is thus a direct link between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second (see, to this effect, Case C-539/09 *Commission* v *Germany* [2011] ECR I-11235, paragraph 72).

27 It follows that tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 (previously Articles 2 and 22 of the Sixth Directive) and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter.

28 The fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion into question, since its application is designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union.

29 That said, where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see, in relation to the latter aspect, Case C-399/11 *Melloni* [2013] ECR, paragraph 60).

30 For this purpose, where national courts find it necessary to interpret the Charter they may, and in some cases must, make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU.

31 It follows from the foregoing considerations that the Court has jurisdiction to answer the questions referred and to provide all the guidance as to interpretation needed in order for the referring court to determine whether the national legislation is compatible with the *ne bis in idem* principle laid down in Article 50 of the Charter.

**Consideration of the questions referred**

*Questions 2, 3 and 4*

32 By these questions, to which it is appropriate to give a joint reply, the Haparanda tingsrätt asks the Court, in essence, whether the *ne bis in idem* principle laid down in Article 50 of the Charter should be interpreted as precluding criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the same acts of providing false information.

33 Application of the *ne bis in idem* principle laid down in Article 50 of the Charter to a prosecution for tax evasion such as that which is the subject of the main proceedings presupposes that the measures which have already been adopted against the defendant by means of a decision that has become final are of a criminal nature.

34 In this connection, it is to be noted first of all that Article 50 of the Charter does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties. In order to ensure that all VAT revenue is collected and, in

so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties (see, to this effect, Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraph 24; Case C-213/99 *de Andrade* [2000] ECR I-11083, paragraph 19; and Case C-91/02 *Hannl-Hofstetter* [2003] ECR I-12077, paragraph 17). These penalties may therefore take the form of administrative penalties, criminal penalties or a combination of the two. It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person.

35 Next, three criteria are relevant for the purpose of assessing whether tax penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (Case C-489/10 *Bonda* [2012] ECR, paragraph 37).

36 It is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties and criminal penalties that is provided for by national law should be examined in relation to the national standards as referred to in paragraph 29 of the present judgment, which could lead it, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive (see, to this effect, inter alia *Commission* v *Greece*, paragraph 24; Case C-326/88 *Hansen* [1990] ECR I-2911, paragraph 17; Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 62; Case C-230/01 *Penycoed* [2004] ECR I-937, paragraph 36; and Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565 paragraph 65).

37 It follows from the foregoing considerations that the answer to the second, third and fourth questions is that the *ne bis in idem* principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.

*Question 5*

38 By its fifth question, the Haparanda tingsrätt asks the Court, in essence, whether national legislation which allows the same court to impose tax penalties in combination with criminal penalties in the event of tax evasion is compatible with the *ne bis in idem* principle guaranteed by Article 50 of the Charter.

39 It should be recalled at the outset that, in proceedings under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling (see, inter alia, Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* [2011] ECR I-7611, paragraph 30 and the case-law cited).

40 The presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to this effect, inter alia *Paint Graphos*, paragraph 31 and the case-law cited).

41 Here, it is apparent from the order for reference that the national legislation to which the Haparanda tingsrätt makes reference is not the legislation applicable to the dispute in the main proceedings and currently does not exist in Swedish law.

42 The fifth question must therefore be declared inadmissible, as the function entrusted to the Court within the framework of Article 267 TFEU is to contribute to the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (see, inter alia, *Paint Graphos*, paragraph 32 and the case-law cited)

*Question 1*

43 By its first question, the Haparanda tingsrätt asks the Court, in essence, whether a national judicial practice is compatible with European Union law if it makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the ECHR and by the Charter conditional upon that infringement being clear from the instruments concerned or the case-law relating to them.

44 As regards, first, the conclusions to be drawn by a national court from a conflict between national law and the ECHR, it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law (see, to this effect, Case C-571/10 *Kamberaj* [2012] ECR, paragraph 62).

45 As regards, next, the conclusions to be drawn by a national court from a conflict between provisions of domestic law and rights guaranteed by the Charter, it is settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means (Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 and 24; Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraph 81; and Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 43).

46 Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of European Union law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent European Union rules from having full force and effect are incompatible with those requirements, which are the very essence of European Union law (*Melki and Abdeli*, paragraph 44 and the case-law cited).

47 Furthermore, in accordance with Article 267 TFEU, a national court hearing a case concerning European Union law the meaning or scope of which is not clear to it may or, in certain circumstances, must refer to the Court questions on the interpretation of the provision of European Union law at issue (see, to this effect, Case 283/81 *Cilfit and Others* [1982] ECR 3415).

48 It follows that European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter.

49 In the light of the foregoing considerations, the answer to the first question is:

– European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law;

– European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter.

**Costs**

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **The *ne bis in idem* principle laid down in Article 50 of the Charter of Fundamental Rights of the European Union does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of value added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.**

2. **European Union law does not govern the relations between the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law.**

**European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter of Fundamental Rights of the European Union conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice of the European Union, whether that provision is compatible with the Charter.**

## Case C-399/11, *Stefano Melloni v Ministerio Fiscal*

In Case C-399/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Constitucional (Spain), made by decision of 9 June 2011, received at the Court on 28 July 2011, in the proceedings

**Stefano Melloni** v **Ministerio Fiscal,**

THE COURT (Grand Chamber),

[…]

after hearing the Opinion of the Advocate General at the sitting on 2 October 2012,

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation and, if necessary, the validity of Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('Framework Decision 2002/584'). It also asks the Court to examine, if necessary, the issue of whether a Member State may refuse to execute a European arrest warrant on the basis of Article 53 of the Charter of Fundamental Rights of the European Union ('the Charter') on grounds of infringement of the fundamental rights of the person concerned guaranteed by the national constitution.

2 The request has been made in proceedings between Mr Melloni and the Ministerio Fiscal concerning the execution of a European arrest warrant issued by the Italian authorities for the execution of a prison sentence handed down by judgment *in absentia* against Mr Melloni.

**Legal context**

*The Charter*

3 The second paragraph of Article 47 of the Charter provides:

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

4 Article 48(2) of the Charter states:

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

5 Paragraph 52(3) of the Charter states:

'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms [signed in Rome on 4 November 1950, "the ECHR"], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

6 Article 53 of the Charter, entitled 'Level of protection', states:

‘Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the [European] Union or all the Member States are party, including the [ECHR] and by the Member States’ constitutions.’

*Framework Decisions 2002/584 and 2009/299*

7 Article 1(2) and (3) of Framework Decision 2002/584 provides:

‘2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.’

8 Article 5 of that framework decision, in its initial version, was worded as follows:

‘The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

1. where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment;

…’

9 Framework Decision 2009/299 sets out the grounds for refusing to execute a European arrest warrant where the person concerned did not appear in person at his trial. Recitals 1 to 4 and 10 state:

‘1. The right of an accused person to appear in person at the trial is included in the right to a fair trial provided for in Article 6 of the [ECHR], as interpreted by the European Court of Human Rights. The Court has also declared that the right of the accused person to appear in person at the trial is not absolute and that under certain conditions the accused person may, of his or her own free will, expressly or tacitly but unequivocally, waive that right.

2. The various Framework Decisions implementing the principle of mutual recognition of final judicial decisions do not deal consistently with the issue of decisions rendered following a trial at which the person concerned did not appear in person. This diversity could complicate the work of the practitioner and hamper judicial cooperation.

3. … Framework Decision 2002/584/JHA … allows the executing authority to require the issuing authority to give an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present when the judgment is given. The adequacy of such an assurance is a matter to be decided by the executing authority, and it is therefore difficult to know exactly when execution may be refused.

4. It is therefore necessary to provide clear and common grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person. This Framework Decision is aimed at refining the definition of such common grounds allowing the executing authority to execute the decision despite the absence of the person at the trial, while fully respecting the person’s right of defence. This Framework Decision is not designed to regulate the forms and methods, including procedural requirements, that are used to achieve the results specified in this Framework Decision, which are a matter for the national laws of the Member States.

…

10. The recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused where the person concerned, being aware of the scheduled trial, was defended at the trial by a legal counsellor to whom he or she had given a mandate to do so, ensuring that legal assistance is practical and effective. In this context, it should not matter whether the legal counsellor was chosen, appointed and paid by the person concerned, or whether this legal counsellor was appointed and paid by the State, it being understood that the person concerned should deliberately have chosen to be represented by a legal counsellor instead of appearing in person at the trial. …'

10 According to Article 1(1) and (2) of Framework Decision 2009/299:

'1. The objectives of this Framework Decision are to enhance the procedural rights of persons subject to criminal proceedings, to facilitate judicial cooperation in criminal matters and, in particular, to improve mutual recognition of judicial decisions between Member States.

2. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the [EU Treaty, in the version prior to the Treaty of Lisbon], including the right of defence of persons subject to criminal proceedings, and any obligations incumbent upon judicial authorities in this respect shall remain unaffected.'

11 Article 2 of Framework Decision 2009/299 repealed Article 5(1) of Framework Decision 2002/584 and introduced therein an Article 4a relating to decisions rendered following a trial at which the person concerned did not appear in person, which is worded as follows:

'1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:

(a) in due time:

(i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;

and

(ii) was informed that a decision may be handed down if he or she does not appear for the trial;

or

(b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

or

(c) after being served with the decision and being expressly informed of the right to a retrial, or an appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:

(i) expressly stated that he or she does not contest the decision;

or

(ii) did not request a retrial or appeal within the applicable time frame;

or

(d) was not personally served with the decision but:

(i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed;

and

(ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.

…'

12 Under Article 8(1) to (3) of Framework Decision 2009/299:

'1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by 28 March 2011.

2. This Framework Decision shall apply as from the date mentioned in paragraph 1 to the recognition and enforcement of decisions rendered in the absence of the person concerned at the trial.

3. If a Member State has declared, on the adoption of this Framework Decision, to have serious reasons to assume that it will not be able to comply with the provisions of this Framework Decision by the date referred to in paragraph 1, this Framework Decision shall apply as from 1 January 2014 at the latest to the recognition and enforcement of decisions, rendered in the absence of the person concerned at the trial which are issued by the competent authorities of that Member State. …'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

13 By order of 1 October 1996, the First Section of the Sala de lo Penal of the Audiencia Nacional (Criminal Division of the High Court) (Spain) authorised the extradition to Italy of Mr Melloni, in order for him to be tried there in relation to the facts set out in arrest warrants Nos 554/1993 and 444/1993, issued on 13 May and 15 June 1993 respectively by the Tribunale di Ferrara (District Court, Ferrara) (Italy). After being released on bail of ESP 5 000 000, which he provided on 30 April 1996, Mr Melloni fled, so that he could not be surrendered to the Italian authorities.

14 By order of 27 March 1997, the Tribunale di Ferrara declared that Mr Melloni had failed to make appearance in court and directed that notice should in future be given to the lawyers who had been chosen and appointed by him. By judgment of 21 June 2000 of the Tribunale di Ferrara, subsequently confirmed by judgment of 14 March 2003 of the Corte d'appello di Bologna (Bologna Appeal Court) (Italy), Mr Melloni was sentenced *in absentia* to 10 years' imprisonment for bankruptcy fraud. By judgment of 7 June 2004, the Fifth Criminal Division of the Corte suprema di cassazione (Supreme Court of Cassation) (Italy) dismissed the appeal lodged by Mr Melloni's lawyers. On 8 June 2004, the Procura Generale della Repubblica (Italian Public Prosecutor's Office) in the Corte d'appello di Bologna issued European arrest warrant No 271/2004 for execution of the sentence imposed by the Tribunale di Ferrara.

15 Following Mr Melloni's arrest by the Spanish police on 1 August 2008, the Juzgado Central de Instrucción (Central Investigating Court) No 6 (Spain), by order of 2 August 2008, resolved to refer the matter of European arrest warrant No 271/2004 to the First Section of the Sala de lo Penal of the Audiencia Nacional.

16 Mr Melloni opposed surrender to the Italian authorities, contending, first, that at the appeal stage he had appointed another lawyer, revoking the appointment of the two previous lawyers, despite which notice was still being given to them. Second, he contended that under Italian procedural law it is impossible to appeal against sentences imposed *in absentia*, for which reason the execution of the European arrest warrant should, where appropriate, be made conditional upon Italy's guaranteeing the possibility of appealing against that judgment.

17 By order of 12 September 2008, the First Section of the Sala de lo Penal of the Audiencia Nacional authorised surrender of Mr Melloni to the Italian authorities in order to serve the sentence imposed upon him by the Tribunale di Ferrara as perpetrator of a bankruptcy fraud. It considered that it was not proved that the lawyers appointed by Mr Melloni had ceased to represent him as from 2001, and that his rights of defence had been respected, since he had been aware from the outset of the forthcoming trial, deliberately absented himself and appointed two lawyers to represent and defend him, who had acted in that capacity at first instance and in the appeal and cassation proceedings, thus exhausting all remedies.

18 Mr Melloni filed a '*recurso de amparo*' (petition for constitutional protection) against that order before the Tribunal Constitucional (Constitutional Court). In support of that petition, he alleged infringement of the absolute requirements deriving from the right to a fair trial proclaimed in Article 24(2) of the Spanish Constitution. In his submission, the very essence of a fair trial had been vitiated in such a way as to undermine human dignity, as a result of allowing surrender to countries which, in the event of very serious offences, validate findings of guilt made *in absentia*, without making surrender subject to the condition that the convicted party is able to challenge them in order to safeguard his rights of defence.

19 By order of 18 September 2008, the First Section of the Tribunal Constitucional acknowledged that the '*recurso de amparo*' was admissible and suspended enforcement of the order of 12 September 2008. By order of 1 March 2011, the Plenary Chamber of the Tribunal Constitucional decided, on a proposal from the First Section, that it would itself examine the '*recurso de amparo*'.

20 The national court points out that, in its judgment 91/2000 of 30 March 2000, it recognised that the binding nature of fundamental rights when applied 'externally' is attenuated, since only the most basic or elementary requirements may be linked to Article 24 of the Spanish Constitution and give rise to a finding of 'indirect' unconstitutionality. Nevertheless, a decision of the Spanish judicial authorities to consent to extradition to countries which, in cases of very serious offences, allow convictions *in absentia* without making the surrender conditional upon the convicted party being able to challenge the same in order to safeguard his rights of defence, gives rise to an 'indirect' infringement of the requirements deriving from the right to a fair trial, in that such a decision undermines the essence of a fair trial in a way which affects human dignity.

21 The national court also points out that that precedent is also applicable to the system of surrender established by Framework Decision 2002/584, for two reasons, namely that the condition for the surrender of a convicted person is inherent in the essence of the constitutional right to a fair trial and that Article 5(1) of that framework decision, in the wording thereof then in force, contemplated the possibility that the execution of a European arrest warrant issued for the execution of a sentence imposed *in absentia* should be subject, 'in accordance with the law of the executing Member State', to, among others, the condition that 'the issuing judicial authority should furnish guarantees that are regarded as sufficient to ensure that the person requested under a European arrest warrant will have an opportunity to apply for a retrial such as to safeguard his rights of defence in the issuing Member State and to be present at the hearing' (judgment 177/2006 of the Tribunal Constitucional).

22 The national court recalls, finally, that in its judgment 199/2009 of 28 September 2009, it upheld the '*recurso de amparo*' filed in relation to an order for surrender of the person concerned to Romania, in implementation of a European arrest warrant issued for the purposes of execution of a sentence of four years' imprisonment imposed *in absentia*, without mentioning the requirement that the conviction in question be amenable to review. In that regard, the Tribunal Constitucional rejected the Audiencia Nacional's argument to the effect that a conviction *in absentia* had not in fact occurred, since the applicant had given a power of attorney to a lawyer who appeared in the trial as his private defence counsellor.

23 According to the Tribunal Constitucional, the difficulty arises from the fact that Framework Decision 2009/299 repealed Article 5(1) of Framework Decision 2002/584 and introduced therein a new Article 4a. Article 4a precludes a refusal 'to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision' where the person concerned, 'being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial'. The national court points out that, in the case which has given rise to these constitutionality review proceedings, it is established that Mr Melloni had appointed two trusted lawyers, whom the Tribunale di Ferrara notified of the forthcoming trial, so that he was aware of it. It is also established that Mr Melloni was actually defended by those two lawyers at the ensuing trial at first instance and also in the subsequent appeal and cassation proceedings.

24 For the Tribunal Constitucional, the question therefore arises whether Framework Decision 2002/584 precludes the Spanish courts from making surrender of Mr Melloni conditional on the right to have the conviction in question reviewed.

25 The Tribunal Constitucional rejects the contention of the Ministerio Fiscal to the effect that a request for a preliminary ruling is not necessary because Framework Decision 2009/299 is not applicable, *ratione temporis*, to the main proceedings. The object of the main proceedings is to determine not whether the order of 12 September 2008 infringed that framework decision, but whether it indirectly infringed the right to a fair trial protected by Article 24(2) of the Spanish Constitution. Framework Decision 2009/299 should be taken into account for determining what part of that right has 'external' effects, because it constitutes the European Union ('EU') law applicable at the time constitutionality is assessed. It must also be taken into account by virtue of the principle that national law is to be interpreted in accordance with framework decisions (Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 43).

26 In the light of those considerations, the Tribunal Constitucional decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must Article 4a(1) of Framework Decision 2002/584/JHA, as inserted by Council Framework Decision 2009/299/JHA, be interpreted as precluding national judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant?

2. In the event of the first question being answered in the affirmative, is Article 4a(1) of Framework Decision 2002/584/JHA compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter …, and from the rights of defence guaranteed under Article 48(2) of the Charter?

3. In the event of the second question being answered in the affirmative, does Article 53 of the Charter, interpreted schematically in conjunction with the rights recognised under Articles 47 and 48 of the Charter, allow a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from European Union law, in order to avoid an interpretation which restricts or adversely affects a fundamental right recognised by the constitution of the first-mentioned Member State?'

**Consideration of the questions referred**

*Admissibility of the request for a preliminary ruling*

27 Some of the parties concerned have submitted observations to the Court contending that the present request for a preliminary ruling should be dismissed as inadmissible on the ground that Article 4a of Framework Decision 2002/584 is inapplicable *ratione temporis* to the surrender procedure in the main proceedings. They argue that the date of 12 September 2008, the date of the order by which the Audiencia Nacional decided to surrender Mr Melloni to the Italian authorities, precedes the date on which the deadline for transposing Framework Decision 2009/299, fixed at 28 March 2011 by Article 8(1) thereof, expired. They argue that, in any event, the Italian Republic availed itself of the opportunity offered by Article 8(3) to defer until 1 January 2014 the application of Framework Decision 2009/299 to the recognition and enforcement of decisions rendered in the absence of the person concerned at the trial by the competent Italian authorities. The conditions for the surrender of Mr Melloni by the Spanish authorities to the Italian authorities are therefore still governed by Article 5(1) of Framework Decision 2002/584.

28 In that regard it should be recalled at the outset that, in proceedings under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (see, inter alia, Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* [2011] ECR I-7611, paragraph 30 and the case-law cited).

29 The presumption of relevance attaching to questions referred for a preliminary ruling by a national court may be set aside only exceptionally, where it is quite obvious that the interpretation of the provisions of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, inter alia *Paint Graphos and Others*, paragraph 31 and the case-law cited).

30 In the present case, it is not quite obvious that the interpretation of Article 4a of Framework Decision 2002/584, sought by the national court, bears no relation to the actual facts of the main action or its purpose or that the problem is hypothetical.

31 It should be observed, in the first place, with respect to the applicability *ratione temporis* of Article 4a of Framework Decision 2002/584, that the very wording of Article 8(2) of Framework Decision 2009/299 makes it clear that, as from 28 March 2011, that decision 'shall apply to the recognition and enforcement of decisions rendered in the absence of the person concerned at the trial', without any distinction whatsoever being drawn between decisions rendered prior or subsequently to that date.

32 A literal interpretation is confirmed by the fact that since the provisions of Article 4a of Framework Decision 2002/584 are to be considered procedural rules (see, by analogy, Joined Cases C-361/02 and C-362/02 *Tsapalos and Diamantakis* [2004] ECR I-6405, paragraph 20, and Case C-296/08 PPU *Santesteban Goicoechea* [2008] ECR I-6307, paragraph 80), they are applicable to the surrender procedure in the main proceedings, which is still pending. According to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force (see, inter alia, Joined Cases 212/80 to 217/80 *Meridionale Industria Salumi and Others* [1981] ECR 2735, paragraph 9; Case C-467/05 *Dell'Orto* [2007] ECR I-5557, paragraph 48; and *Santesteban Goicoechea*, paragraph 80).

33 In the second place, the fact that the Italian Republic availed itself of the opportunity offered by Article 8(3) of Framework Decision 2009/299 to defer until 1 January 2014 at the latest the application of the Framework Decision to the recognition and enforcement of decisions rendered in the absence of the person concerned at the trial by the competent Italian authorities does not make the present request for a preliminary ruling inadmissible. It is apparent from the order for reference that, in order to interpret the fundamental rights recognised under the Spanish Constitution in accordance with the international treaties ratified by the Kingdom of Spain, the national court wishes to take into consideration the relevant provisions of EU law to determine the substantive content of the right to a fair trial guaranteed by Article 24(2) of that constitution.

34 It follows from all of the foregoing considerations that the request for a preliminary ruling from the Tribunal Constitucional is admissible.

*Substance*

The first question

35 By its first question, the Tribunal Constitucional asks, in essence, whether Article 4a(1) of Framework Decision 2002/584 must be interpreted as precluding the executing judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant issued for the purposes of executing a sentence conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State.

36 It should be recalled that, as is apparent in particular from Article 1(1) and (2) of Framework Decision 2002/584 and from recitals 5 and 7 in the preamble thereto, the purpose of that decision is to replace the multilateral system of extradition between Member States with a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of conducting prosecutions, that system of surrender being based on the principle of mutual recognition (see Case C-396/11 *Radu* [2013] ECR, paragraph 33).

37 Framework Decision 2002/584 thus seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and

accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice by basing itself on the high degree of confidence which should exist between the Member States (*Radu*, paragraph 34).

38 Under Article 1(2) of Framework Decision 2002/584, the Member States are in principle obliged to act upon a European arrest warrant. According to the provisions of that framework decision, the Member States may refuse to execute such a warrant only in the cases of mandatory non-execution provided for in Article 3 thereof and in the cases of optional non-execution listed in Articles 4 and 4a. Furthermore, the executing judicial authority may make the execution of a European arrest warrant subject solely to the conditions set out in Article 5 of that framework decision (*Radu*, paragraphs 35 and 36).

39 In order to determine the scope of Article 4a(1) of Framework Decision 2002/584, which is the subject-matter of the present question, it is necessary to examine its wording, scheme and purpose.

40 It is apparent from the wording of Article 4a(1) of Framework Decision 2002/584 that it provides for an optional ground for non-execution of a European arrest warrant issued for the purpose of executing a custodial sentence or a detention order, where the person concerned has not appeared in person at the trial which resulted in the conviction. That option is nevertheless accompanied by four exceptions in which the executing judicial authority may not refuse to execute the European arrest warrant in question. Article 4a(1) thus precludes, in the four situations set out therein, the executing judicial authority from making the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in his presence.

41 This literal interpretation of Article 4a(1) of Framework Decision 2002/584 is confirmed by an analysis of the purpose of the provision. The object of Framework Decision 2009/299 is, firstly, to repeal Article 5(1) of Framework Decision 2002/584, which, subject to certain conditions, allowed for the execution of a European arrest warrant issued for the purposes of executing a sentence rendered *in absentia* to be made conditional on there being a guarantee of a retrial of the case in the presence of the person concerned in the issuing Member State and, secondly, to replace that provision by Article 4a. That provision henceforth restricts the opportunities for refusing to execute such a warrant by setting out, as indicated in recital 6 of Framework Decision 2009/299, 'conditions under which the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused'.

42 In particular, Article 4a(1)(a) and (b) of Framework Decision 2002/584 provides in essence, that, once the person convicted *in absentia* was aware, in due time, of the scheduled trial and was informed that a decision could be handed down if he did not appear for the trial or, being aware of the scheduled trial, gave a mandate to a legal counsellor to defend him at the trial, the executing judicial authority is required to surrender that person, with the result that it cannot make that surrender subject to there being an opportunity for a retrial of the case at which he is present in the issuing Member State.

43 This interpretation of Article 4a is also confirmed by the objectives pursued by the EU legislature. It is apparent from recitals 2 to 4 and also Article 1 of Framework Decision 2009/299 that the European Union, in adopting that decision, intended to facilitate judicial cooperation in criminal matters by improving mutual recognition of judicial decisions between Member States through harmonisation of the grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person. As is apparent in particular from recital 4, the EU legislature, in defining those common grounds, wished to allow 'the executing authority to execute the decision despite the absence of the person at the trial, while fully respecting the person's right of defence'.

44 As observed by the Advocate General in points 65 and 70 of his Opinion, the solution which the EU legislature found, consisting in providing an exhaustive list of the circumstances in which the execution of a European arrest warrant issued in order to enforce a decision rendered *in absentia* must be regarded as not infringing the rights of the defence, is incompatible with any retention of the possibility for the executing judicial authority to make that execution conditional on the conviction in question being open to review in order to guarantee the rights of defence of the person concerned.

45 As to the national court's argument to the effect that the obligation to respect fundamental rights as enshrined in Article 6 TEU allows the executing judicial authorities to refuse to execute the European arrest warrant, including in the situations referred to in Article 4a(1) of Framework Decision 2002/584, where the person

concerned is not entitled to a retrial, it should be noted that that argument, in reality, raises the question of the compatibility of Article 4a of Framework Decision 2002/584 with the fundamental rights protected in the legal order of the European Union, which is the subject of the second question.

46 It follows from all of the foregoing considerations that Article 4a(1) of Framework Decision 2002/584 must be interpreted as precluding the executing judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant issued for the purposes of executing a sentence conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State.

The second question

47 By its second question, the national court asks the Court, in essence, whether Article 4a(1) of Framework Decision 2002/584 is compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter and from the rights of the defence guaranteed under Article 48(2) of the Charter.

48 It must be borne in mind that, under Article 6(1) TEU, the Union recognises the rights, freedoms and principles set out in the Charter, 'which shall have the same legal value as the Treaties'.

49 Regarding the scope of the right to an effective judicial remedy and to a fair trial provided for in Article 47 of the Charter, and the rights of the defence guaranteed by Article 48(2) thereof, it should be observed that, although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that right is not absolute (see, inter alia, Case C-619/10 *Trade Agency* [2012] ECR, paragraphs 52 and 55). The accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, violation of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so.

50 This interpretation of Articles 47 and 48(2) of the Charter is in keeping with the scope that has been recognised for the rights guaranteed by Article 6(1) and (3) of the ECHR by the case-law of the European Court of Human Rights (see, inter alia, ECtHR, *Medenica v. Switzerland*, no. 20491/92, § 56 to 59, ECHR 2001-VI; *Sejdovic v. Italy* [GC], no. 56581/00, § 84, 86 and 98, ECHR 2006-II; and *Haralampiev v. Bulgaria*, no. 29648/03, § 32 and 33, 24 April 2012).

51 Furthermore, as indicated by Article 1 of Framework Decision 2009/299, the objective of the harmonisation of the conditions of execution of European arrest warrants issued for the purposes of executing decisions rendered at the end of trials at which the person concerned has not appeared in person, effected by that framework decision, is to enhance the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States.

52 Accordingly, Article 4a(1)(a) and (b) of Framework Decision 2002/584 lays down the circumstances in which the person concerned must be deemed to have waived, voluntarily and unambiguously, his right to be present at his trial, with the result that the execution of a European arrest warrant issued for the purposes of executing the sentence of a person convicted *in absentia* cannot be made subject to the condition that that person may claim the benefit of a retrial at which he is present in the issuing Member State. This is so either where, as referred to in Article 4a(1)(a), the person did not appear in person at the trial despite having been summoned in person or officially informed of the scheduled date and place of the trial or, as referred to in Article 4a(1)(b), the person, being aware of the scheduled trial, deliberately chose to be represented by a legal counsellor instead of appearing in person. Article 4a(1)(c) and (d) refers to circumstances where the executing judicial authority is required to execute the European arrest warrant, even though the person concerned is entitled to a retrial, because the arrest warrant states that the person concerned either did not ask for a retrial or that he will be expressly informed of his right to a retrial.

53 In the light of the foregoing, Article 4a(1) of Framework Decision 2002/584 does not disregard either the right to an effective judicial remedy and to a fair trial or the rights of the defence guaranteed by Articles 47 and 48(2) of the Charter respectively.

54 It follows from the foregoing considerations that the answer to the second question is that Article 4a(1) of Framework Decision 2002/584 is compatible with the requirements under Articles 47 and 48(2) of the Charter.

The third question

55 By its third question, the national court asks, in essence, whether Article 53 of the Charter must be interpreted as allowing the executing Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.

56 The interpretation envisaged by the national court at the outset is that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. Such an interpretation would, in particular, allow a Member State to make the execution of a European arrest warrant issued for the purposes of executing a sentence rendered *in absentia* subject to conditions intended to avoid an interpretation which restricts or adversely affects fundamental rights recognised by its constitution, even though the application of such conditions is not allowed under Article 4a(1) of Framework Decision 2002/584.

57 Such an interpretation of Article 53 of the Charter cannot be accepted.

58 That interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.

59 It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (see Opinion 1/91 [1991] ECR I-6079, paragraph 21, and Opinion 1/09 [2011] ECR I-1137, paragraph 65), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State (see, to that effect, inter alia, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3, and Case C-409/06 *Winner Wetten* [2010] ECR I-8015, paragraph 61).

60 It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.

61 However, as is apparent from paragraph 40 of this judgment, Article 4a(1) of Framework Decision 2002/584 does not allow Member States to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein.

62 It should also be borne in mind that the adoption of Framework Decision 2009/299, which inserted that provision into Framework Decision 2002/584, is intended to remedy the difficulties associated with the mutual recognition of decisions rendered in the absence of the person concerned at his trial arising from the differences as among the Member States in the protection of fundamental rights. That framework decision effects a harmonisation of the conditions of execution of a European arrest warrant in the event of a conviction rendered *in absentia*, which reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted *in absentia* who are the subject of a European arrest warrant.

63 Consequently, allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.

64 In the light of the foregoing considerations, the answer to the third question is that Article 53 of the Charter must be interpreted as not allowing a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.

**Costs**

[…]

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as precluding the executing judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant issued for the purposes of executing a sentence conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State.**

2. **Article 4a(1) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, is compatible with the requirements under Articles 47 and 48(2) of the Charter of Fundamental Rights of the European Union.**

3. **Article 53 of the Charter of Fundamental Rights of the European Union must be interpreted as not allowing a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.**

# Opinion 2/13

I – **The request for an Opinion**

1. The request for an Opinion submitted to the Court of Justice of the European Union by the European Commission is worded as follows:

'Is the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms[, signed in Rome on 4 November 1950 ("the ECHR"),] compatible with the Treaties?'

2. The following documents were sent by the Commission to the Court as annexes to its request:

– the draft revised agreement on the accession of the European Union ('EU') to the Convention for the Protection of Human Rights and Fundamental Freedoms ('the draft agreement');

– the draft declaration by the EU to be made at the time of signature of the Accession Agreement ('the draft declaration');

– the draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the EU is a party ('draft Rule 18');

– the draft model of memorandum of understanding between the EU and X [State which is not a member of the EU]; and

– the draft explanatory report to the Agreement on the Accession of the EU to the Convention for the Protection of Human Rights and Fundamental Freedoms ('the draft explanatory report', and, together with the other instruments referred to above, 'the draft accession instruments' or 'the agreement envisaged').

II – **The institutional framework and the European Convention for the Protection of Human Rights and Fundamental Freedoms**

A – *The Council of Europe*

3. By an international agreement signed in London on 5 May 1949, which entered into force on 3 August 1949 ('the Statute of the Council of Europe'), a group of 10 European States created the Council of Europe in order to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles of their common heritage and facilitating economic and social progress in Europe. At present, 47 European States are members of the Council of Europe, including the 28 Member States of the EU ('the Member States').

4. According to that statute, the organs of the Council of Europe are the Committee of representatives of governments ('the Committee of Ministers') and the Parliamentary Assembly ('the Assembly'), which are served by the Secretariat of the Council of Europe.

5. In accordance with Article 14 of the Statute of the Council of Europe, the Committee of Ministers is composed of one representative for each member, each representative being entitled to one vote.

6. Under Article 15.a of the Statute of the Council of Europe, '[o]n the recommendation of the [Assembly] or on its own initiative, the Committee of Ministers shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters. …'. The same article states, in the first part of paragraph b, that, '[i]n appropriate cases, the conclusions of the Committee [of Ministers] may take the form of recommendations to the governments of members'.

7. Article 20 of the Statute of the Council of Europe governs the quorums required for the adoption of decisions by the Committee of Ministers. It is worded as follows:

‘a. Resolutions of the Committee of Ministers relating to the following important matters, namely:

i. recommendations under Article 15.b;

…

v. recommendations for the amendment of Articles … 15 [and] 20 …; and

vi. any other question which the Committee may, by a resolution passed under d below, decide should be subject to a unanimous vote on account of its importance,

require the unanimous vote of the representatives casting a vote, and of a majority of the representatives entitled to sit on the Committee.

…

d. All other resolutions of the Committee … require a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee.’

8. According to Article 25 of the Statute of the Council of Europe, the Assembly is to consist of representatives of each member of the Council of Europe, elected by its parliament from among the members thereof, or appointed from among the members of that national parliament, in such manner as it shall decide. Each member is to be entitled to a number of representatives determined by Article 26 of that statute. The highest number of representatives is 18.

B – *The European Convention for the Protection of Human Rights and Fundamental Freedoms*

9. The ECHR is a multilateral international agreement concluded in the Council of Europe, which entered into force on 3 September 1953. All the members of the Council of Europe are among the High Contracting Parties to that Convention (‘the Contracting Parties’).

10. The ECHR is in three sections.

1. Section I of the ECHR, entitled ‘Rights and freedoms’, and the substantive provisions thereof

11. Section I of the ECHR defines the rights and freedoms which the Contracting Parties, in accordance with Article 1 of the ECHR, ‘shall secure to everyone within their jurisdiction’. There is no provision for any derogation from that commitment other than that contained in Article 15 of the ECHR, ‘[i]n time of war or other public emergency threatening the life of the nation’. In particular, in no circumstances can any derogation be made from the obligations set out in Article 2 (right to life, save in the case of deprivation of life resulting from the necessary use of force), Article 3 (prohibition of torture), Article 4(1) (prohibition of slavery) and Article 7 (no punishment without law).

12. Article 6 of the ECHR, headed ‘Right to a fair trial’, states:

‘1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

13. Article 13 of the ECHR, headed 'Right to an effective remedy', is worded as follows:

'Everyone whose rights and freedoms as set forth in [the ECHR] are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

2. Section II of the ECHR and the control mechanisms

14. Section II of the ECHR governs the mechanisms for controlling the Contracting Parties' compliance with their commitments in accordance with Article 1 thereof. That section includes, in particular, Article 19 of the ECHR, which establishes the European Court of Human Rights ('the ECtHR'), and Article 46, which confers on the Committee of Ministers powers of supervision of the execution of judgments of the ECtHR.

a) The ECtHR

15. In accordance with Articles 20 and 22 of the ECHR, the Judges of the ECtHR, the number of which is equal to that of the Contracting Parties, are to be elected by the Assembly with respect to each Contracting Party from a list of three candidates nominated by that contracting party.

16. Article 32 of the ECHR confers on the ECtHR jurisdiction to interpret and apply the ECHR as provided, inter alia, in Articles 33 and 34 thereof.

17. Under Article 33 of the ECHR (Inter-State cases), the ECtHR may receive an application from a Contracting Party alleging breach of the provisions of the ECHR and of the protocols thereto by one (or more) other Contracting Parties.

18. In accordance with the first sentence of Article 34 of the ECHR, the ECtHR 'may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the [Contracting Parties] of the rights set forth in the Convention or the Protocols thereto'.

19. The ECHR makes the admissibility of an individual application subject, in particular, to the following four criteria: First, under Article 34 of the ECHR, the applicant must be able to claim to be the victim of a violation of the rights set forth in the ECHR or the protocols thereto. Secondly, in accordance with Article 35(1) of the ECHR, the applicant must have exhausted all 'domestic' remedies, that is to say, those that exist in the legal order of the Contracting Party against which the application is brought. That admissibility criterion reflects the principle that the control mechanism established by the ECHR is subsidiary to the machinery of human rights protection that exists within the Contracting Parties (judgments of the ECtHR in *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65 and 66, *Reports of Judgments and Decisions* 1996-IV, and in *Burden v. the United Kingdom* [GC], no. 13378/05, § 42, ECHR 2008). Thirdly, under the same provision, the application must be brought within a period of six months from the date on which the final decision was taken. Fourthly, under Article 35(2)(b) of the ECHR, the admissibility of an application is subject to the application not being 'substantially the same as a matter that has already been examined by the [ECtHR] or has already been submitted to another procedure of international investigation or settlement', unless it contains relevant new information.

20. Proceedings before the ECtHR culminate either in a decision or judgment by which the ECtHR finds that the application is inadmissible or that the ECHR has not been violated, or in a judgment finding a violation of the ECHR. That judgment is declaratory and does not affect the validity of the relevant acts of the Contracting Party.

21. A judgment of the ECtHR delivered by the Grand Chamber is final, in accordance with Article 44(1) of the ECHR. It follows from Article 43, read in conjunction with Article 44(2) of the ECHR, that a judgment delivered by a Chamber of the ECtHR becomes final when the parties declare that they will not request that the case be referred to the Grand Chamber, or when such a request has been rejected by the panel of the Grand Chamber, or three months after the date of the judgment if no request has been made for the case to be referred to the Grand Chamber.

22. Under Article 46(1) of the ECHR, the Contracting Parties are obliged to abide by the final judgment of the ECtHR in any case to which they are parties. In accordance with that provision, a Contracting Party is obliged to take, so far as concerns the applicant, all individual measures applicable under domestic law in order to eliminate the consequences of the violation established in the judgment of the ECtHR (*restitutio in integrum*). If the domestic law of the Contracting Party concerned allows only partial reparation to be made, Article 41 of the ECHR provides that the ECtHR is to afford 'just satisfaction' to the applicant. Moreover, a Contracting Party is obliged to adopt general measures, such as the amendment of domestic law, changes in interpretation by the courts or other types of measures, in order to prevent further violations similar to those found by the ECtHR, or to put an end to the violations subsisting in domestic law.

b) The functioning of the Committee of Ministers in the exercise of its powers to supervise the execution of the judgments of the ECtHR

23. Article 46(2) of the ECHR confers on the Committee of Ministers responsibility for supervising the execution of the final judgments of the ECtHR. Similarly, under Article 39(4) of the ECHR, the Committee of Ministers is to supervise the execution of the terms of a friendly settlement of a case, as provided for in paragraph 1 of that article.

24. Pursuant to those powers, the Committee of Ministers examines, in essence, whether the Contracting Party has taken all the necessary measures to abide by the final judgment of the ECtHR or, where appropriate, to execute the terms of a friendly settlement. The exercise of those powers is governed by the 'Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements' ('the Rules for the supervision of execution').

25. According to Rule 17 of the Rules for the supervision of execution, the Committee of Ministers is to adopt a 'final resolution' if it establishes that the Contracting Party has taken all the necessary measures to abide by the final judgment of the ECtHR or, where appropriate, that the terms of a friendly settlement have been executed. In accordance with Rule 16 of those rules, the Committee of Ministers may adopt 'interim resolutions', notably in order to 'provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution'. In order for both types of resolution to be adopted, the quorum laid down in Article 20.d of the Statute of the Council of Europe must be satisfied.

26. According to Article 46(3) and (4) of the ECHR, the Committee of Ministers may, by a majority vote of two thirds of the representatives entitled to sit on that committee, if it considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of that judgment, submit a request for interpretation to the ECtHR. Moreover, if that committee considers that a Contracting Party is refusing to abide by a final judgment in a case to which it is a party, it may refer to the ECtHR the question whether that party has failed to fulfil its obligation under Article 46(1). If the ECtHR finds that that obligation has been violated, it is to refer the case to the Committee of Ministers for consideration of the measures to be taken. If no violation is found, the case is to be referred to the Committee of Ministers, which is to close its examination of the case, in accordance with Article 46(5).

27. The ECHR also confers certain other powers on the Committee of Ministers. Thus, in accordance with Article 26(2) thereof, it may, at the request of the plenary Court of the ECtHR, by a unanimous decision and for a fixed period reduce from seven to five the number of Judges of the Chambers, and, on the basis of Article 47 of the ECHR, request an advisory opinion of the ECtHR on legal questions concerning the interpretation of the ECHR and the protocols thereto.

28. Lastly, under Article 50 of the ECHR, the expenditure on the ECtHR is to be borne by the Council of Europe.

3. Section III of the ECHR, entitled 'Miscellaneous provisions'

29. In accordance with Article 53 of the ECHR, nothing in the ECHR is to be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a party.

30. Under Article 55 of the ECHR, the Contracting Parties agree that, except by special agreement, they will not submit a dispute arising out of the interpretation or application of the ECHR to a means of settlement other than those provided for in the ECHR.

31. Article 57(1) of the ECHR allows the Contracting Parties, when signing that Convention or when depositing the instrument of ratification, to 'make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision', but prohibits '[r]eservations of a general character'.

4. The Protocols to the ECHR

32. The ECHR is supplemented by a series of 14 protocols.

33. A first group of protocols, comprising the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Protocol') and Protocols No 4, No 6, No 7, No 12 and No 13, supplements the content of the ECHR by establishing additional fundamental rights. All the Member States are Contracting Parties to the Protocol and to Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty ('Protocol No 6'). By contrast, each of the other protocols has only a limited number of Member States among its Contracting Parties.

34. A second group of protocols, including Protocols No 2, No 3, No 5, Nos 8 to 11 and No 14, merely amends the ECHR and these protocols have no autonomous content. Moreover, most of them have been repealed or have become devoid of purpose.

35. Of the protocols in the second group, the most relevant for the purposes of the present request for an Opinion is Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, which was adopted on 13 May 2004 and entered into force on 1 June 2010. By Article 17 of that protocol, Article 59(2) of the ECHR was amended to lay down the very principle of the EU's accession to that Convention. That provision now reads as follows:

'The [EU] may accede to [the ECHR].'

36. Lastly, two additional protocols are open for signature and are not yet in force. These are Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, which amends the ECHR in relatively minor respects, and Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 2 October 2013 ('Protocol No 16'), which provides, in Article 1(1), for the highest courts and tribunals of the Contracting Parties to be able to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or the protocols thereto.

## III – **The relationship between the EU and the ECHR**

37. According to well-established case-law of the Court of Justice, fundamental rights form an integral part of the general principles of EU law. For that purpose, the Court of Justice draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (judgments in *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, paragraph 4, and *Nold* v *Commission*, 4/73, EU:C:1974:51, paragraph 13). In that context, the Court of Justice has stated that the ECHR has special significance (see, in particular, judgments in *ERT*, C-260/89, EU:C:1991:254, paragraph 41, and *Kadi and Al*

*Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 283). Article F(2) of the Treaty on European Union (which became, after amendment, Article 6(2) EU) codified that case-law.

38. In paragraphs 34 and 35 of its Opinion 2/94 (EU:C:1996:140), the Court of Justice considered that, as Community law stood at the time, the European Community had no competence to accede to the ECHR. Such accession would have entailed a substantial change in the existing Community system for the protection of human rights in that it would have entailed the entry of the Community into a distinct international institutional system as well as integration of all the provisions of that Convention into the Community legal order. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would have been of constitutional significance and would therefore have been such as to go beyond the scope of Article 235 of the EC Treaty (which became Article 308 EC), a provision now contained in Article 352(1) TFEU, which could have been brought about only by way of amendment of that Treaty.

39. Subsequently, on 7 December 2000, the European Parliament, the Council of the European Union and the Commission proclaimed the Charter of Fundamental Rights of the European Union in Nice (OJ 2000 C 364, p. 1; 'the Charter'). The Charter, which at that time was not a legally binding instrument, has the principal aim, as is apparent from the preamble thereto, of reaffirming 'the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the [Court of Justice] and of the [ECtHR]' (see, to that effect, judgment in *Parliament* v *Council*, C-540/03, EU:C:2006:429, paragraph 38).

40. The Treaty of Lisbon, which entered into force on 1 December 2009, amended Article 6 EU. As amended, that provision, which is now Article 6 TEU, is worded as follows:

'1. The Union recognises the rights, freedoms and principles set out in the [Charter], which shall have the same legal value as the Treaties.

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

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

2. The Union shall accede to the [ECHR]. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

41. In that regard, Article 218(6)(a)(ii) TFEU provides that the Council is to adopt the decision concluding the agreement on EU accession to the ECHR ('the accession agreement') after obtaining the consent of the Parliament. In addition, Article 218(8) states that, for that purpose, the Council is to act unanimously and that its decision is to enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

42. The protocols to the EU and FEU Treaties, which, according to Article 51 TEU, form an integral part of those Treaties, include Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms ('Protocol No 8 EU'). This protocol consists of three articles, which are worded as follows:

'*Article 1*

The [accession agreement] provided for in Article 6(2) [TEU] shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

(a) the specific arrangements for the Union's possible participation in the control bodies of the [ECHR];

(b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

*Article 2*

The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the [ECHR], in particular in relation to the Protocols thereto, measures taken by Member States derogating from the [ECHR] in accordance with Article 15 thereof and reservations to the [ECHR] made by Member States in accordance with Article 57 thereof.

*Article 3*

Nothing in the agreement referred to in Article 1 shall affect [Article 344 TFEU].'

43. The Declaration on Article 6(2) of the Treaty on European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, is worded as follows:

'The Conference agrees that the Union's accession to the [ECHR] should be arranged in such a way as to preserve the specific features of Union law. In this connection, the Conference notes the existence of a regular dialogue between the [Court of Justice] and the [ECtHR]; such dialogue could be reinforced when the Union accedes to that Convention.'

44. Article 52(3) of the Charter states:

'In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

45. Lastly, according to Article 53 of the Charter:

'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR], and by the Member States' constitutions.'

## IV – **The process of accession**

46. Upon the recommendation of the Commission of 17 March 2010, the Council adopted a decision on 4 June 2010 authorising the opening of negotiations in relation to the accession agreement, and designated the Commission as negotiator.

47. A supplementary annex to the Council's mandate for the negotiation of 26 and 27 April 2012 sets out the principles which will have to be covered by the EU's internal rules, the adoption of which is necessary in order to make the EU's accession to the ECHR effective ('the internal rules'). According to that document, the internal rules will deal in particular with the representation of the EU before the ECtHR, the triggering of the co-respondent mechanism before the ECtHR and coordination rules for the purpose of the conduct of the procedure before the ECtHR by the respondent and the co-respondent, the selection of three candidates for the office of Judge in the ECtHR, the prior involvement of the Court of Justice, and the circumstances in which the EU will agree a position and those in which the Member States will remain free to speak and act as they choose, both in the ECtHR and in the Committee of Ministers.

48. On 5 April 2013, the negotiations resulted in agreement among the negotiators on the draft accession instruments. The negotiators agreed that all those instruments constitute a package and that they are all equally necessary for the accession of the EU to the ECHR.

V – **The draft agreement**

49. The draft agreement contains the provisions considered necessary to allow for the EU's accession to the ECHR. A first group of these provisions relates to accession proper and introduces the procedural mechanisms necessary in order for such accession to be effective. A second group of those provisions, of a purely technical nature, sets out, first, the amendments to the ECHR that are required having regard to the fact that the ECHR was drawn up to apply to the member States of the Council of Europe, whereas the EU is neither a State nor a member of that international organisation. Secondly, provisions are laid down relating to other instruments linked to the ECHR and the final clauses concerning entry into force and the notification of instruments of ratification or accession.

A – *The provisions governing accession*

50. Taking account of Article 59(2) of the ECHR, Article 1(1) of the draft agreement provides that, by that agreement, the EU accedes to the ECHR, to the Protocol and to Protocol No 6, that is to say, to the two protocols to which all the Member States are already parties.

51. Article 1(2) of the draft agreement amends Article 59(2) of the ECHR so as, first, to enable the EU to accede to other protocols at a later stage, such accession continuing to be governed, *mutatis mutandis*, by the relevant provisions of each protocol, and, secondly, to make clear that the accession agreement 'constitutes an integral part of [the ECHR]'.

52. According to Article 2(1) of the draft agreement, the EU may, when signing or expressing its consent to be bound by the provisions of the accession agreement in accordance with Article 10 thereof, make reservations to the ECHR and to the Protocol in accordance with Article 57 of the ECHR. Article 4 of Protocol No 6 provides, however, that no reservation may be made in respect of that protocol. In addition, Article 2(2) of the draft agreement inserts a new sentence into Article 57 of the ECHR, according to which the EU 'may, when acceding to [the ECHR], make a reservation in respect of any particular provision of the Convention to the extent that any law of the [EU] then in force is not in conformity with the provision'. Article 11 of the draft agreement states, moreover, that no reservation may be made in respect of the provisions of that agreement.

53. According to Article 1(3) of the draft agreement, accession to the ECHR and the protocols thereto is to impose on the EU obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf. Moreover, nothing in the ECHR or the protocols thereto is to require the EU to perform an act or adopt a measure for which it has no competence under EU law.

54. Conversely, the first sentence of Article 1(4) of the draft agreement makes clear that, for the purposes of the ECHR, of the protocols thereto and of the accession agreement itself, an act, measure or omission of organs of a Member State of the EU or of persons acting on its behalf is to be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the EU, including decisions taken under the EU and FEU Treaties. The second sentence in the same paragraph makes clear that this is not to preclude the EU from being responsible as a co-respondent for a violation resulting from such an act, measure or omission, in accordance with, in particular, Article 3 of the draft agreement.

55. The aforementioned Article 3 introduces the co-respondent mechanism. Article 3(1) amends Article 36 of the ECHR by adding a paragraph 4 which provides that the EU or a Member State may become a co-respondent to proceedings before the ECtHR in the circumstances set out, in essence, in Article 3(2) to (8), and, moreover, that the co-respondent is a party to the case.

56. Article 3(2) to (8) of the draft agreement is worded as follows:

'2. Where an application is directed against one or more member States of the [EU], the [EU] may become a co-respondent to the proceedings in respect of an alleged violation notified by the [ECtHR] if it appears that such allegation calls into question the compatibility with the rights at issue defined in the [ECHR] or in the protocols to which the [EU] has acceded of a provision of [EU] law, including decisions taken under the [EU Treaty] and under the [FEU Treaty], notably where that violation could have been avoided only by disregarding an obligation under [EU] law.

3. Where an application is directed against the [EU], the [Member States] may become co-respondents to the proceedings in respect of an alleged violation notified by the [ECtHR] if it appears that such allegation calls into question the compatibility with the rights at issue defined in the [ECHR] or in the protocols to which the [EU] has acceded of a provision of the [EU Treaty], the [FEU Treaty] or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments.

4. Where an application is directed against and notified to both the [EU] and one or more of [the] Member States, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this article are met.

5. A [Contracting Party] shall become a co-respondent either by accepting an invitation from the [ECtHR] or by decision of the [ECtHR] upon the request of that [Contracting Party]. When inviting a [Contracting Party] to become co-respondent, and when deciding upon a request to that effect, the [ECtHR] shall seek the views of all parties to the proceedings. When deciding upon such a request, the [ECtHR] shall assess whether, in the light of the reasons given by the [Contracting Party] concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met.

6. In proceedings to which the [EU] is a co-respondent, if the [Court of Justice] has not yet assessed the compatibility with the rights at issue defined in the [ECHR] or in the protocols to which the [EU] has acceded of the provision of [EU] law as under paragraph 2 of this article, sufficient time shall be afforded for the [Court of Justice] to make such an assessment, and thereafter for the parties to make observations to the [ECtHR]. The [EU] shall ensure that such assessment is made quickly so that the proceedings before the [ECtHR] are not unduly delayed. The provisions of this paragraph shall not affect the powers of the [ECtHR].

7. If the violation in respect of which a [Contracting Party] is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the [ECtHR], on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.

8. This article shall apply to applications submitted from the date of entry into force of [the accession agreement].'

57. Lastly, Article 5 of the draft agreement states that proceedings before the Court of Justice are to be understood as constituting neither procedures of international investigation or settlement within the meaning of Article 35, paragraph 2.*b*, of the ECHR, nor means of dispute settlement within the meaning of Article 55 of the ECHR.

B – *The other provisions*

58. In the first place, one set of provisions is intended, first of all, to modify the provisions of the ECHR or of the protocols thereto which refer to the Contracting Parties as 'States' or to matters covered by the concept of 'State'.

59. Accordingly, Article 1(5) of the draft agreement contains an interpretation clause according to which any of the terms 'State', 'States', 'States Parties', 'national law', 'administration of the State', 'national laws', 'national authority', 'domestic', 'national security', 'economic well-being of the country', 'territorial integrity', 'life of the nation', which appear in various provisions of the ECHR and in some of the protocols thereto, are to be understood after accession as referring also, *mutatis mutandis*, to the EU as a Contracting Party.

60. As regards the territorial aspects more specifically, as provided in Article 1(6) of the draft agreement, the expression 'everyone within their jurisdiction' appearing in Article 1 of the ECHR is to be understood, with regard to the EU, as referring to persons within the territories of the Member States to which the EU and FEU Treaties apply. In so far as that expression refers to persons outside the territory of a Contracting Party, it is to be understood as referring to persons who, if the alleged violation had been attributable to a Contracting Party which is a State, would have been within the jurisdiction of that Contracting Party. In addition, Article 1(7) provides that, with regard to the EU, the terms 'country' and 'territory of a State' appearing in various provisions of the ECHR and in some of the protocols thereto are to mean each of the territories of the Member States to which the EU and FEU Treaties apply.

61. Next, Article 1(8) of the draft agreement amends Article 59(5) of the ECHR so as to provide that the Secretary-General of the Council of Europe is henceforth to notify the EU also of the entry into force of the ECHR, the names of the Contracting Parties who have ratified it or acceded to it, and the deposit of all instruments of ratification or accession which may be effected subsequently.

62. Lastly, Article 4 of the draft agreement amends the first sentence of Article 29(2) of the ECHR and the heading of Article 33 thereof by replacing the terms 'inter-State applications' and 'inter-State cases' with the terms 'inter-Party applications' and 'inter-Party cases', respectively.

63. In the second place, certain amendments of the ECHR were considered necessary on account of the fact that the EU is not a member of the Council of Europe.

64. Article 6(1) of the draft agreement provides that a delegation of the European Parliament is to be entitled to participate, with the right to vote, in the sittings of the Assembly whenever the Assembly exercises its functions related to the election of Judges to the ECtHR. The delegation is to have the same number of representatives as the delegation of the member State of the Council of Europe which is entitled to the highest number of representatives. According to Article 6(2), '[t]he modalities of the participation of representatives of the European Parliament in the sittings of the [Assembly] and its relevant bodies shall be defined by the [Assembly], in co-operation with the European Parliament'.

65. As regards the Committee of Ministers, first of all, Article 7(1) of the draft agreement is to amend Article 54 of the ECHR by adding a new paragraph 1, according to which '[p]rotocols to [the] Convention are adopted by the Committee of Ministers'. Next, according to Article 7(2), the EU is to be entitled to participate in the meetings of the Committee of Ministers, with the right to vote, when the latter takes decisions under certain provisions of the ECHR, namely Articles 26(2) (reduction of the number of Judges of the Chambers), 39(4) (supervision of the execution of a friendly settlement), 46(2) to (5) (execution of the judgments of the ECtHR), 47 (requests for advisory opinions) and 54(1) (powers of the Committee of Ministers). In addition, Article 7(3) provides that, before the adoption of any text relating to the ECHR or to any protocol to the ECHR to which the EU has become a party, to decisions by the Committee of Ministers under the provisions mentioned in paragraph 2 of that article, or to the selection of candidates for election of Judges by the Assembly, the EU is to be consulted within that Committee, which must take due account of the position expressed by the EU. Lastly, the first sentence of Article 7(4) of the draft agreement sets out the principle that the exercise of the right to vote by the EU and its Member States is not to prejudice the effective exercise by the Committee of Ministers of its supervisory functions under Articles 39 and 46 of the ECHR (execution of friendly settlements and of the judgments of the ECtHR). More specifically, Article 7(4)(a) states that, 'in relation to cases where the Committee of Ministers supervises the fulfilment of obligations either by the [EU] alone, or by the [EU] and one or more of its [M]ember States jointly, it derives from the [EU Treaties] that the [EU] and its [M]ember States express positions and vote in a co-ordinated manner', before going on to provide that the rules for the supervision of the execution of judgments and of the terms of friendly settlements 'shall be adapted to ensure that the Committee of Ministers effectively exercises its functions in those circumstances'. By contrast, in the words of Article 7(4)(b), 'where the Committee of Ministers otherwise [than in the cases referred to in subparagraph (a)] supervises the fulfilment of obligations by a [Contracting Party] other than the [EU], the [Member States] are free under the [EU Treaties] to express their own position and exercise their right to vote'.

66. It was precisely in response to the abovementioned Article 7(4)(a) that the negotiators agreed to add to the Rules for the supervision of execution a Rule 18, headed 'Judgments and friendly settlements in cases to which the [EU] is a party'. The wording of that new Rule 18 is as follows:

'1. Decisions by the Committee of Ministers under Rule 17 (Final Resolution) of the present rules shall be considered as adopted if a majority of four fifths of the representatives casting a vote and a majority of two thirds of the representatives entitled to sit on the Committee of Ministers are in favour.

2. Decisions by the Committee of Ministers under Rule 10 (Referral to the [ECtHR] for interpretation of a judgment) and under Rule 11 (Infringement proceedings) of the present rules shall be considered as adopted if one fourth of the representatives entitled to sit on the Committee of Ministers is in favour.

3. Decisions on procedural issues or merely requesting information shall be considered as adopted if one fifth of the representatives entitled to sit on the Committee of Ministers is in favour.

4. Amendments to the provisions of this rule shall require consensus by all [Contracting Parties] to the [ECHR].'

67. As regards participation in the expenditure related to the ECHR, Article 8 of the draft agreement provides that the EU is to pay into the budget of the Council of Europe an annual contribution dedicated to the expenditure related to the functioning of the ECHR, and that that contribution is to be in addition to contributions made by the other Contracting Parties.

68. In the third place, the draft agreement includes a provision concerning relations between the ECHR and other agreements concluded in the Council of Europe that are related to the ECHR. Thus, under Article 9(1) of the draft agreement, the EU is, within the limits of its competences, to respect Articles 1 to 6 of the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights, concluded in Strasbourg on 5 March 1996; Articles 1 to 19 of the General Agreement on Privileges and Immunities of the Council of Europe, concluded in Paris on 2 September 1949; Articles 2 to 6 of the Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, concluded in Strasbourg on 6 November 1952; and Articles 1 to 6 of the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, signed in Strasbourg on 5 March 1996. In addition, Article 9(2) of the draft agreement provides that, for the purpose of the application of those instruments, the Contracting Parties to each of them are to treat the EU as if it were a Contracting Party. Paragraphs 3 and 4 of the same article provide, respectively, for the EU to be consulted when those instruments are amended and for it to be notified of events such as signature, deposit, date of entry into force or any other act relating to them.

69. Lastly, Articles 10 and 12 of the draft agreement, headed 'Signature and entry into force' and 'Notifications', respectively, contain the final clauses.

70. It should also be noted that, in accordance with the terms of the draft declaration, at paragraph (a), '[u]pon its accession to the [ECHR], the [EU] will ensure that … it will request to become a co-respondent to the proceedings before the [ECtHR] or accept an invitation by the [ECtHR] to that effect, where the conditions set out in Article 3, paragraph 2, of the Accession Agreement are met …'.

## VI – **The Commission's assessment in its request for an Opinion**

### A – *Admissibility*

71. According to the Commission, its request for an Opinion is admissible, given that the information available to the Court of Justice is sufficient for it to consider whether the draft agreement is compatible with the Treaties and that, moreover, the draft accession instruments agreed by the negotiators are sufficiently advanced to be regarded as an 'agreement envisaged' within the meaning of Article 218(11) TFEU. Furthermore, the fact that internal rules have yet to be adopted should not have any bearing on the admissibility of the request for an Opinion, given that those rules cannot be adopted until the accession agreement has been concluded.

### B – *Substance*

72. As regards the substance, the Commission analyses the conformity of the draft agreement with the various requirements set out in Article 6(2) TEU and Protocol No 8 EU. Furthermore, it also puts forward arguments to establish that the agreement envisaged respects the autonomy of the legal order of the EU in pursuing its own particular objectives. According to the Commission, it is necessary to avoid a situation in which the ECtHR or the Committee of Ministers could, when a dispute relating to the interpretation or application of one or more provisions of the ECHR or of the accession agreement is brought before them, be called upon, in the exercise of their powers under the ECHR, to interpret concepts in those instruments in a manner that might require them to rule on the respective competences of the EU and its Member States.

73. At the end of its analysis, the Commission concludes that the accession agreement is compatible with the Treaties.

#### 1. Article 1(a) of Protocol No 8 EU

74. According to the Commission, the purpose of the requirement in Article 1(a) of Protocol No 8 EU to preserve the specific characteristics of the EU and EU law with regard to the specific arrangements for the EU's possible

participation in the control bodies of the ECHR is to ensure that the EU participates on the same footing as any other Contracting Party in the control bodies of the ECHR, that is to say, the ECtHR, the Assembly and the Committee of Ministers.

75. The Commission submits that the draft agreement ensures such participation in those control bodies.

76. As regards the ECtHR, there is, it is argued, no need to amend the ECHR in order to allow the presence of a Judge elected in respect of the EU, since Article 22 of the ECHR provides that a Judge is to be elected in respect of each Contracting Party. As regards the election of Judges to the ECtHR by the Assembly, Article 6(1) of the draft agreement provides that a delegation of the European Parliament is to participate, with the right to vote, in the relevant sittings of the Assembly. As to the Committee of Ministers, Article 7(2) of the draft agreement provides that the EU is to be entitled to participate, with the right to vote, in the meetings of that Committee when it takes decisions in the exercise of the powers conferred on it by the ECHR. The EU is to have one vote, like the 47 other Contracting Parties.

77. The Commission notes that the obligation of sincere cooperation requires the EU and the Member States to act in a coordinated manner when they express their views or cast their votes on the execution of a judgment of the ECtHR delivered against the EU or against a Member State establishing a violation of the ECHR in proceedings to which the EU was a co-respondent. According to the Commission, it follows from this that, after accession, the EU and the Member States will together hold 29 votes out of a total number of 48 in the Committee of Ministers, and will, by themselves, hold a large majority within that Committee. Accordingly, in order to preserve both the effectiveness of the control machinery and the substantive equality of the Contracting Parties, the second sentence of Article 7(4)(a) of the draft agreement provides that the Rules for the supervision of execution are to be adapted to enable the Committee of Ministers to exercise its functions effectively. To that end, special voting rules are laid down in draft Rule 18. According to paragraph 4 of that draft rule, any amendment of those rules is to require consensus by all Contracting Parties.

78. Lastly, when the Committee of Ministers adopts instruments or texts without binding legal effect on the basis of its general competence under Article 15 of the Statute of the Council of Europe, it would not be possible for the EU, not being a member of that international organisation, to participate, with the right to vote, in the adoption of such decisions. Article 7(3) of the draft agreement therefore requires the EU to be consulted before the adoption of such texts or instruments and makes clear that the Committee of Ministers is to take due account of the position expressed by the EU.

2. Article 1(b) of Protocol No 8 EU

79. As regards the requirement in Article 1(b) of Protocol No 8 EU to preserve the specific characteristics of the EU and EU law with regard to the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate, the Commission notes that, where a violation of the ECHR alleged before the ECtHR in relation to an act or omission on the part of a Contracting Party is linked to another legal provision, the compatibility of that provision with the ECHR is called into question, with the result that the review exercised by the ECHR bodies will necessarily be concerned with that provision. However, unlike the position in the case of any other Contracting Party which is simultaneously responsible for the act and for the provision on which that act is based, where a violation alleged before the ECtHR — in relation to an act of a Member State — is linked to a provision of EU law, the EU, as the Contracting Party to which that provision pertains, would not be a party to the proceedings before the ECtHR. The same applies to the Member States, taken together, where a violation alleged before the ECtHR in relation to an act or omission on the part of an institution, body, office or agency of the EU is linked to a provision of the Treaties, for which the Member States alone are responsible.

80. In the Commission's submission, in order to ensure that, in both situations, the Contracting Party that adopted the provision in question is not prevented either from taking part in the proceedings before the ECtHR or from being bound, as the case may be, by the obligations under Article 46(1) of the ECHR regarding the possible amendment or repeal of that provision, the draft agreement lays down specific procedural rules introducing the co-respondent mechanism. In particular, Article 3 of the draft agreement would, on the one hand, allow the EU to become a co-respondent in the case of an allegation of a violation calling into question the compatibility with the ECHR of a provision of EU law, and, on the other, allow Member States to become co-respondents in the case of an allegation of a violation calling into question the compatibility with the ECHR of a provision laid down in the Treaties.

81. The Commission points out that the new Article 36(4) of the ECHR, added by Article 3(1) of the draft agreement, states in the second sentence that '[a] co-respondent is a party to the case'. Thus, the co-respondent would enjoy all the procedural rights available to the parties and would not, therefore, be regarded merely as a third-party intervener. In addition, if a judgment of the ECtHR should find a violation of the ECHR, thus also calling into question a provision of EU law, the co-respondent would be obliged to remedy that violation so as to abide by the judgment, either by amending that provision or by repealing it.

82. According to the Commission, the provisions mentioned in the three preceding paragraphs of this Opinion preserve the autonomy of the EU legal order with regard to the decisions which the ECtHR may be called upon to take in respect of the EU and the Member States. In the first place, in accordance with Article 3(5) of the draft agreement, the status of co-respondent would be acquired either by accepting an invitation to that effect from the ECtHR, or by a decision of the ECtHR on the basis of the plausibility of the reasons given in the request from the Contracting Party concerned. Thus, the ECtHR would not be called upon to interpret EU law incidentally in order to establish whether an allegation of a violation of the ECHR called into question the compatibility with the ECHR of a provision of EU law. In the second place, Article 3(7) lays down the rule that the respondent and co-respondent are to be jointly responsible for any violation of the ECHR in proceedings to which a Contracting Party is a co-respondent. Consequently, in such cases, the ECtHR would confine itself to finding that the violation had taken place. By contrast, it would not be required to rule directly on the nature of the parts played in the violation by the EU and the Member State concerned, or their shares in it, or, therefore, to rule indirectly on their respective obligations with regard to the execution of the judgment and in particular any individual or general measures to be taken in that respect. Furthermore, in accordance with the second part of Article 3(7), only on the basis of any reasons given jointly by the respondent and the co-respondent could the ECtHR decide that only one of them should be held responsible.

83. The Commission further takes the view that the draft agreement also ensures that a judgment of the ECtHR delivered in proceedings to which the EU is a co-respondent cannot affect the competences of the EU. Such a judgment cannot impose on the EU obligations that go beyond those it is required to fulfil under the competences conferred on it in the Treaties.

84. Specifically, according to the Commission, the EU ought to join the proceedings as a co-respondent automatically whenever it is alleged that the ECHR has been violated by an act on the part of a Member State that is applying a provision of EU law in such a way that the allegation calls into question the compatibility of that provision with the ECHR. The Commission argues that the draft agreement makes it possible to achieve that result. It submits that, under Article 3(5) of the draft agreement, when the ECtHR is ruling on a request by a Contracting Party asking to become a co-respondent, the ECtHR is to assess whether, in the light of the reasons given by that party, it is plausible that the conditions in Article 3(2) or (3) of the ECHR are met. Those considerations also apply, *mutatis mutandis*, to the Member States when a violation of the ECHR by an act on the part of the EU calls into question the compatibility of the Treaties with the ECHR. The Commission adds, however, that in such cases fulfilment of the obligation of sincere cooperation requires that the Member States be represented before the ECtHR by a single agent, a requirement which should be included in the internal rules.

3. The second sentence of Article 6(2) TEU and the first sentence of Article 2 of Protocol No 8 EU

85. As regards the requirement set out in the second sentence of Article 6(2) TEU and the first sentence of Article 2 of Protocol No 8 EU, according to which accession must not affect the EU's competences as defined in the Treaties, the Commission notes that accession will impose an obligation on the EU to respect the rights guaranteed by the ECHR. In so far as that obligation entails an obligation to refrain from adopting any measure that might violate those rights, the EU, in acceding to the ECHR, would merely be accepting limits on the exercise of the competences conferred on it by the Member States in the Treaties. Moreover, in so far as that obligation on the part of the EU entails an obligation to adopt specific measures, the second sentence of Article 1(3) of the draft agreement provides that nothing in the ECHR or the protocols thereto is to require the EU to perform an act or adopt a measure for which it has no competence under EU law. Consequently, the commitments made by the EU when acceding to the ECHR would not in any way affect its competences.

86. Similarly, the competences of the EU would not be affected by the draft agreement's providing for the EU to accede not only to the ECHR but also to the Protocol and to Protocol No 6 and, moreover, for the possibility of acceding to the other existing protocols. Principally, the Commission takes the view that Article 6(2) TEU confers a competence on the EU to accede to all the existing protocols, irrespective of whether or not all the Member States are parties to them. If it were otherwise, the rule in the second sentence of Article 2 of Protocol No 8 EU,

according to which the accession agreement is to ensure that the situation of the Member States in relation to the protocols is not affected by the accession of the EU, would be meaningless. Furthermore, those protocols are merely accessory to the ECHR. Thus, the EU would have the competence, if necessary, to enter into any new protocols or to accede to them at a later stage, provided they too are accessory to the ECHR.

4. Article 1(b) and the first sentence of Article 2 of Protocol No 8 EU

87. According to the Commission, the powers of the EU institutions other than the Court of Justice are not affected by accession. Those institutions would have to exercise their powers with regard to the ECHR and its control bodies in the same way as they are required to do with regard to any other international agreement and the bodies set up or given decision-making powers by such an agreement. In particular, it follows, both from Article 335 TFEU and from paragraph 94 of the judgment in *Reynolds Tobacco and Others* v *Commission* (C-131/03 P, EU:C:2006:541) that the Commission represents the EU before courts other than those of the Member States. In the present case, the Commission would be required to represent the EU before the ECtHR, but, in accordance with the principle of sincere cooperation between institutions, if a provision of EU law laid down in an act of an institution other than the Commission were called into question in proceedings before the ECtHR, the powers of that other institution would be preserved if that institution were involved in the preparation of the procedural acts to be addressed to the ECtHR. In addition, when the Committee of Ministers is called upon to adopt acts having legal effects, the procedure provided for in Article 218(9) TFEU will apply *ipso jure*.

88. As regards the Court of Justice and, more generally, the preservation of the specific characteristics of the EU and of EU law with regard to the system of judicial protection, the Commission's assessment in that regard relates, in essence, to three issues: the exhaustion of domestic remedies, the effectiveness of judicial protection, particularly having regard to the common foreign and security policy ('the CFSP'), and the powers of the Court of Justice under Articles 258 TFEU, 260 TFEU and 263 TFEU. The first two issues arise in the light of Articles 6, 13 and 35(1) of the ECHR, according to which there must be an effective remedy before a domestic authority against any act on the part of a Contracting Party, and, moreover, an individual application brought before the ECtHR is admissible only after all domestic remedies have been exhausted.

89. With regard, first of all, to the prior exhaustion of domestic remedies, the Commission maintains that the draft agreement guarantees that remedies before the Courts of the EU must be exhausted before an application against an act on the part of the EU can be validly brought before the ECtHR. In the Commission's submission, the second indent in Article 1(5) of the draft agreement states that the term 'domestic' in Article 35(1) of the ECHR is to be understood as relating also, *mutatis mutandis*, to the internal legal order of the EU. Moreover, Article 5 of the draft agreement clearly states that proceedings before the Courts of the EU are not to be understood as constituting procedures of international investigation or settlement. Therefore, the fact that a matter had been submitted to those Courts would not make an application before the ECtHR inadmissible under Article 35(2)(b) of the ECHR.

90. Furthermore, in introducing the procedure for the prior involvement of the Court of Justice, the Commission emphasises that there is a possibility that a court of a Member State may find that an act or omission on the part of that Member State infringes a fundamental right that is guaranteed at EU level and which corresponds to a right guaranteed by the ECHR, and that that violation is linked to a provision of EU secondary law. In such a case, the national court is not itself entitled to find, incidentally, that the EU act containing that provision is invalid and to decline to apply it, since the Court of Justice alone, on a request for a preliminary ruling, can declare that act invalid (judgment in *Foto-Frost*, 314/85, EU:C:1987:452, paragraphs 11 to 20). If it were subsequently alleged before the ECtHR that the same act or omission violated the same fundamental right as guaranteed by the ECHR, and if, therefore, that allegation called into question the compatibility with the ECHR of the provision of EU law in question, the EU would become co-respondent and its institutions, including the Court of Justice, would be bound by the judgment of the ECtHR finding a violation of the ECHR. That situation could arise even though the Court of Justice would not yet have had the opportunity to consider the validity of the EU act at issue in the light of the fundamental right in question the violation of which was being alleged before the ECtHR. In that context, a reference to the Court of Justice for a preliminary ruling under point (b) in the first paragraph of Article 267 TFEU could not be regarded as a 'domestic remedy' which the applicant should have exhausted before bringing an application before the ECtHR, since the parties have no control over whether or not such a reference is made and, therefore, the omission of such a reference would not mean that an application to the ECtHR was inadmissible. That conclusion is all the more compelling given that the powers of the Court of Justice include the jurisdiction to declare an EU act invalid. According to the Commission, in order to preserve those powers, it is necessary to provide for the Court of Justice to be able to consider the compatibility of a provision of EU law with

the ECHR in connection with proceedings in the ECtHR to which the EU is a co-respondent. That opportunity should, moreover, arise before the ECtHR rules on the merits of the allegation raised before it and, therefore, indirectly, on the compatibility of that provision with the fundamental right in question. Furthermore, the necessity of prior consideration by the Court of Justice of the provision in question follows also from the fact that the control machinery established by the ECHR is subsidiary to the mechanisms that safeguard human rights at the level of the Contracting Parties.

91. It is, the Commission submits, to meet those needs that the first sentence of Article 3(6) of the draft agreement provides that, in such circumstances, sufficient time is to be afforded for the Court of Justice to make an assessment of the provision at issue in the context of the procedure for the prior involvement of that court. The second sentence of Article 3(6) states that that assessment must be made quickly so that the proceedings before the ECtHR are not unduly delayed. The ECtHR would not be bound by the assessment of the Court of Justice, as is apparent from the last sentence of that provision.

92. The Commission does add that Article 3(6) of the draft agreement must be accompanied by internal EU rules governing the procedure for the prior involvement of the Court of Justice. The draft agreement does not contain such rules. However, they should not be included in an international agreement, but should be laid down independently at EU level, since their purpose is to regulate an internal EU procedure. Nor would it be necessary or indeed appropriate to insert those procedural rules in the Treaties. The Treaties already impose an obligation on the EU institutions and on the Member States to ensure that the EU accedes to the ECHR and provide, moreover, that the powers of the Court of Justice are not to be affected by that accession. In that regard, the Commission takes the view that it is more appropriate for the rules laying down the principle of a procedure for the prior involvement of the Court of Justice, designating the bodies having the authority to initiate it, and defining the standards governing the examination of compatibility, to be included within the Council decision concluding the accession agreement pursuant to Article 218(6)(a)(ii) TFEU. As regards the content of the internal rules governing the procedure for the prior involvement of the Court of Justice, first of all, the power to make applications to the Court of Justice initiating that procedure should be exercised by the Commission and by the Member State to which the application to the ECtHR is addressed. Furthermore, the Court of Justice should be able to give its ruling before the EU and the Member State concerned present their views to the ECtHR. Next, since the prior involvement procedure has certain structural similarities with the preliminary ruling procedure, the rules concerning the entitlement to participate in it should be similar to those in Article 23 of the Statute of the Court of Justice of the European Union. Lastly, the requirements for speed could be met by applying the expedited procedure referred to in Article 23a of that statute.

93. As regards, secondly, the effectiveness of judicial protection, according to the Commission it is important that, when an act has to be attributed to the EU or indeed to a Member State in order to determine responsibility under the ECHR, this be done in accordance with the same criteria as those that apply within the EU. It is submitted that this requirement is met by the first sentence of Article 1(4) of the draft agreement, which provides that, for the purposes of the ECHR, a measure of a Member State is to be attributed to that State, even if that measure occurs when the State implements the law of the EU, including decisions taken under the EU and FEU Treaties. The effectiveness of the remedy would therefore be assured, given that, in accordance with the second subparagraph of Article 19(1) TEU, it is for the courts of that Member State to guarantee legal protection with regard to acts on the part of that State.

94. However, it is submitted that particular questions with regard to effective judicial protection arise in relation to the area of the CFSP, EU law having two specific characteristics in that respect.

95. In the first place, as regards the attributability of acts, military operations in application of the CFSP are conducted by the Member States, in accordance with the fourth sentence of the second subparagraph of Article 24(1) TEU and Articles 28(1) TEU, 29 TEU and 42(3) TEU. The Commission states that, in order to take account of that characteristic, Article 1(4) of the draft agreement provides that, even with respect to operations conducted in the framework of the CFSP, the acts of the Member States are to be attributed to the Member State in question and not to the EU. That clarification should preclude the possibility that the case-law of the ECtHR — whereby the ECtHR has ruled on the responsibility of an international organisation in relation to acts performed by a Contracting Party for the purpose of implementing a resolution of that organisation (decision of the ECtHR in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway,* nos 71412/01 and 78166/01, § 122, 2 May 2007, and judgment of the ECtHR in *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, ECHR 2011) — might be applied to relations between the EU and its Member States. As stated, moreover, in

paragraph 24 of the draft explanatory report, in the cases giving rise to that case-law there was no specific rule on the attribution of acts, such as that provided for by Article 1(4) of the draft agreement.

96. In the second place, as regards the effectiveness of review by the EU judicature in the area of the CFSP, that review is limited, according to the Commission, both by the last sentence of the second subparagraph of Article 24(1) TEU and by the second paragraph of Article 275 TFEU. It follows, in essence, from those provisions that the Court of Justice is not to have jurisdiction with respect to the provisions relating to the CFSP or with respect to acts adopted on the basis of those provisions. It is to have jurisdiction only to monitor compliance with Article 40 TEU and to rule on actions, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, for a review of the legality of decisions providing for 'restrictive measures' against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty. The question could therefore arise as to whether the EU provides effective internal remedies in relation to the CFSP.

97. The Commission points out in that regard that, in order for an application to the ECtHR to be admissible, the applicant must be able to claim to be a victim of a violation of the rights set forth in the ECHR or the protocols thereto, and must therefore be directly affected by the act or omission at issue.

98. On the one hand, when a CFSP act on the part of a Member State affects a person directly and may therefore be the subject of an application to the ECtHR, judicial protection with regard to the act is a matter for the courts of the Member States. Where, in exceptional cases, such an act is based on a provision of a Council decision adopted pursuant to Article 28(1) TEU, the compatibility of that provision with the ECHR could be called into question. According to the Commission, in such a case, the Council decision itself constitutes a 'restrictive measure' within the meaning of the second paragraph of Article 275 TFEU, with the result that, although that provision expressly recognises the jurisdiction of the Court of Justice only in respect of actions for annulment 'brought in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU]', such provisions could nevertheless be the subject of a reference for a preliminary ruling, including as regards their validity. The Commission relies in that regard in particular on the judgment in *Segi and Others* v *Council* (C-355/04 P, EU:C:2007:116), in which, despite the fact that Article 35(1) of the EU Treaty, as amended by the Treaty of Nice, excluded 'common positions' from the jurisdiction of the Court of Justice to give preliminary rulings, the Court of Justice held that national courts could ask it to deliver preliminary rulings on questions relating to a common position which, owing to its content, did of itself produce legal effects in relation to third parties, and consequently had a scope going beyond that assigned by the EU Treaty to that kind of act. In such circumstances, moreover, the procedure for the prior involvement of the Court of Justice should also apply.

99. On the other hand, where CFSP acts are performed by EU institutions, a distinction should be made between acts that have binding legal effects and those that do not. Acts that have binding legal effects are, in so far as they are capable of violating fundamental rights, 'restrictive measures' within the meaning of the second paragraph of Article 275 TFEU and could, therefore, be the subject of an action for annulment before the EU judicature. By contrast, acts that do not produce such effects could not by their nature be the subject of an action for annulment or of a reference for a preliminary ruling. The only remedy available within the EU against such acts would be an action for damages pursuant to Article 340 TFEU, since such an action is not, in the Commission's submission, excluded by the first paragraph of Article 275 TFEU.

100. Thus, in the Commission's view, the combined effect of Article 1(4) of the draft agreement, the first subparagraph of Article 19(1) TEU and Articles 275 TFEU and 340 TFEU is that all acts and measures on the part of the EU and of the Member States in the area of the CFSP, in respect of which a person may claim to be a victim of a violation of the rights set forth in the ECHR, have an effective remedy before the EU judicature or the courts of the Member States.

101. Thirdly, according to the Commission, the draft agreement does not affect the powers of the Court of Justice under Articles 258 TFEU, 260 TFEU and 263 TFEU either. Article 5 of the draft agreement contains an interpretation clause according to which '[p]roceedings before the [Court of Justice] shall [not] be understood as constituting means of dispute settlement within the meaning of Article 55 of the [ECHR]'. Thus, the possibility is expressly preserved that disputes regarding the interpretation and application of the ECHR, or indeed of fundamental rights as defined at EU level and, in particular, in the Charter, may be brought before the Court of Justice.

102. With regard, in particular, to actions for failure to fulfil obligations, the Commission notes that it follows from Article 1(3) of the draft agreement that no obligation is imposed on the Member States, under EU law, with

regard to the ECHR and the protocols thereto. Consequently, an action for failure to fulfil obligations could not, by definition, concern the failure of a Member State to fulfil its obligations under the ECHR. Nevertheless, the reference to Article 55 of the ECHR in Article 5 of the draft agreement serves a purpose as regards the requirement that accession should have no effect on the powers of the Court of Justice. The Member States are, under Article 51(1) of the Charter, bound by the fundamental rights defined at EU level when they are implementing EU law. In so far as the prohibition in Article 55 of the ECHR might be understood to refer also to disputes between Contracting Parties regarding the interpretation or application of provisions of an international instrument (such as, in the case of the Member States, the Treaties and the Charter) that has the same content as the provisions of the ECHR, Article 5 of the draft agreement has the effect that that interpretation cannot be relied upon against the EU.

103. Moreover, the ECtHR has specified that the exercise by the Commission of its powers under Article 258 TFEU does not correspond to resorting to procedures of international investigation or settlement within the meaning of Article 35(2)(b) of the ECHR (judgment of the ECtHR in *Karoussiotis v. Portugal*, no. 23205/08, §§ 75 and 76, ECHR 2011 (extracts)).

104. The Commission states that it is not necessary for the draft agreement to make provision for a specific objection of inadmissibility in the case of applications brought before the ECtHR, under Article 33 of the ECHR, by the EU against a Member State or, conversely, by a Member State against the EU in a dispute regarding the interpretation or application of the ECHR, given that such applications would be manifestly contrary to EU law. Not only would they constitute a circumvention of Article 258 TFEU, but the decision to make such an application could be challenged by an action for annulment under Article 263 TFEU. In addition, an application brought by a Member State against the EU would constitute a circumvention of Article 263 TFEU or, as the case may be, of Article 265 TFEU, which would be subject under EU law to the infringement procedure.

5. The second sentence of Article 2 of Protocol No 8 EU

105. As regards the requirement, set out in the second sentence of Article 2 of Protocol No 8 EU, that accession must not affect the situation of Member States in relation to the ECHR, in particular in relation to the protocols thereto, measures taken by Member States derogating from the ECHR in accordance with Article 15 thereof and reservations to the ECHR made by Member States in accordance with Article 57 thereof, the Commission submits that, in accordance with the first sentence of Article 1(3) of the draft agreement, the scope of the EU's commitments is limited *ratione personae* to the EU alone, as a party governed by public international law which is distinct from the Member States. Therefore, the accession of the EU to the ECHR does not affect the legal situation of a Member State which, under Article 57 of the ECHR, has made a reservation in respect of a provision of the ECHR or of one of the protocols to which the EU is acceding, or which has taken measures derogating from the ECHR under Article 15 thereof, or which is not a party to one of the protocols to which the EU might accede in the future. It also follows from this that, even though under Article 216(2) TFEU agreements concluded by the EU are binding upon the institutions of the EU and on the Member States, the draft agreement does not impose any obligation on them, under EU law, in respect of the ECHR and the protocols thereto.

6. Article 3 of Protocol No 8 EU

106. As regards, lastly, the requirement, set out in Article 3 of Protocol No 8 EU, that accession must not affect Article 344 TFEU, the Commission submits that another consequence of the fact that, in accordance with Article 1(3) of the draft agreement, the accession of the EU to the ECHR does not impose any obligation on the Member States, under EU law, in respect of the ECHR and the protocols thereto is that a dispute between Member States regarding the interpretation or application of the ECHR is not strictly speaking a dispute regarding the interpretation or application of the Treaties, of the kind referred to in Article 344 TFEU.

107. However, the reference to Article 55 of the ECHR in Article 5 of the draft agreement serves a purpose as regards that requirement also. In so far as the prohibition in Article 55 might be understood to refer also to disputes between Contracting Parties regarding the interpretation or application of provisions of an international instrument (such as, in the case of the Member States, the Treaties and the Charter) that has the same content as the provisions of the ECHR, Article 5 of the draft agreement has the effect that that interpretation cannot be relied upon against the Member States. The Commission adds that there is no need for a rule that an application brought before the ECtHR by one Member State against another in a dispute regarding the interpretation or application of provisions of EU law that have the same content as those of the ECHR, in particular provisions of the Charter, is to be

inadmissible. The bringing of such an application would itself constitute an infringement of Article 344 TFEU and would be subject, at EU level, to the proceedings referred to in Articles 258 TFEU to 260 TFEU.

## VII – **Summary of the main observations submitted to the Court of Justice**

108. In the context of the present request for an Opinion, observations were submitted to the Court in writing or orally at the hearing by the Belgian, Bulgarian, Czech, Danish, German and Estonian Governments, Ireland, the Greek, Spanish, French, Italian, Cypriot, Latvian, Lithuanian, Hungarian, Netherlands, Austrian, Polish, Portuguese, Romanian, Slovak, Finnish, Swedish and United Kingdom Governments, and by the Parliament and the Council.

109. All the Member States and institutions mentioned above conclude, in essence, that the draft agreement is compatible with the Treaties, and largely endorse the Commission's assessment. However, their assessments differ from that of the Commission in a number of respects.

### A – *Admissibility of the request for an Opinion*

110. As regards the admissibility of the request for an Opinion, it is essentially common ground that the subject-matter of the request is indeed an 'agreement envisaged' within the meaning of Article 218(11) TFEU, and that the Court of Justice has all the information necessary to assess the compatibility of that agreement with the Treaties, as the Court of Justice requires (Opinion 2/94, EU:C:1996:140, paragraphs 20 and 21).

111. By contrast, the Commission's assessment regarding the internal rules has given rise to very different positions.

112. According to the Bulgarian and Danish Governments, Ireland, the French, Hungarian, Portuguese, Finnish, Swedish and United Kingdom Governments, as well as the Parliament and the Council, the fact that those rules have not yet been adopted does indeed not affect the admissibility of the request. That is particularly so since, as the Estonian and Latvian Governments note, such rules would have consequences only for the EU and could not affect the international aspects of the draft agreement and, moreover, as the Polish and Swedish Governments essentially emphasise, those rules must also be compatible with the Treaties, such compatibility being subject to review, if necessary, according to the Cypriot, Swedish and United Kingdom Governments, by the Court of Justice in accordance with Article 263 TFEU.

113. However, it is submitted that the Commission ought not to have initiated a discussion of such rules before the Court of Justice in the present Opinion procedure. It is impossible for the Court of Justice to express a view on such internal rules either, according to the Greek and Netherlands Governments, because of their hypothetical nature or, according to the French, Cypriot and Lithuanian Governments and the Council, because there is insufficient information regarding their content, or indeed, in the opinion of the Czech, Estonian, French, Cypriot, Lithuanian, Netherlands, Portuguese, Slovak and Swedish Governments, in the light of the fact that they are extraneous to the international agreement at issue, that agreement alone being capable of forming the subject-matter of a request for an Opinion within the meaning of Article 218(11) TFEU. Furthermore, for the Court of Justice to be required to express a view on the content of rules that have not yet been adopted by the EU legislature would, according to the Estonian and United Kingdom Governments and the Council, be to encroach upon the competences of the EU legislature, contrary to Article 13 TEU, or, according to the Estonian Government, be in breach of the principle of the division of powers set out in Article 5(1) and (2) TEU.

114. It is argued that it follows from this that the request for an Opinion is admissible only in so far as it concerns the agreement envisaged, whereas, so far as concerns the internal rules, either, according to the French and Cypriot Governments, the Court of Justice has no jurisdiction, or, according to the Czech, Estonian and French Governments, the request is inadmissible, or, according to the Lithuanian Government, it is not necessary for the Court of Justice to express a view.

115. Should, however, an analysis of the internal rules be necessary for the purposes of assessing whether the draft agreement is consistent with the Treaties — a point which, according to the Greek Government, is for the Court of Justice to determine — then either, according to the Polish Government, the Court of Justice must make its Opinion regarding the compatibility of that draft with the Treaties conditional on the internal rules also being compatible with the Treaties or, in the view of the Romanian Government, with the draft declaration; or, according

to the Estonian Government and the Council, the procedure must be stayed until those rules become available; or, according to the Greek Government and the Council, the request must be declared inadmissible in its entirety or, in the Spanish Government's view, be declared inadmissible in respect of those aspects of the draft agreement which have yet to be detailed in those internal rules, namely those concerning the issues of the EU's representation before the ECtHR, the prior involvement of the Court of Justice, the procedures to be followed in drawing up the list of three candidates for the position of Judge and the EU's participation in the Assembly or in the Committee of Ministers, and the new voting rules set out in draft Rule 18.

116. In the alternative, in the event that the Court of Justice should decide to express a view on the internal rules, observations were submitted with regard to the main rules.

B – *Substance*

1. Article 1(a) of Protocol No 8 EU

117. All the Member States and institutions which submitted observations agree on the essence of the Commission's assessment in concluding that the draft agreement preserves the specific characteristics of the EU and EU law with regard to the specific arrangements for the EU's participation in the control bodies of the ECHR.

2. Article 1(b) of Protocol No 8 EU

118. Those Member States and institutions also consider that the co-respondent mechanism broadly enables the specific characteristics of the EU and EU law to be preserved by ensuring that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate.

119. Nevertheless, certain Member States take the view that the Commission's assessment requires adjustment or clarification.

120. First of all, according to the Austrian Government, the co-respondent mechanism must be capable of being triggered not only where the violation of the ECHR 'could have been avoided only by disregarding an obligation under EU law', but also where such a violation is attributable to a Member State in the context of the implementation of EU law, and even though EU law accords that Member State a certain degree of autonomy. If the alleged violation is linked to an act transposing a directive, it might be in the EU's interest to defend the legality of that directive before the ECtHR, even if the directive does not compel the Member State concerned to adopt the act but merely authorises it to do so. Furthermore, it might be difficult to know in advance the extent of the margin of discretion to be given to the Member States in connection with the transposition of a directive.

121. Next, the Bulgarian Government takes the view that the fact that the co-respondent mechanism is optional means that it is open to potential co-respondents to escape their responsibilities under Article 46 of the ECHR. In that regard, the Austrian Government adds that the compatibility of that mechanism with the requirements of Article 1(b) of Protocol No 8 EU depends on there being an internal provision in EU law compelling the institutions of the EU, in proceedings against one or more Member States, to request that the EU be admitted as a co-respondent where it is alleged that the ECHR has been violated and the allegation calls into question the compatibility of EU law with the ECHR. Even though such an internal obligation is already envisaged in paragraph (a) of the draft declaration, it is none the less necessary for that obligation to be regulated in a binding manner, so that a failure to make such a request or a refusal to participate in proceedings upon being invited to do so by the ECtHR pursuant to Article 3(5) of the draft agreement constitutes a failure to act for the purposes of Article 265 TFEU. Furthermore, according to the Romanian Government, it follows from that draft declaration that although the EU's intervention as co-respondent is envisaged as a possibility by the draft agreement, the EU undertakes to establish rules internally that will make it possible to determine which alleged violation of the provisions of the ECHR are related to EU law and the amount of leeway available to the Member State concerned.

122. In addition, according to the French Government, in order to avoid the ECtHR ruling on issues relating to EU law, such as the division of responsibilities in the context of a violation established following proceedings to which a Contracting Party is a co-respondent, Article 3(7) of the draft agreement would certainly have to be interpreted as meaning that the ECtHR can decide on the sharing of responsibility between respondent and co-respondent only on the basis of the reasons they give in their joint request.

123. Lastly, the United Kingdom Government states that, contrary to the Commission's suggestion that the co-respondent will have an obligation under Article 46(1) of the ECHR to remedy a violation of the ECHR so as to abide by a judgment of the ECtHR, in fact that obligation must be shared. If such a judgment were to be given jointly against the EU and one or more of its Member States, it would not in itself give rise to a power for any of the EU institutions, in particular the Commission, to act in order to ensure its proper execution, which would have to be effected through the normal legislative processes of the EU.

3. Article 6(2) TEU and the first sentence of Article 2 of Protocol No 8 EU

124. The Commission's assessment with regard to the requirement that accession to the ECHR does not affect the EU's competences is largely shared by the Member States that submitted observations to the Court of Justice, save as regards the question of the competence of the EU to accede to protocols other than those to which the EU is to accede pursuant to Article 1 of the draft agreement, that is the Protocol and Protocol No 6.

125. In particular, according to the German Government, the considerations included in the request for an Opinion regarding possible accession to protocols other than the Protocol and Protocol No 6 are inadmissible, since there is no 'agreement envisaged' in that respect.

126. As to the substance, the Slovak Government maintains that the EU currently has competence to accede only to the two protocols mentioned in the preceding paragraph, while, in the Danish Government's view, the EU does not have competence to accede to existing protocols to which the Member States are not already parties.

127. By contrast, the Latvian, Netherlands and Polish Governments take the view that the EU could, in theory, have competence to accede to the latter protocols also. However, it is submitted that that is not a decisive factor. According to the Netherlands Government, in the light of the procedure laid down in Article 218(6)(a)(ii) and the second subparagraph of Article 218(8) TFEU, which prescribes unanimity for the conclusion of an agreement within the meaning of that article and its approval by all the Member States in accordance with their respective constitutional requirements, it is unlikely that the EU would be able to obtain Member States' approval for accession to protocols to which they are not parties. In any event, at present, the EU would not be able to accede to protocols other than those mentioned in Article 1 of the draft agreement without, according to the Latvian Government, the Council having approved a specific mandate in that regard, or, according to the Polish Government, without regard to the will of the Member States. Lastly, the German Government adds that that competence must be exercised in accordance with the second sentence of Article 2 of Protocol No 8 EU, which states that the accession agreement must not affect the situation of Member States in relation to the ECHR, in particular in relation to the protocols thereto. Immediate accession to the protocols to which not all the Member States are parties would infringe that provision or, according to the Greek Government, would be in breach of the principle of sincere cooperation.

4. Article 1(b) and the first sentence of Article 2 of Protocol No 8 EU

128. As regards the question of the effectiveness of the remedies provided for by the Treaties in the area of the CFSP, and as regards in particular the Commission's assessment in relation to the attributability of acts adopted under that policy, that assessment was considered unnecessary by the United Kingdom Government on the ground that the ECtHR has never applied to the EU its case-law concerning the attributability to international organisations of acts of the Contracting Parties. In any event, according to the German Government, the rule laid down in Article 1(4) of the draft agreement, as explained in paragraphs 22 to 26 of the draft explanatory report, is to apply only for the purposes of the EU's accession to the ECHR and must not affect the general principles of international law in relation to the attributability of acts to international organisations.

129. The positions of the Member States on the limitations which the Treaties impose on the jurisdiction of the Court of Justice in the area of the CFSP are more nuanced.

130. First of all, according to the Greek and United Kingdom Governments, it is not necessary for the Court of Justice to interpret Article 275 TFEU and to express a view on its possible jurisdiction in respect of, inter alia, references for preliminary rulings in that area.

131. In any event, the United Kingdom Government adds that the broad interpretation of that article advocated by the Commission, according to which the jurisdiction of the Court of Justice under Article 267 TFEU extends also

to acts falling within the CFSP, is incorrect and is based on the judgments in *Gestoras Pro Amnistía and Others* v *Council* (C-354/04 P, EU:C:2007:115) and *Segi and Others* v *Council* (EU:C:2007:116), that is to say, on case-law that predates the Treaty of Lisbon. However, as the Spanish and Finnish Governments also note, that Treaty, through Article 275 TFEU, specifically limited reviews of the validity of acts covered by the CFSP to actions for annulment only, thereby excluding references for preliminary rulings on validity. According to those two governments, Article 275 TFEU must be interpreted narrowly, not only because of the fact that, in this area, the lack of jurisdiction of the Court of Justice is the rule, and its jurisdiction merely the exception, as the French and Polish Governments and the Council submit, but also because of the fact, highlighted by the Spanish and Polish Governments, that a broad interpretation expanding the jurisdiction of the Court of Justice in CFSP matters does not accord with the requirements of Article 2 of Protocol No 8 EU. The Netherlands Government submits, moreover, that such a broad interpretation creates uncertainty as to the criteria for the admissibility of actions for annulment of such acts. The Courts of the EU have jurisdiction only to rule, on the basis of the fourth paragraph of Article 263 TFEU, on decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty. According to the French Government, a broad interpretation of 'restrictive measure' has consequences as regards the interpretation of the criteria for the admissibility of actions for annulment and of actions based on a plea of illegality provided for in Article 277 TFEU. Lastly, according to the French Government and the Council, such an expansion is, moreover, likely to extend also to the procedure for the prior involvement of the Court of Justice. That procedure could in fact be triggered only where the allegation before the ECtHR is that there has been a violation of the ECHR linked to a restrictive measure; if it were otherwise the jurisdiction of the Court of Justice would be extended.

132. Next, in the submission of the French Government and of the Council, the distinction made by the Commission between measures that have binding effect and those that do not is unfounded, since what matters is only whether it is a 'restrictive measure' within the meaning of Article 275 TFEU. The meaning of 'restrictive measure' cannot depend simply on the fact that a measure is capable of infringing the fundamental rights of individuals, since such a definition goes beyond the letter of Article 215(2) TFEU and renders the first paragraph of Article 275 TFEU redundant.

133. Consequently, according to the Council, while the Court of Justice continues to have jurisdiction over pleas of illegality in accordance with Article 277 TFEU, it does not, according to the Polish Government, have jurisdiction over the validity of measures other than restrictive measures by means of a reference for a preliminary ruling, nor, according to the French Government and the Council, does it have jurisdiction to rule on claims in non-contractual liability in which compensation is sought for damage resulting from a CFSP act or measure. According to the French and Netherlands Governments and the Council, the concept of restrictive measures includes only 'decisions imposing sanctions' on natural or legal persons which are intended to limit their entry into the territory of the Member States and to freeze their funds and economic resources, which thus concerns both basic acts under Article 31(1) TEU and implementing acts adopted on the basis of Article 31(2) TEU.

134. In that regard, the French Government states that the judgment in *Segi and Others* v *Council* (EU:C:2007:116) concerning the admissibility of references for a preliminary ruling in the context of the former 'third pillar' cannot be applied to the present case, since, unlike Article 35(1) EU, Article 275 TFEU does not confer on the Court of Justice any jurisdiction to give preliminary rulings.

135. Lastly, according to the French Government, the fact that that interpretation of Article 275 TFEU is likely to deprive individuals of effective judicial protection against certain acts falling within the CFSP cannot be sufficient to confer on the Court of Justice a jurisdiction not provided for by the Treaties. According to the French, Polish, Finnish and Swedish Governments, it is precisely in order to avoid the EU being systematically censured for violation of Articles 6 and 13 of the ECHR that Article 1(4) of the draft agreement and paragraphs 23 and 24 of the draft explanatory report make clear that it is for the Member States to guarantee protection of the right to obtain a judicial determination and of the right to an effective judicial remedy, particularly as, according to the Council, the EU does not enjoy any immunity from legal proceedings, in accordance with Protocol (No 7) on the privileges and immunities of the European Union annexed to the EU, FEU and EAEC Treaties, and can therefore be sued for compensation in the national courts. Moreover, according to the Council, the question whether the system of judicial protection in relation to the CFSP is in conformity with Articles 6 and 13 of the ECHR is relevant only in respect of CFSP acts attributable to the EU, as regards both military and civilian operations, given that it is for the courts of the Member States to guarantee the effectiveness of such protection in respect of any such acts attributable to the Member States.

136. As regards the procedure for the prior involvement of the Court of Justice, it is, first of all, maintained by the United Kingdom Government that that procedure is not necessary in order for the draft agreement to be considered compatible with the Treaties: given their declaratory nature, decisions of the ECtHR have no effect on the validity of EU law. In any event, according to the Bulgarian Government, it is not necessary to initiate that procedure where the Court of Justice has already ruled on the validity of the act concerned in the light of the corresponding fundamental right in the Charter, in view of Article 52(3) of the Charter and of the presumption, according to the case-law of the ECtHR, that EU law offers equivalent protection (judgment of the ECtHR in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 155, ECHR 2005-VI).

137. Next, according to the Czech Government, Ireland and the Greek, Spanish and United Kingdom Governments, although the prior involvement procedure confers additional functions on the Court of Justice over and above those already given to it by the Treaties, that none the less does not mean that the powers of the Court of Justice are being extended by the draft agreement, since those additional functions do not alter the essential character of the Court's present powers (Opinions 1/92, EU:C:1992:189, paragraph 32; 1/00, EU:C:2002:231, paragraphs 21, 23 and 26; and 1/09, EU:C:2011:123, paragraph 75). In addition, according to the Danish and Hungarian Governments, the ability of the Court of Justice to adjudicate in the context of the prior involvement procedure flows naturally and necessarily from the Treaties themselves and, in particular, from Article 6(2) TEU. Thus, while no amendment of the Treaties is necessary, according to the French and Austrian Governments, a Council decision pursuant to Article 218(8) TFEU is, according to the Danish, German and Austrian Governments, sufficient to confer that new function on the Court of Justice, since such a decision requires approval by all the Member States in accordance with their respective constitutional requirements. In that regard, however, the Parliament also submits that, since the Council's decisions on the conclusion of international agreements in principle merely give legal force to an agreement concluded by the EU, it is doubtful whether such decisions can have a normative content of their own, particularly as they are not 'subject to amendment by the Parliament'.

138. In the light of respect for the powers of the institutions, but without coming to the conclusion that the procedure for the prior involvement of the Court of Justice is contrary to the requirements of Protocol No 8 EU, the Polish Government argues that to acknowledge that the Commission is entitled to bring before the Court of Justice requests for decisions regarding the validity and interpretation of provisions of EU legal acts outwith Articles 263 TFEU and 267 TFEU could ultimately alter the essential character of the powers of the institutions, both of the Commission and of the Court of Justice itself, and result in circumvention of the admissibility criteria laid down by those provisions. For example, in accordance with the sixth paragraph of Article 263 TFEU, an action for annulment of an EU act could be brought by an institution within two months of the publication of the measure or of its notification to the plaintiff. However, where the Commission had not brought an action for annulment within that period, it could obtain the annulment of a measure by means of the prior involvement procedure, and thus circumvent compliance with that time-limit. Similarly, the powers of the Court of Justice would be likely to undergo significant changes, given that, while Article 267 TFEU currently reserves to the courts or tribunals of Member States alone the possibility of submitting a request for a preliminary ruling, after accession, the Court of Justice would be interpreting EU law at the request also of the Commission. Yet, just like the other EU institutions, the Court of Justice does not have general powers, and its jurisdiction is limited to the cases brought before it. Consequently, the possibility of the Court of Justice ruling on issues submitted by the Commission would have to have a specific basis in the Treaty, which is not the case at present.

139. Furthermore, according to the Netherlands and Austrian Governments, even though the procedure for the prior involvement of the Court of Justice has to take account of the imperatives of speed, that procedure must be more comprehensive than the present urgent preliminary ruling procedure provided for in Article 23a of the Statute of the Court of Justice and allow all the Member States to submit written observations. In any event, according to the Netherlands Government, that procedure must be governed not by particular provisions of the Council decision concluding the accession agreement, but directly by the Statute of the Court of Justice and its rules of procedure.

140. Lastly, the Council argues that the scope of the jurisdiction of the Court of Justice to adjudicate, prior to the ECtHR, on whether acts directly or indirectly attributable to the EU in the area of the CFSP comply with fundamental rights must be the same as its internal jurisdiction in that area. Thus, the Court of Justice would be called upon to give a prior ruling in a case that is brought against one or more Member States and in which the EU is co-respondent concerning an act of a Member State implementing an EU act adopted in the area of the CFSP where the criteria laid down in Article 275 TFEU are met. Should the Court of Justice decide that the limits set out in Article 40 TEU have not in fact been observed and the act at issue ought not to have been adopted on the basis of the chapter of the EU Treaty relating to the CFSP, it would then have jurisdiction to rule both on the interpretation and the validity of the act in question, as it would not be an act falling within the CFSP. The fact

that EU acts in the area of the CFSP which do not affect persons directly cannot be annulled by a judicial body within the EU's system of judicial protection would not mean that that system violates the ECHR.

5. Second sentence of Article 2 of Protocol No 8 EU

141. Some Member States contend that the accession of the EU to the ECHR and, possibly, to protocols thereto which have not yet been ratified by all the Member States does, contrary to what the Commission maintains, involve obligations on the part of the Member States under Article 216 TFEU. While, in the view of the German Government, that means that accession to those protocols infringes the second sentence of Article 2 of Protocol No 8 EU, the Czech Government comes to the opposite conclusion, given that the source of those obligations is Article 216(2) TFEU and not the ECHR itself. In any event, according to the Czech Government, accession to those protocols could proceed only in accordance with the procedure laid down in Article 218 TFEU, which means that the Opinion of the Court of Justice can be obtained if necessary.

142. In addition, according to the Polish Government, on the assumption that the EU has the competence to conclude protocols which have not yet been ratified by all the Member States, it is not inconceivable that, in the event of accession to one of those protocols, a Member State which had not ratified that protocol could, within the Council, express its agreement to be bound through the EU and accordingly 'approve' the decision to be bound by that protocol in that way. That State would then be bound by that protocol only in the field of the EU's competence. That solution would raise doubts, however, particularly in the light of the need to apply the law in a consistent, transparent and uniform manner. Those doubts would be particularly significant as regards the protocols relating to matters covered by shared competences.

6. Article 3 of Protocol No 8 EU

143. As regards compliance with Article 344 TFEU, the Greek Government takes the view that it is pointless to provide that an action between Member States before the ECtHR is to be inadmissible, given that such an action is already prohibited by Article 344 TFEU; nevertheless the French Government states that it must still remain possible for a Member State to appear as a third-party intervener in support of one or more of its nationals in a case against another Member State that is brought before the ECtHR, even where that other Member State is acting in the context of the implementation of EU law.

VIII – **Position of the Court of Justice**

A – *Admissibility*

144. Certain Member States that participated in the present procedure have expressed doubts as to the admissibility of the Commission's request for an Opinion in so far as it contains an assessment relating to the internal rules.

145. It must be borne in mind in that regard that, under Article 218(11) TFEU, the Parliament, the Council, the Commission or a Member State may obtain the Opinion of the Court of Justice as to whether an envisaged agreement is compatible with the provisions of the Treaties. That provision has the aim of forestalling complications which would result from legal disputes concerning the compatibility with the Treaties of international agreements binding upon the EU (see Opinions 2/94, EU:C:1996:140, paragraph 3; 1/08, EU:C:2009:739, paragraph 107; and 1/09, EU:C:2011:123, paragraph 47).

146. A possible decision of the Court of Justice, after the conclusion of an international agreement binding upon the EU, to the effect that such an agreement is, by reason either of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaties could not fail to provoke, not only in the internal EU context, but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries (see Opinions 3/94, EU:C:1995:436, paragraph 17, and 1/09, EU:C:2011:123, paragraph 48).

147. In order to enable the Court of Justice to rule on the compatibility of the provisions of an envisaged agreement with the rules of the Treaties, the Court must have sufficient information on the actual content of that agreement (see Opinions 2/94, EU:C:1996:140, paragraphs 20 to 22, and 1/09, EU:C:2011:123, paragraph 49).

148. In this instance, the Commission has submitted to the Court of Justice the draft accession instruments on which the negotiators have already reached agreement in principle. All those instruments together constitute a sufficiently comprehensive and precise framework for the arrangements in accordance with which the envisaged accession should take place, and thus enable the Court to assess the compatibility of those drafts with the Treaties.

149. By contrast, since the internal rules have not yet been adopted, their content is merely hypothetical, and, in any event, the fact that they constitute internal EU law precludes them from forming the subject-matter of the present Opinion procedure, which can only relate to international agreements which the EU is proposing to conclude.

150. Moreover, the review which the Court of Justice is called upon to carry out in the context of the Opinion procedure, and which can take place regardless of the future content of the internal rules that will have to be adopted, is closely circumscribed by the Treaties; therefore, if it is not to encroach on the competences of the other institutions responsible for drawing up the internal rules necessary in order to make the accession agreement operational, the Court must confine itself to examining the compatibility of that agreement with the Treaties and satisfy itself not only that it does not infringe any provision of primary law but also that it contains every provision that primary law may require.

151. It follows from this that the assessments relating to those internal rules put forward both by the Commission and by the Member States and the other institutions that have submitted observations to the Court are irrelevant to the examination of the present request for an Opinion and, consequently, do not call into question the admissibility of that request.

152. Accordingly, the present request for an Opinion is admissible.

B – *Substance*

1. Preliminary considerations

153. Before any analysis of the Commission's request can be undertaken, it must be noted as a preliminary point that, unlike the position under Community law in force when the Court delivered Opinion 2/94 (EU:C:1996:140), the accession of the EU to the ECHR has, since the entry into force of the Treaty of Lisbon, had a specific legal basis in the form of Article 6 TEU.

154. That accession would, however, still be characterised by significant distinctive features.

155. Ever since the adoption of the ECHR, it has only been possible for State entities to be parties to it, which explains why, to date, it has been binding only on States. This is also confirmed by the fact that, to enable the accession of the EU to proceed, not only has Article 59 of the ECHR been amended, but the agreement envisaged itself contains a series of amendments of the ECHR that are to make accession operational within the system established by the ECHR itself.

156. Those amendments are warranted precisely because, unlike any other Contracting Party, the EU is, under international law, precluded by its very nature from being considered a State.

157. As the Court of Justice has repeatedly held, the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals (see, in particular, judgments in *van Gend & Loos*, 26/62, EU:C:1963:1, p. 12, and *Costa*, 6/64, EU:C:1964:66, p. 593, and Opinion 1/09, EU:C:2011:123, paragraph 65).

158. The fact that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, has consequences as regards the procedure for and conditions of accession to the ECHR.

159. It is precisely in order to ensure that that situation is taken into account that the Treaties make accession subject to compliance with various conditions.

160. Thus, first of all, having provided that the EU is to accede to the ECHR, Article 6(2) TEU makes clear at the outset, in the second sentence, that '[s]uch accession shall not affect the Union's competences as defined in the Treaties'.

161. Next, Protocol No 8 EU, which has the same legal value as the Treaties, provides in particular that the accession agreement is to make provision for preserving the specific characteristics of the EU and EU law and ensure that accession does not affect the competences of the EU or the powers of its institutions, or the situation of Member States in relation to the ECHR, or indeed Article 344 TFEU.

162. Lastly, by the Declaration on Article 6(2) of the Treaty on European Union, the Intergovernmental Conference which adopted the Treaty of Lisbon agreed that accession must be arranged in such a way as to preserve the specific features of EU law.

163. In performing the task conferred on it by the first subparagraph of Article 19(1) TEU, the Court of Justice must review, in the light, in particular, of those provisions, whether the legal arrangements proposed in respect of the EU's accession to the ECHR are in conformity with the requirements laid down and, more generally, with the basic constitutional charter, the Treaties (judgment in *Les Verts* v *Parliament*, 294/83, EU:C:1986:166, paragraph 23).

164. For the purposes of that review, it must be noted that, as is apparent from paragraphs 160 to 162 above, the conditions to which accession is subject under the Treaties are intended, particularly, to ensure that accession does not affect the specific characteristics of the EU and EU law.

165. It should be borne in mind that these characteristics include those relating to the constitutional structure of the EU, which is seen in the principle of conferral of powers referred to in Articles 4(1) TEU and 5(1) and (2) TEU, and in the institutional framework established in Articles 13 TEU to 19 TEU.

166. To these must be added the specific characteristics arising from the very nature of EU law. In particular, as the Court of Justice has noted many times, EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States (see, to that effect, judgments in *Costa*, EU:C:1964:66, p. 594, and *Internationale Handelsgesellschaft*, EU:C:1970:114, paragraph 3; Opinions 1/91, EU:C:1991:490, paragraph 21, and 1/09, EU:C:2011:123, paragraph 65; and judgment in *Melloni*, C-399/11, EU:C:2013:107, paragraph 59), and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves (judgment in *van Gend & Loos*, EU:C:1963:1, p. 12, and Opinion 1/09, EU:C:2011:123, paragraph 65).

167. These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'.

168. This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.

169. Also at the heart of that legal structure are the fundamental rights recognised by the Charter (which, under Article 6(1) TEU, has the same legal value as the Treaties), respect for those rights being a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU (see judgments in *ERT*, C-260/89, EU:C:1991:254, paragraph 41; *Kremzow*, C-299/95, EU:C:1997:254, paragraph 14; *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 73; and *Kadi and Al Barakaat International Foundation* v *Council and Commission*, EU:C:2008:461, paragraphs 283 and 284).

170. The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU (see, to that effect, judgments in *Internationale Handelsgesellschaft*, EU:C:1970:114, paragraph 4, and *Kadi and Al Barakaat International Foundation* v *Council and Commission*, EU:C:2008:461, paragraphs 281 to 285).

171. As regards the structure of the EU, it must be emphasised that not only are the institutions, bodies, offices and agencies of the EU required to respect the Charter but so too are the Member States when they are implementing EU law (see, to that effect, judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 17 to 21).

172. The pursuit of the EU's objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute — each within its specific field and with its own particular characteristics — to the implementation of the process of integration that is the *raison d'être* of the EU itself.

173. Similarly, the Member States are obliged, by reason, inter alia, of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In addition, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU (Opinion 1/09, EU:C:2011:123, paragraph 68 and the case-law cited).

174. In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law.

175. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law (Opinion 1/09, EU:C:2011:123, paragraph 68 and the case-law cited).

176. In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law (see, to that effect, judgment in *van Gend & Loos*, EU:C:1963:1, p. 12), thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see, to that effect, Opinion 1/09, EU:C:2011:123, paragraphs 67 and 83).

177. Fundamental rights, as recognised in particular by the Charter, must therefore be interpreted and applied within the EU in accordance with the constitutional framework referred to in paragraphs 155 to 176 above.

2. The compatibility of the agreement envisaged with EU primary law

178. In order to take a position on the Commission's request for an Opinion, it is important (i) to ascertain whether the agreement envisaged is liable adversely to affect the specific characteristics of EU law just outlined and, as the Commission itself has emphasised, the autonomy of EU law in the interpretation and application of fundamental rights, as recognised by EU law and notably by the Charter, and (ii) to consider whether the institutional and procedural machinery envisaged by that agreement ensures that the conditions in the Treaties for the EU's accession to the ECHR are complied with.

a) The specific characteristics and the autonomy of EU law

179. It must be borne in mind that, in accordance with Article 6(3) TEU, fundamental rights, as guaranteed by the ECHR, constitute general principles of the EU's law. However, as the EU has not acceded to the ECHR, the latter does not constitute a legal instrument which has been formally incorporated into the legal order of the EU (see, to

that effect, judgments in *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 60, and *Åkerberg Fransson*, EU:C:2013:105, paragraph 44).

180. By contrast, as a result of the EU's accession the ECHR, like any other international agreement concluded by the EU, would, by virtue of Article 216(2) TFEU, be binding upon the institutions of the EU and on its Member States, and would therefore form an integral part of EU law (judgment in *Haegeman*, 181/73, EU:C:1974:41, paragraph 5; Opinion 1/91, EU:C:1991:490, paragraph 37; judgments in *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 36, and *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 73).

181. Accordingly, the EU, like any other Contracting Party, would be subject to external control to ensure the observance of the rights and freedoms the EU would undertake to respect in accordance with Article 1 of the ECHR. In that context, the EU and its institutions, including the Court of Justice, would be subject to the control mechanisms provided for by the ECHR and, in particular, to the decisions and the judgments of the ECtHR.

182. The Court of Justice has admittedly already stated in that regard that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law; that is particularly the case where, as in this instance, the conclusion of such an agreement is provided for by the Treaties themselves. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions (see Opinions 1/91, EU:C:1991:490, paragraphs 40 and 70, and 1/09, EU:C:2011:123, paragraph 74).

183. Nevertheless, the Court of Justice has also declared that an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order (see Opinions 1/00, EU:C:2002:231, paragraphs 21, 23 and 26, and 1/09, EU:C:2011:123, paragraph 76; see also, to that effect, judgment in *Kadi and Al Barakaat International Foundation* v *Council and Commission*, EU:C:2008:461, paragraph 282).

184. In particular, any action by the bodies given decision-making powers by the ECHR, as provided for in the agreement envisaged, must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law (see Opinions 1/91, EU:C:1991:490, paragraphs 30 to 35, and 1/00, EU:C:2002:231, paragraph 13).

185. It is admittedly inherent in the very concept of external control that, on the one hand, the interpretation of the ECHR provided by the ECtHR would, under international law, be binding on the EU and its institutions, including the Court of Justice, and that, on the other, the interpretation by the Court of Justice of a right recognised by the ECHR would not be binding on the control mechanisms provided for by the ECHR, particularly the ECtHR, as Article 3(6) of the draft agreement provides and as is stated in paragraph 68 of the draft explanatory report.

186. The same would not apply, however, with regard to the interpretation by the Court of Justice of EU law, including the Charter. In particular, it should not be possible for the ECtHR to call into question the Court's findings in relation to the scope *ratione materiae* of EU law, for the purposes, in particular, of determining whether a Member State is bound by fundamental rights of the EU.

187. In that regard, it must be borne in mind, in the first place, that Article 53 of the Charter provides that nothing therein is to be interpreted as restricting or adversely affecting fundamental rights as recognised, in their respective fields of application, by EU law and international law and by international agreements to which the EU or all the Member States are party, including the ECHR, and by the Member States' constitutions.

188. The Court of Justice has interpreted that provision as meaning that the application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law (judgment in *Melloni*, EU:C:2013:107, paragraph 60).

189. In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should

be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited — with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR — to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.

190. However, there is no provision in the agreement envisaged to ensure such coordination.

191. In the second place, it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see, to that effect, judgments in *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78 to 80, and *Melloni*, EU:C:2013:107, paragraphs 37 and 63).

192. Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.

193. The approach adopted in the agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law.

194. In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.

195. However, the agreement envisaged contains no provision to prevent such a development.

196. In the third place, it must be pointed out that Protocol No 16 permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto, even though EU law requires those same courts or tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU.

197. It is indeed the case that the agreement envisaged does not provide for the accession of the EU as such to Protocol No 16 and that the latter was signed on 2 October 2013, that is to say, after the agreement reached by the negotiators in relation to the draft accession instruments, namely on 5 April 2013; nevertheless, since the ECHR would form an integral part of EU law, the mechanism established by that protocol could — notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR — affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU.

198. In particular, it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, as has been noted in paragraph 176 of this Opinion, is the keystone of the judicial system established by the Treaties.

199. By failing to make any provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU, the agreement envisaged is liable adversely to affect the autonomy and effectiveness of the latter procedure.

200. Having regard to the foregoing, it must be held that the accession of the EU to the ECHR as envisaged by the draft agreement is liable adversely to affect the specific characteristics of EU law and its autonomy.

b) Article 344 TFEU

201. The Court has consistently held that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is notably enshrined in Article 344 TFEU, according to which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein (see, to that effect, Opinions 1/91, EU:C:1991:490, paragraph 35, and 1/00, EU:C:2002:231, paragraphs 11 and 12; judgments in *Commission* v *Ireland*, C-459/03, EU:C:2006:345, paragraphs 123 and 136, and *Kadi and Al Barakaat International Foundation* v *Council and Commission*, EU:C:2008:461, paragraph 282).

202. Furthermore, the obligation of Member States to have recourse to the procedures for settling disputes established by EU law — and, in particular, to respect the jurisdiction of the Court of Justice, which is a fundamental feature of the EU system — must be understood as a specific expression of Member States' more general duty of loyalty resulting from Article 4(3) TEU (see, to that effect, judgment in *Commission* v *Ireland*, EU:C:2006:345, paragraph 169), it being understood that, under that provision, the obligation is equally applicable to relations between Member States and the EU.

203. It is precisely in view of these considerations that Article 3 of Protocol No 8 EU expressly provides that the accession agreement must not affect Article 344 TFEU.

204. However, as explained in paragraph 180 of this Opinion, as a result of accession, the ECHR would form an integral part of EU law. Consequently, where EU law is at issue, the Court of Justice has exclusive jurisdiction in any dispute between the Member States and between those Member States and the EU regarding compliance with the ECHR.

205. Unlike the international convention at issue in the case giving rise to the judgment in *Commission* v *Ireland* (EU:C:2006:345, paragraphs 124 and 125), which expressly provided that the system for the resolution of disputes set out in EU law must in principle take precedence over that established by that convention, the procedure for the resolution of disputes provided for in Article 33 of the ECHR could apply to any Contracting Party and, therefore, also to disputes between the Member States, or between those Member States and the EU, even though it is EU law that is in issue.

206. In that regard, contrary to what is maintained in some of the observations submitted to the Court of Justice in the present procedure, the fact that Article 5 of the draft agreement provides that proceedings before the Court of Justice are not to be regarded as a means of dispute settlement which the Contracting Parties have agreed to forgo in accordance with Article 55 of the ECHR is not sufficient to preserve the exclusive jurisdiction of the Court of Justice.

207. Article 5 of the draft agreement merely reduces the scope of the obligation laid down by Article 55 of the ECHR, but still allows for the possibility that the EU or Member States might submit an application to the ECtHR, under Article 33 of the ECHR, concerning an alleged violation thereof by a Member State or the EU, respectively, in conjunction with EU law.

208. The very existence of such a possibility undermines the requirement set out in Article 344 TFEU.

209. This is particularly so since, if the EU or Member States did in fact have to bring a dispute between them before the ECtHR, the latter would, pursuant to Article 33 of the ECHR, find itself seised of such a dispute.

210. Contrary to the provisions of the Treaties governing the EU's various internal judicial procedures, which have objectives peculiar to them, Article 344 TFEU is specifically intended to preserve the exclusive nature of

the procedure for settling those disputes within the EU, and in particular of the jurisdiction of the Court of Justice in that respect, and thus precludes any prior or subsequent external control.

211. Moreover, Article 1(b) of Protocol No 8 EU itself refers only to the mechanisms necessary to ensure that proceedings brought before the ECtHR by non-Member States are correctly addressed to Member States and/or to the EU as appropriate.

212. Consequently, the fact that Member States or the EU are able to submit an application to the ECtHR is liable in itself to undermine the objective of Article 344 TFEU and, moreover, goes against the very nature of EU law, which, as noted in paragraph 193 of this Opinion, requires that relations between the Member States be governed by EU law to the exclusion, if EU law so requires, of any other law.

213. In those circumstances, only the express exclusion of the ECtHR's jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU in relation to the application of the ECHR within the scope *ratione materiae* of EU law would be compatible with Article 344 TFEU.

214. In the light of the foregoing, it must be held that the agreement envisaged is liable to affect Article 344 TFEU.

c) The co-respondent mechanism

215. The co-respondent mechanism has been introduced, as is apparent from paragraph 39 of the draft explanatory report, in order to 'avoid gaps in participation, accountability and enforceability in the [ECHR] system', gaps which, owing to the specific characteristics of the EU, might result from its accession to the ECHR.

216. In addition, that mechanism also has the aim of ensuring that, in accordance with the requirements of Article 1(b) of Protocol No 8 EU, proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate.

217. However, those objectives must be pursued in such a way as to be compatible with the requirement of ensuring that the specific characteristics of EU law are preserved, as required by Article 1 of that protocol.

218. Yet, first, Article 3(5) of the draft agreement provides that a Contracting Party is to become a co-respondent either by accepting an invitation from the ECtHR or by decision of the ECtHR upon the request of that Contracting Party.

219. When the ECtHR invites a Contracting Party to become co-respondent, that invitation is not binding, as is expressly stated in paragraph 53 of the draft explanatory report.

220. This lack of compulsion reflects not only, as paragraph 53 of the draft explanatory report indicates, the fact that the initial application has not been brought against the potential co-respondent and that no Contracting Party can be forced to become a party to a case where it was not named in the application initiating proceedings, but also, above all, the fact that the EU and Member States must remain free to assess whether the material conditions for applying the co-respondent mechanism are met.

221. Given that those conditions result, in essence, from the rules of EU law concerning the division of powers between the EU and its Member States and the criteria governing the attributability of an act or omission that may constitute a violation of the ECHR, the decision as to whether those conditions are met in a particular case necessarily presupposes an assessment of EU law.

222. While the draft agreement duly takes those considerations into account as regards the procedure in accordance with which the ECHR may invite a Contracting Party to become co-respondent, the same cannot be said in the case of a request to that effect from a Contracting Party.

223. As Article 3(5) of the draft agreement provides, if the EU or Member States request leave to intervene as co-respondents in a case before the ECtHR, they must give reasons from which it can be established that the conditions for their participation in the procedure are met, and the ECtHR is to decide on that request in the light of the plausibility of those reasons.

224. Admittedly, in carrying out such a review, the ECtHR is to ascertain whether, in the light of those reasons, it is plausible that the conditions set out in paragraphs 2 and 3 of Article 3 are met, and that review does not relate to the merits of those reasons. However, the fact remains that, in carrying out that review, the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member States and on the EU.

225. Such a review would be liable to interfere with the division of powers between the EU and its Member States.

226. Secondly, Article 3(7) of the draft agreement provides that if the violation in respect of which a Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent are to be jointly responsible for that violation.

227. That provision does not preclude a Member State from being held responsible, together with the EU, for the violation of a provision of the ECHR in respect of which that Member State may have made a reservation in accordance with Article 57 of the ECHR.

228. Such a consequence of Article 3(7) of the draft agreement is at odds with Article 2 of Protocol No 8 EU, according to which the accession agreement is to ensure that nothing therein affects the situation of Member States in relation to the ECHR, in particular in relation to reservations thereto.

229. Thirdly, there is provision at the end of Article 3(7) of the draft agreement for an exception to the general rule that the respondent and co-respondent are to be jointly responsible for a violation established. The ECtHR may decide, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, that only one of them is to be held responsible for that violation.

230. A decision on the apportionment as between the EU and its Member States of responsibility for an act or omission constituting a violation of the ECHR established by the ECtHR is also one that is based on an assessment of the rules of EU law governing the division of powers between the EU and its Member States and the attributability of that act or omission.

231. Accordingly, to permit the ECtHR to adopt such a decision would also risk adversely affecting the division of powers between the EU and its Member States.

232. That conclusion is not affected by the fact that the ECtHR would have to give its decision solely on the basis of the reasons given by the respondent and the co-respondent.

233. Contrary to the submissions of some of the Member States that participated in the present procedure and of the Commission, it is not clear from reading Article 3(7) of the draft agreement and paragraph 62 of the draft explanatory report that the reasons to be given by the respondent and co-respondent must be given by them jointly.

234. In any event, even it is assumed that a request for the apportionment of responsibility is based on an agreement between the co-respondent and the respondent, that in itself would not be sufficient to rule out any adverse effect on the autonomy of EU law. The question of the apportionment of responsibility must be resolved solely in accordance with the relevant rules of EU law and be subject to review, if necessary, by the Court of Justice, which has exclusive jurisdiction to ensure that any agreement between co-respondent and respondent respects those rules. To permit the ECtHR to confirm any agreement that may exist between the EU and its Member States on the sharing of responsibility would be tantamount to allowing it to take the place of the Court of Justice in order to settle a question that falls within the latter's exclusive jurisdiction.

235. Having regard to the foregoing, it must be held that the arrangements for the operation of the co-respondent mechanism laid down by the agreement envisaged do not ensure that the specific characteristics of the EU and EU law are preserved.

d) The procedure for the prior involvement of the Court of Justice

236. It is true that the necessity for the procedure for the prior involvement of the Court of Justice is, as paragraph 65 of the draft explanatory report shows, linked to respect for the subsidiary nature of the control mechanism established by the ECHR, as referred to in paragraph 19 of this Opinion. Nevertheless, it should equally be noted that that procedure is also necessary for the purpose of ensuring the proper functioning of the judicial system of the EU.

237. In that context, the necessity for the prior involvement of the Court of Justice in a case brought before the ECtHR in which EU law is at issue satisfies the requirement that the competences of the EU and the powers of its institutions, notably the Court of Justice, be preserved, as required by Article 2 of Protocol No 8 EU.

238. Accordingly, to that end it is necessary, in the first place, for the question whether the Court of Justice has already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR to be resolved only by the competent EU institution, whose decision should bind the ECtHR.

239. To permit the ECtHR to rule on such a question would be tantamount to conferring on it jurisdiction to interpret the case-law of the Court of Justice.

240. Yet neither Article 3(6) of the draft agreement nor paragraphs 65 and 66 of the draft explanatory report contain anything to suggest that that possibility is excluded.

241. Consequently, the prior involvement procedure should be set up in such a way as to ensure that, in any case pending before the ECtHR, the EU is fully and systematically informed, so that the competent EU institution is able to assess whether the Court of Justice has already given a ruling on the question at issue in that case and, if it has not, to arrange for the prior involvement procedure to be initiated.

242. In the second place, it should be noted that the procedure described in Article 3(6) of the draft agreement is intended to enable the Court of Justice to examine the compatibility of the provision of EU law concerned with the relevant rights guaranteed by the ECHR or by the protocols to which the EU may have acceded. Paragraph 66 of the draft explanatory report explains that the words '[a]ssessing the compatibility of the provision' mean, in essence, to rule on the validity of a legal provision contained in secondary law or on the interpretation of a provision of primary law.

243. It follows from this that the agreement envisaged excludes the possibility of bringing a matter before the Court of Justice in order for it to rule on a question of interpretation of secondary law by means of the prior involvement procedure.

244. However, it must be noted that, just as the prior interpretation of primary law is necessary in order for the Court of Justice to be able to rule on whether that law is consistent with the EU's commitments resulting from its accession to the ECHR, it should be possible for secondary law to be subject to such interpretation for the same purpose.

245. The interpretation of a provision of EU law, including of secondary law, requires, in principle, a decision of the Court of Justice where that provision is open to more than one plausible interpretation.

246. If the Court of Justice were not allowed to provide the definitive interpretation of secondary law, and if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law.

247. Accordingly, limiting the scope of the prior involvement procedure, in the case of secondary law, solely to questions of validity adversely affects the competences of the EU and the powers of the Court of Justice in that it does not allow the Court to provide a definitive interpretation of secondary law in the light of the rights guaranteed by the ECHR.

248. Having regard to the foregoing, it must be held that the arrangements for the operation of the procedure for the prior involvement of the Court of Justice provided for by the agreement envisaged do not enable the specific characteristics of the EU and EU law to be preserved.

e) The specific characteristics of EU law as regards judicial review in CFSP matters

249. It is evident from the second subparagraph of Article 24(1) TEU that, as regards the provisions of the Treaties that govern the CFSP, the Court of Justice has jurisdiction only to monitor compliance with Article 40 TEU and to review the legality of certain decisions as provided for by the second paragraph of Article 275 TFEU.

250. According to the latter provision, the Court of Justice is to have jurisdiction, in particular, to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty.

251. Notwithstanding the Commission's systematic interpretation of those provisions in its request for an Opinion — with which some of the Member States that submitted observations to the Court have taken issue — essentially seeking to define the scope of the Court's judicial review in this area as being sufficiently broad to encompass any situation that could be covered by an application to the ECtHR, it must be noted that the Court has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions.

252. However, for the purpose of adopting a position on the present request for an Opinion, it is sufficient to declare that, as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice.

253. That situation is inherent to the way in which the Court's powers are structured by the Treaties, and, as such, can only be explained by reference to EU law alone.

254. Nevertheless, on the basis of accession as provided for by the agreement envisaged, the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights.

255. Such a situation would effectively entrust the judicial review of those acts, actions or omissions on the part of the EU exclusively to a non-EU body, albeit that any such review would be limited to compliance with the rights guaranteed by the ECHR.

256. The Court has already had occasion to find that jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU (see, to that effect, Opinion 1/09, EU:C:2011:123, paragraphs 78, 80 and 89).

257. Therefore, although that is a consequence of the way in which the Court's powers are structured at present, the fact remains that the agreement envisaged fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters.

258. In the light of all the foregoing considerations, it must be held that the agreement envisaged is not compatible with Article 6(2) TEU or with Protocol No 8 EU in that:

– it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU;

– it is liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope *ratione materiae* of EU law being brought before the ECtHR;

– it does not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice that enable the specific characteristics of the EU and EU law to be preserved; and

– it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body.

Consequently, the Court (Full Court) gives the following Opinion:

**The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.**

## Case C-42/17, Criminal proceedings against M.A.S. and M.B. (Taricco II)

In Case C-42/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte costituzionale (Constitutional Court, Italy), made by decision of 23 November 2016, received at the Court on 26 January 2017, in the criminal proceedings against

**M.A.S.,**

**M.B.**

intervener:

**Presidente del Consiglio dei Ministri,**

THE COURT (Grand Chamber),

[…]

after hearing the Opinion of the Advocate General at the sitting on 18 July 2017,

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 325(1) and (2) TFEU as interpreted by the judgment of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555) ('the *Taricco* judgment').

2 The request has been made in criminal proceedings against M.A.S. and M.B. for infringements relating to value added tax (VAT).

**Legal context**

**EU law**

3 Article 325(1) and (2) TFEU provides:

'1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.

2. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.'

**Italian law**

4 Article 25 of the Constitution provides:

'No one may be diverted from the ordinary court established by law.

No one may be punished except under a law already in force before the act was committed.

No one may be subjected to preventive measures except in cases provided for by law.'

5 Article 157 of the Codice penale (Criminal Code), as amended by Legge n. 251 (Law No 251) of 5 December 2005 (GURI No 285, 7 December 2005), ('the Criminal Code') provides:

'Prosecution of an offence shall be time-barred after a period equal to the maximum duration of the penalty laid down by law for the offence itself, and in any event a period not less than six years in the case of a serious offence and four years in the case of another offence, even where they are punishable only by a fine.

…'

6 Article 160 of the Criminal Code provides:

'The limitation period shall be interrupted by the judgment or order of conviction.

An order applying personal protective measures … and an order fixing the preliminary hearing … shall also interrupt the limitation period.

If it is interrupted, the limitation period shall start to run anew from the day of the interruption. If there is more than one interruption, the limitation period shall run from the last of them; however, the periods laid down in Article 157 may not in any case be extended beyond the periods referred to in the second paragraph of Article 161, with the exception of the offences referred to in Article 51(3 *bis*) and (3 *quater*) of the Code of Criminal Procedure.'

7 In accordance with the second paragraph of Article 161 of the Criminal Code:

'With the exception of the prosecution of offences referred to in Article 51(3 *bis*) and (3 *quater*) of the Code of Criminal Procedure, an interruption of the limitation period may not in any case lead to an extension of the period by more than one quarter of the maximum prescribed period …'

8 Under Article 2 of Decreto legislativo n. 74, nuova disciplina dei reati in materia di imposte sui redditi e sul valore aggiunto (Legislative Decree No 74 on new rules on offences relating to income tax and value added tax) of 10 March 2000 (GURI No 76, 31 March 2000, 'Decree No 74/2000'), the submission of a fraudulent VAT declaration mentioning invoices or other documents relating to non-existent transactions is punishable by a term of imprisonment from one year and six months to six years.

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

9 The Court held in the *Taricco* judgment that the last paragraph of Article 160 in conjunction with Article 161 of the Criminal Code ('the provisions of the Criminal Code at issue'), in so far as they provide that the interruption of criminal proceedings concerning serious fraud in relation to VAT has the effect of extending the limitation period by only a quarter of its initial duration, are liable to have an adverse effect on the fulfilment of the Member States' obligations under Article 325(1) and (2) TFEU if those national rules prevent the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provide for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union. The Court further held that the national court must give full effect to Article 325(1) and (2) TFEU, if need be by disapplying the provisions of national law the effect of which would be to prevent the Member State concerned from fulfilling its obligations under those provisions of the FEU Treaty.

10 The Corte suprema di cassazione (Court of Cassation, Italy) and the Corte d'appello di Milano (Court of Appeal, Milan, Italy), which have referred questions of constitutionality to the Corte costituzionale (Constitutional Court, Italy), are of the view that the rule in that judgment applies to two cases pending before them. Those proceedings concern infringements covered by Decree No 74/2000 which may be classified as serious. Furthermore, prosecution of those infringements would be time-barred if the provisions of the Criminal Code at issue were to be applied, whereas in the opposite case the proceedings could lead to convictions.

11 The Corte d'appello di Milano (Court of Appeal, Milan) doubts that there is compliance with the obligation under Article 325(2) TFEU as regards the proceedings pending before it. The offence of criminal association with a view to smuggling foreign manufactured tobacco, contrary to Article 291 *quater* of Decreto del Presidente della Repubblica n. 43, recante approvazione del testo unico delle disposizioni legislative in materia doganale (Decree of the President of the Republic No 43 approving the single text of the legislative provisions in customs matters) of 23 January 1973 (GURI No 80, 28 March 1973), although comparable to infringements covered by Decree No 74/2000, such as those at issue in the main proceedings, is not subject to the same rules on the maximum length of the limitation period as those infringements.

12 The Corte suprema di cassazione (Court of Cassation) and the Corte d'appello di Milano (Court of Appeal, Milan) therefore consider that, in compliance with the rule stated in the *Taricco* judgment, they should disapply the limitation period laid down in the provisions of the Criminal Code at issue and give judgment on the substance of the cases.

13 The Corte costituzionale (Constitutional Court) expresses doubts as to whether that approach is compatible with the overriding principles of the Italian constitutional order and with observance of the inalienable rights of the individual. In particular, according to that court, that approach is liable to interfere with the principle that offences and penalties must be defined by law, which requires that rules of criminal law are precisely determined and cannot be retroactive.

14 The Corte costituzionale (Constitutional Court) explains that in the Italian legal system the rules on limitation in criminal matters are substantive in character, and consequently fall within the scope of the principle of legality referred to in Article 25 of the Italian Constitution. Those rules must therefore be established by provisions that are precise and are in force at the time when the offence in question was committed.

15 In those circumstances, the Corte costituzionale (Constitutional Court) considers that it is being called on by the national courts concerned to decide whether the rule in the *Taricco* judgment complies with the requirement of 'determination' which, under the Constitution, must characterise substantive criminal law.

16 Consequently, first, it has to be ascertained whether the person concerned could know, at the time when the infringement in question was committed, that EU law requires the national court, where the conditions defined in that judgment are present, to disapply the provisions of the Criminal Code at issue. Moreover, the requirement that the criminal nature of the infringement and the applicable penalties can be determined clearly beforehand by the person committing the offence follows also from the case-law of the European Court of Human Rights on Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR').

17 Second, the referring court finds that the *Taricco* judgment does not give sufficient detail of the factors the national court must take into account in order to establish the 'significant number of cases' on which the application of the rule in that judgment depends, and thus imposes no limits on the discretion of the courts.

18 Moreover, according to the referring court, the *Taricco* judgment does not rule on the compatibility of the rule it sets out with the overriding principles of the Italian constitutional order and expressly leaves that task to the competent national courts. It notes in this respect that, in paragraph 53 of the judgment, it is stated that, if the national court decides to disapply the provisions of the Criminal Code at issue, it must also ensure that the fundamental rights of the persons concerned are respected. It adds that, in paragraph 55 of the judgment, any such disapplication is envisaged as being subject to verification by the national court of compliance with the rights of defendants.

19 Furthermore, the referring court observes that in the *Taricco* judgment the Court ruled on the issue of the compatibility of the rule in that judgment with Article 49 of the Charter of Fundamental Rights of the European Union ('the Charter') with regard only to the principle of non-retroactivity. It says that the Court did not, however, examine the other aspect of the principle that offences and penalties must be defined by law, namely the requirement that the rules on criminal liability must be sufficiently precise. This is, however, a requirement which forms part of the constitutional traditions common to the Member States and is also to be found in the system of protection of the ECHR, thus corresponding to a general principle of EU law. Even if the rules on limitation in criminal matters in the Italian legal system were to be regarded as procedural rules, they would still have to be applied in accordance with precise provisions.

20 In those circumstances, the Corte costituzionale (Constitutional Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is Article 325(1) and (2) TFEU to be interpreted as requiring the criminal court to disapply national legislation on limitation periods which precludes, in a significant number of cases, the punishment of serious fraud affecting the financial interests of the European Union, or which imposes shorter limitation periods for fraud affecting the financial interests of the European Union than for fraud affecting the financial interests of the State, even where there is no sufficiently precise legal basis for such disapplication?

(2) Is Article 325(1) and (2) TFEU to be interpreted as requiring the criminal court to disapply national legislation on limitation periods which precludes, in a significant number of cases, the punishment of serious fraud affecting the financial interests of the European Union, or which imposes shorter limitation periods for fraud affecting the financial interests of the European Union than for fraud affecting the financial interests of the State, even where, in the legal system of the Member State concerned, limitation periods form part of substantive criminal law and are subject to the principle of the legality of criminal proceedings?

(3) Is the [*Taricco* judgment] to be interpreted as requiring the criminal court to disapply national legislation on limitation periods which precludes, in a significant number of cases, the punishment of serious fraud affecting the financial interests of the European Union, or which imposes shorter limitation periods for fraud affecting the financial interests of the European Union than for fraud affecting the financial interests of the State, even where such disapplication is at variance with the overriding principles of the constitution of the Member State concerned or with the inalienable rights of the individual conferred by the constitution of the Member State?’

21 By order of 28 February 2017, *M.A.S. and M.B.* (C-42/17, not published, EU:C:2017:168), the President of the Court allowed the referring court’s request that the present case be dealt with under the accelerated procedure in accordance with Article 23a of the Statute of the Court of Justice of the European Union and Article 105(1) of the Rules of Procedure of the Court.

**Consideration of the questions referred**

**Preliminary observations**

22 The preliminary ruling procedure provided for in Article 267 TFEU sets up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, with the object of securing uniform interpretation of EU law and ensuring its consistency, its full effect and its autonomy (see, to that effect, Opinion 2/13 (Accession of the EU to the ECHR), of 18 December 2014, EU:C:2014:2454, paragraph 176).

23 The procedure provided for by Article 267 TFEU thus functions as an instrument of cooperation between the Court of Justice and national courts and tribunals, by means of which the former provides the latter with the points of interpretation of EU law which they need in order to decide the disputes before them (see, to that effect, judgment of 5 July 2016, *Ognyanov*, C-614/14, EU:C:2016:514, paragraph 16).

24 It should be noted here that the Court, when answering questions referred for a preliminary ruling, must take account, under the division of jurisdiction between the EU judicature and the national courts and tribunals, of the factual and legislative context of the questions as described in the order for reference (judgment of 26 October 2017, *Argenta Spaarbank*, C-39/16, EU:C:2017:813, paragraph 38).

25 In the proceedings in which the *Taricco* judgment was delivered, the Tribunale di Cuneo (District Court, Cuneo, Italy) put questions to the Court on the interpretation of Articles 101, 107 and 119 TFEU and Article 158 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

26 In the *Taricco* judgment the Court nonetheless found it necessary, for the purposes of the criminal proceedings pending in that Italian court, to provide it with an interpretation of Article 325(1) and (2) TFEU.

27 In the main proceedings, the Corte costituzionale (Constitutional Court) raises the question of a possible breach of the principle that offences and penalties must be defined by law which might follow from the obligation

stated in the *Taricco* judgment to disapply the provisions of the Criminal Code at issue, having regard, first, to the substantive nature of the limitation rules in the Italian legal system, which means that those rules must be reasonably foreseeable by individuals at the time when the alleged offences are committed and cannot be retroactively altered *in peius*, and, second, to the requirement that any national rules on criminal liabilitymust be founded on a legal basis that is precise enough to delimit and guide the national court's assessment.

28 It is therefore for the Court, in the light of the questions raised by the referring court with regard to that principle, which were not drawn to its attention in the case in which the *Taricco* judgment was given, to clarify the interpretation of Article 325(1) and (2) TFEU in that judgment.

**Questions 1 and 2**

29 By its first and second questions, which should be considered together, the referring court essentially asks whether Article 325(1) and (2) TFEU must be interpreted as requiring the national court, in criminal proceedings for infringements relating to VAT, to disapply national provisions on limitation, forming part of national substantive law, which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the Union, or which lay down shorter limitation periods for cases of fraud affecting those interests than for those affecting the financial interests of the Member State concerned, including where compliance with that obligation would entail a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of that law.

30 It must be recalled that Article 325(1) and (2) TFEU requires the Member States to counter illegal activities affecting the financial interests of the Union through effective and deterrent measures, and to take the same measures to counter fraud affecting the financial interests of the Union as they take to combat fraud affecting their own financial interests.

31 Since the European Union's own resources, by virtue of Council Decision 2014/335/EU, Euratom of 26 May 2014 on the system of own resources of the European Union (OJ 2014 L 168, p. 105), include revenue from the application of a uniform rate to the harmonised VAT assessment bases determined in accordance with EU rules, there is a direct link between the collection of VAT revenue in compliance with the EU law applicable and the availability to the EU budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second (see, to that effect, judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 26, and the *Taricco* judgment, paragraph 38).

32 It is for the Member States to ensure effective collection of the Union's own resources (see, to that effect, judgment of 7 April 2016, *Degano Trasporti*, C-546/14, EU:C:2016:206, paragraph 21). On that basis, they are obliged to collect sums corresponding to the own resources which, because of fraud, have been withheld from the EU budget.

33 To ensure that all VAT revenue is collected, and thereby that the financial interests of the EU are protected, the Member States are free to choose the applicable penalties, which may take the form of administrative penalties, criminal penalties or a combination of the two (see, to that effect, judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 34, and the *Taricco* judgment, paragraph 39).

34 It should be observed, however, first, that criminal penalties may be essential to combat certain cases of serious VAT fraud in an effective and deterrent manner (see, to that effect, the *Taricco* judgment, paragraph 39).

35 Thus the Member States, if they are not to disregard their obligations under Article 325(1) and (2) TFEU, must ensure that, in cases of serious fraud affecting the EU's financial interests in relation to VAT, criminal penalties that are effective and deterrent are adopted (see, to that effect, the *Taricco* judgment, paragraphs 42 and 43).

36 Consequently, it must be considered that Member States are in breach of their obligations under Article 325(1) and (2) TFEU if the criminal penalties adopted to punish serious VAT fraud do not enable the collection in full of VAT to be guaranteed effectively. The Member States must also ensure that the limitation rules laid down by national law allow effective punishment of infringements linked to such fraud.

37 Second, in accordance with Article 325(2) TFEU, Member States must take the same measures to counter fraud affecting the financial interests of the Union, in particular in relation to VAT, as they take to counter fraud affecting their own financial interests.

38 As regards the consequences of the possible incompatibility of national legislation with Article 325(1) and (2) TFEU, it follows from the Court's case-law that that article imposes on the Member States precise obligations as to the result to be achieved, which are not subject to any condition regarding the application of the rules which they lay down (see, to that effect, the *Taricco* judgment, paragraph 51).

39 It is therefore for the competent national courts to give full effect to the obligations under Article 325(1) and (2) TFEU and to disapply national provisions, including rules on limitation, which, in connection with proceedings concerning serious VAT infringements, prevent the application of effective and deterrent penalties to counter fraud affecting the financial interests of the Union (see, to that effect, the *Taricco* judgment, paragraphs 49 and 58).

40 It should be recalled that in paragraph 58 of the *Taricco* judgment the national provisions at issue were regarded as liable to have an adverse effect on the fulfilment of the obligations of the Member State concerned under Article 325(1) and (2) TFEU if they prevented the imposition of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the Union, or provided for shorter limitation periods for cases of fraud affecting those interests than for those affecting the financial interests of that Member State.

41 It is primarily for the national legislature to lay down rules on limitation that enable compliance with the obligations under Article 325 TFEU, in the light of the considerations set out by the Court in paragraph 58 of the *Taricco* judgment. It is that legislature's task to ensure that the national rules on limitation in criminal matters do not lead to impunity in a significant number of cases of serious VAT fraud, or are more severe for accused persons in cases of fraud affecting the financial interests of the Member State concerned than in those affecting the financial interests of the European Union.

42 It should be recalled here that an extension of a limitation period by the national legislature and its immediate application, including to alleged offences that are not yet time-barred, do not, in principle, infringe the principle that offences and penalties must be defined by law (see, to that effect, the *Taricco* judgment, paragraph 57, and the case-law of the European Court of Human Rights cited in that paragraph).

43 That being so, it should be added that the protection of the financial interests of the Union by the enactment of criminal penalties falls within the shared competence of the Union and the Member States within the meaning of Article 4(2) TFEU.

44 In the present case, at the material time for the main proceedings, the limitation rules applicable to criminal proceedings relating to VAT had not been harmonised by the EU legislature, and harmonisation has since taken place only to a partial extent by the adoption of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (OJ 2017 L 198, p. 29).

45 The Italian Republic was thus, at that time, free to provide that in its legal system those rules, like the rules on the definition of offences and the determination of penalties, form part of substantive criminal law, and are thereby, like those rules, subject to the principle that offences and penalties must be defined by law.

46 The competent national courts, for their part, when they have to decide in proceedings before them to disapply the provision of the Criminal Code at issue, are required to ensure that the fundamental rights of persons accused of committing criminal offences are observed (see, to that effect, judgment in *Taricco*, paragraph 53).

47 In that respect, the national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised (judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 29 and the case-law cited).

48 In particular, where the imposition of criminal penalties is concerned, the competent national courts must ensure that the rights of defendants flowing from the principle that offences and penalties must be defined by law are guaranteed.

49 According to the referring court, those rights would not be observed if the provisions of the Criminal Code at issue were disapplied in the proceedings pending before it, in so far as, first, the persons concerned could not reasonably foresee before the delivery of the *Taricco* judgment that that Article 325 TFEU requires the national court to disapply those provisions in the circumstances set out in that judgment.

50 Second, according to the referring court, the national court would not be able to define the particular circumstances in which it would have to disapply those provisions, namely where they prevent the imposition of effective and deterrent penalties in a significant number of cases of serious fraud, without exceeding the limits imposed on its discretion by the principle that offences and penalties must be defined by law.

51 In this respect, the importance given, both in the EU legal order and in national legal systems, to the principle that offences and penalties must be defined by law, as to its requirements concerning the foreseeability, precision and non-retroactivity of the criminal law applicable, must be recalled.

52 That principle, as enshrined in Article 49 of the Charter, must be observed by the Member States when they implement EU law, in accordance with Article 51(1) of the Charter, which is the case where, in the context of their obligations under Article 325 TFEU, they provide for the application of criminal penalties for infringements relating to VAT. The obligation to ensure the effective collection of the Union's resources cannot therefore run counter to that principle (see, by analogy, judgment of 29 March 2012, *Belvedere Costruzioni*, C-500/10, EU:C:2012:186, paragraph 23).

53 Moreover, the principle that offences and penalties must be defined by law forms part of the constitutional traditions common to the Member States (see, with reference to the principle of non-retroactivity of the criminal law, judgments of 13 November 1990, *Fedesa and Others*, C-331/88, EU:C:1990:391, paragraph 42, and of 7 January 2004, *X*, C-60/02, EU:C:2004:10, paragraph 63) and has been enshrined in various international treaties, in particular in Article 7(1) of the ECHR (see, to that effect, judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, EU:C:2007:261, paragraph 49).

54 It may be seen from the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) that, in accordance with Article 52(3) of the Charter, the right guaranteed in Article 49 has the same meaning and scope as the right guaranteed by the ECHR.

55 As to the requirements that follow from the principle that offences and penalties must be defined by law, it must be observed, in the first place, that the European Court of Human Rights has held in relation to Article 7(1) of the ECHR that, under that principle, provisions of criminal law must comply with certain requirements of accessibility and foreseeability, as regards both the definition of the offence and the determination of the penalty (see ECtHR, 15 November 1996, *Cantoni v. France*, CE:ECHR:1996:1115JUD001786291, § 29; ECtHR, 7 February 2002, *E.K. v. Turkey*, CE:ECHR:2002:0207JUD002849695, § 51; ECtHR, 29 March 2006, *Achour v. France*, CE:ECHR:2006:0329JUD006733501, § 41; and ECtHR, 20 September 2011, *OAO Neftyanaya Kompaniya Yukos v. Russia*, CE:ECHR:2011:0920JUD001490204, §§ 567 to 570).

56 In the second place, the requirement that the applicable law must be precise, which is inherent in that principle, means that the law must clearly define offences and the penalties which they attract. That condition is met where the individual is in a position, on the basis of the wording of the relevant provision and if necessary with the help of the interpretation made by the courts, to know which acts or omissions will make him criminally liable (see, to that effect, judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 162).

57 In the third place, the principle of non-retroactivity of the criminal law means in particular that a court cannot, in the course of criminal proceedings, impose a criminal penalty for conduct which is not prohibited by a national rule adopted before the commission of the alleged offence or aggravate the rules on criminal liability of those against whom such proceedings are brought (see, by analogy, judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraphs 62 to 64 and the case-law cited).

58 As noted in paragraph 45 above, the requirements of foreseeability, precision and non-retroactivity inherent in the principle that offences and penalties must be defined by law apply also, in the Italian legal system, to the limitation rules for criminal offences relating to VAT.

59 It follows, first, that it is for the national court to ascertain whether the finding, required by paragraph 58 of the *Taricco* judgment, that the provisions of the Criminal Code at issue prevent the imposition of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the Union leads to a situation of uncertainty in the Italian legal system as regards the determination of the applicable limitation rules, which would be in breach of the principle that the applicable law must be precise. If that is indeed the case, the national court is not obliged to disapply the provisions of the Criminal Code at issue.

60 Second, the requirements mentioned in paragraph 58 above preclude the national court, in proceedings concerning persons accused of committing VAT infringements before the delivery of the *Taricco* judgment, from disapplying the provisions of the Criminal Code at issue. The Court has already pointed out in paragraph 53 of that judgment that, if those provisions were disapplied, penalties might be imposed on those persons which, in all likelihood, would not have been imposed if those provisions had been applied. Those persons could thus be made subject, retroactively, to conditions of criminal liability that were stricter than those in force at the time the infringement was committed.

61 If the national court were thus to come to the view that the obligation to disapply the provisions of the Criminal Code at issue conflicts with the principle that offences and penalties must be defined by law, it would not be obliged to comply with that obligation, even if compliance with the obligation allowed a national situation incompatible with EU law to be remedied (see, by analogy, judgment of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraphs 58 and 59). It will then be for the national legislature to take the necessary measures, as stated in paragraphs 41 and 42 above.

62 Having regard to the above considerations, the answer to Questions 1 and 2 is that Article 325(1) and (2) TFEU must be interpreted as requiring the national court, in criminal proceedings for infringements relating to VAT, to disapply national provisions on limitation, forming part of national substantive law, which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the Union, or which lay down shorter limitation periods for cases of serious fraud affecting those interests than for those affecting the financial interests of the Member State concerned, unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed.

**Question 3**

63 In view of the answer to Questions 1 and 2, there is no need to answer Question 3.

**Costs**

[…]

On those grounds, the Court (Grand Chamber) hereby rules:

**Article 325(1) and (2) TFEU must be interpreted as requiring the national court, in criminal proceedings for infringements relating to value added tax, to disapply national provisions on limitation, forming part of national substantive law, which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or which lay down shorter limitation periods for cases of serious fraud affecting those interests than for those affecting the financial interests of the Member State concerned, unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed.**

## LECTURE 3: FUNDAMENTAL RIGHTS IN THE EU INTERNAL MARKET (I): FREE MOVEMENT RIGHTS AS/AND FUNDAMENTAL RIGHTS

From the very beginning, the EU integration project acknowledged that individuals and businesses had the fundamental right to move goods, services, capital and their own labour across the EU internal market. Those so-called fundamental freedoms have grown into the EU's equivalent of fundamental economic rights ever since the 1970s. A large body of case law has contributed to confirming and maintaining the fundamental right status of those freedoms. The acknowledgement of fundamental freedoms as a kind of fundamental rights nevertheless also resulted in potential tensions between those fundamental freedoms and other fundamental rights or regarding the scope of application of fundamental rights within the framework of European Union law. The Court of Justice has acknowledged those problems and has sought to offer solutions for them. In doing so, the Court essentially confirmed that fundamental freedoms are to be regarded as fundamental rights and that fundamental rights and freedoms may require balancing in practice. In this lecture, we identify and distinguish the balancing test put forward and analyse its potential and limits.

It is submitted that the balancing test put in place also facilitated the invocability of fundamental rights in the EU legal order. In the *Mangold* and *Egenberger* judgments, this invocation came most clearly to the forefront. During the lecture, we will endeavour to link both strands of case law, as they allow us better to understand why, how and when fundamental rights and fundamental freedoms interact within European Union law.

*Materials to read:*

- Court of Justice, 12 June 2003, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, ECLI:EU:C:2003:333.
- Court of Justice, 14 October 2004, Case 36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, ECLI:EU:C:2004:614.
- Court of Justice, 22 November 2005, Case C-144/04, *Werner Mangold v Rüdiger Helm*, ECLI:EU:C:2005:709.
- Court of Justice, 17 April 2018, Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, ECLI:EU:C:2018:257.
- Francesco de Cecco, 'Fundamental freedoms, fundamental rights and the scope of free movement law', 15 *German Law Journal* (2014), 383-406 (via eCampus).

## Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*

In Case C-112/00,

REFERENCE to the Court under Article 234 EC by the Oberlandesgericht Innsbruck (Austria) for a preliminary ruling in the proceedings pending before that court between

**Eugen Schmidberger, Internationale Transporte und Planzüge**

and

**Republik Österreich,**

on the interpretation of Articles 30, 34 and 36 of the EC Treaty (now, after amendment, Articles 28 EC, 29 EC and 30 EC) read together with Article 5 of the EC Treaty (now Article 10 EC), and on the conditions for liability of a Member State for damage caused to individuals by a breach of Community law,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet and R. Schintgen (Rapporteur) (Presidents of Chambers), C. Gulmann, D.A.O. Edward, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues and A. Rosas, Judges,

Advocate General: F.G. Jacobs,

Registrar: H.A. Rühl (Principal Administrator),

after considering the written observations submitted on behalf of:

- Eugen Schmidberger, Internationale Transporte und Planzüge, by K.-H. Plankel, H. Mayrhofer and R. Schneider, Rechtsanwälte,

- the Republic of Austria, by A. Riccabona, acting as Agent,

- the Austrian Government, by H. Dossi, acting as Agent,

- the Greek Government, by N. Dafniou and G. Karipsiadis, acting as Agents,

- the Italian Government, by U. Leanza, acting as Agent, assisted by O. Fiumara, vice avvocato generale dello Stato,

- the Netherlands Government, by M.A. Fierstra, acting as Agent,

- the Commission of the European Communities, by J.C. Schieferer, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Eugen Schmidberger, Internationale Transporte und Planzüge, represented by R. Schneider; the Republic of Austria, represented by A. Riccabona; the Austrian Government, represented by E. Riedl, acting as Agent; the Greek Government, represented by N. Dafniou and G. Karipsiadis; the Italian Government, represented by O. Fiumara; the Netherlands Government, represented by H.G. Sevenster, acting as

Agent; the Finnish Government, represented by T. Pynnä, acting as Agent; and the Commission, represented by J.C. Schieferer and J. Grunwald, acting as Agent, at the hearing on 12 March 2002,

after hearing the Opinion of the Advocate General at the sitting on 11 July 2002,

gives the following

Judgment

1. By order of 1 February 2000, received at the Court on 24 March 2000, the Oberlandesgericht Innsbruck (Innsbruck Higher Regional Court) referred under Article 234 EC six questions for a preliminary ruling on the interpretation of Articles 30, 34 and 36 of the EC Treaty (now, after amendment, Articles 28 EC, 29 EC and 30 EC) read together with Article 5 of the EC Treaty (now Article 10 EC), and on the conditions for liability of a Member State for damage caused to individuals by a breach of Community law.

2. Those questions were raised in proceedings between Eugen Schmidberger, Internationale Transporte und Planzüge ('Schmidberger') and the Republic of Austria concerning the permission implicitly granted by the competent authorities of that Member State to an environmental group to organise a demonstration on the Brenner motorway, the effect of which was to completely close that motorway to traffic for almost 30 hours.

**National law**

3. Paragraph 2 of the Versammlungsgesetz (Law on assembly) of 1953, as subsequently amended ('VslgG') provides:

'(1) A person desirous of arranging a popular meeting or any meeting accessible to the public and not limited to invited guests must give written notice thereof to the authority (Paragraph 16) at least 24 hours in advance of the proposed event, stating the purpose, place and time of the meeting. The notice must reach the authority at least 24 hours before the time of the proposed meeting.

(2) On demand the authority shall forthwith issue a certificate concerning the notice ...'.

4. Paragraph 6 of the VslgG provides:

'Meetings whose purpose runs counter to the criminal law or which, if held, are likely to endanger public order or the common weal are to be banned by the authorities.'

5. Paragraph 16 of the VslgG provides:

'For the purposes of the present law, the usual meaning of "the authority" is:

(a) in places within their competence, the Federal Police;

(b) in the place where the Landeshauptmann [head of government of the Land] has his seat of government, where there is no Federal Police presence, the Sicherheitsdirektion [the security services]; ...

(c) in all other places, the Bezirksverwaltungsbehörde [district administrative authority]'.

6. Paragraph 42(1) of the Straßenverkehrsordnung (Highway Code) of 1960, as subsequently amended ('the StVO'), prohibits the transport by road of heavy goods trailers on Saturdays from 15.00 hrs to midnight and on Sundays and bank holidays from midnight to 22.00 hrs where the maximum permitted total weight of the heavy goods vehicle or of the trailer exceeds 3.5 tonnes. Further, according to Paragraph 42(2), during the periods stated in Paragraph 42(1) the movement of heavy goods vehicles, articulated lorries and rigid-chassis lorries having a maximum permitted total weight in excess of 7.5 tonnes is prohibited. Certain exceptions are permitted, in particular for the transport of milk, perishable foodstuffs or animals for slaughter (except for the transport of cattle on motorways).

7. Under Paragraph 42(6) of the StVO, the movement of heavy goods vehicles having a maximum permitted total weight in excess of 7.5 tonnes is prohibited between 22.00 hrs and 05.00 hrs. The journeys made by vehicles emitting noise below a certain level are not affected by that prohibition.

8. Pursuant to Paragraph 45(2) et seq. of the StVO, derogations in respect of road use may be granted in respect of individual applications and subject to certain conditions.

9. Paragraph 86 of the StVO provides:

'Marches. Unless provided otherwise, where it is intended to use a road for outdoor meetings, public or customary marches, local fêtes, parades or other such assemblies, these must be declared in advance by their organisers to the authority ...'.

**The main proceedings and the questions referred for a preliminary ruling**

10. According to the file in the main proceedings, on 15 May 1998 the Transitforum Austria Tirol, an association 'to protect the biosphere in the Alpine region', gave notice to the Bezirkshauptmannschaft Innsbruck (Innsbruck provincial government) under Paragraph 2 of the VslgG and Paragraph 86 of the StVO of a demonstration to be held from 11.00 hrs on Friday 12 June 1998 to 15.00 hrs on Saturday 13 June 1998 on the Brenner motorway (A13), resulting in that motorway being closed to all traffic on the section from the Europabrücke service area to the Schönberg toll station (Austria).

11. On the same day, the chairman of that association gave a press conference following which the Austrian and German media disseminated information concerning the closure of the Brenner motorway. The German and Austrian motoring organisations were also notified and they too offered practical information to motorists, advising them in particular to avoid that motorway during the period in question.

12. On 21 May 1998, the Bezirkshauptmannschaft requested the Sicherheitsdirektion für Tirol (Directorate of security for Tyrol) to provide instructions concerning the proposed demonstration. On 3 June 1998,

the Sicherheitsdirektor issued an order that it was not to be banned. On 10 June 1998, there was a meeting of members of various local authorities in order to ensure that the demonstration would be free of trouble.

13.

Considering that that demonstration was lawful as a matter of Austrian law, the Bezirkshauptmannschaft decided not to ban it, but it did not consider whether its decision might infringe Community law.

14.

The demonstration took place at the stated place and time. Consequently, heavy goods vehicles which should have used the Brenner motorway were immobilised from 09.00 hrs on Friday 12 June 1998. The motorway was reopened to traffic on Saturday 13 June 1998 at approximately 15.30 hrs, subject to the prohibition on the movement of lorries in excess of 7.5 tonnes during certain hours on Saturdays and Sundays applicable under Austrian legislation.

15.

Schmidberger is an international transport undertaking based at Rot an der Rot (Germany) which operates six articulated heavy goods vehicles with 'reduced noise and soot emission'. Its main activity is the transport of timber from Germany to Italy and steel from Italy to Germany. Its vehicles generally use the Brenner motorway for that purpose.

16.

Schmidberger brought an action before the Landesgericht Innsbruck (Innsbruck Regional Court) (Austria) seeking damages of ATS 140 000 against the Republic of Austria on the basis that five of its lorries were unable to use the Brenner motorway for four consecutive days because, first, Thursday 11 June 1998 was a bank holiday in Austria, whilst 13 and 14 June 1998 were a Saturday and Sunday, and second, the Austrian legislation prohibits the movement of lorries in excess of 7.5 tonnes most of the time at weekends and on bank holidays. That motorway is the sole transit route for its vehicles between Germany and Italy. The failure on the part of the Austrian authorities to ban the demonstration and to intervene to prevent that trunk route from being closed amounted to a restriction of the free movement of goods. Since it could not be justified by the protesters' right to freedom of expression and freedom of assembly the restriction was a breach of Community law in respect of which the Member State concerned incurred liability. In the present case, the damage suffered by Schmidberger consisted of the immobilisation of its heavy goods vehicles (ATS 50 000), the fixed costs in respect of the drivers (ATS 5 000) and a loss of profit arising from concessions on payment allowed to customers on account of the substantial delays in transporting the goods and the failure to make six journeys between Germany and Italy (ATS 85 000).

17.

The Republic of Austria contended that the claim should be rejected on the grounds that the decision not to ban the demonstration was taken following a detailed examination of the facts, that information as to the date of the closure of the Brenner motorway had been announced in advance in Austria, Germany and Italy, and that the demonstration did not result in substantial traffic jams or other incidents. The restriction on free movement arising from a demonstration is permitted provided that the obstacle it creates is neither permanent nor serious. Assessment of the interests involved should lean in favour of the freedoms of expression and assembly, since fundamental rights are inviolable in a democratic society.

18.

Having found that Schmidberger had not shown either that its lorries would have had to use the Brenner motorway on 12 and 13 June 1998 or that it had not been possible, after it had become aware that the demonstration was due to take place, to change its routes in order to avoid loss, the Landesgericht Innsbruck dismissed the action by judgment of 23 September 1999 on the grounds that the transport company had neither discharged the burden (under Austrian substantive law) of making out and proving its claim for pecuniary loss nor complied with its obligation (under Austrian procedural law) to present

all the facts on which the application was based and which were necessary for the dispute to be determined.

19. Schmidberger then lodged an appeal against that judgment before the Oberlandesgericht Innsbruck, which considers that it is necessary to have regard to the requirements of Community law where, as in the present case, claims are made which are, at least in part, founded on Community law.

20. It considers that it is necessary in that regard to determine first whether the principle of the free movement of goods, possibly in conjunction with Article 5 of the Treaty, requires a Member State to keep open major transit routes and whether that obligation takes precedence over fundamental rights such as the freedom of expression and the freedom of assembly guaranteed by Articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR').

21. If so, the national court asks, secondly, whether the breach of Community law thus established is sufficiently serious to give rise to State liability. Questions of interpretation arise in particular in determining the degree of precision and clarity of Article 5 as well as Articles 30, 34 and 36 of the Treaty.

22. In the present case State liability might be incurred as a result of either legislative defect - the Austrian legislature having failed to adapt the legislation on freedom of assembly to comply with the obligations arising under Community law, in particular under the principle of the free movement of goods - or by reason of administrative fault - the competent national authorities being required by the obligation of cooperation and loyalty laid down by Article 5 of the Treaty to interpret national law in such a way as to comply with the requirements of that Treaty as regards the free movement of goods, in so far as those obligations arising from Community law are directly applicable.

23. Thirdly, the court seeks guidance as to the nature and extent of the right to compensation based on State liability. It asks how stringent are the requirements as to proof of the cause and amount of the damage occasioned by a breach of Community law resulting from legislation or administrative action and wishes to know, in particular, whether a right to compensation also exists where the amount of the damage can only be assessed by general estimate.

24. Lastly, the referring court harbours doubts as to the national requirements for establishing a right to compensation based on State liability. It asks whether the Austrian rules on the burden and standard of proof and on the obligation to submit all facts necessary for the determination of the dispute comply with the principle of legal effectiveness, in so far as the rights based on Community law cannot always be defined *ab initio* in their entirety and the applicant faces genuine difficulty in stating correctly all the facts required under Austrian law. Thus, in the present case, the content of the right to compensation based on State liability is so unclear, as regards its nature and extent, as to make a reference for a preliminary ruling necessary. The reasoning of the court ruling at first instance is likely to curtail claims based on Community law by rejecting the application on the basis of principles of national law and circumventing on purely formal grounds relevant questions of Community law.

25. Considering that the resolution of the dispute thus required an interpretation of Community law, the Oberlandesgericht Innsbruck decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

‘1. Are the principles of the free movement of goods under Article 30 et seq. of the EC Treaty (now Article 28 et seq. EC), or other provisions of Community law, to be interpreted as meaning that a Member State is obliged, either absolutely or at least as far as reasonably possible, to keep major transit routes clear of all restrictions and impediments, *inter alia*, by requiring that a political demonstration to be held on a transit route, of which notice has been given, may not be authorised or must at least be later dispersed, if or as soon as it can also be held at a place away from the transit route with a comparable effect on public awareness?

2. Where, on account of the failure by a Member State to indicate in its national provisions on freedom of assembly and the right to exercise it that, in the weighing of freedom of assembly against the public interest, the principles of Community law, primarily the fundamental freedoms and, in this particular case, the provisions on the free movement of goods, are also to be observed, a political demonstration of 28 hours' duration is authorised and held which, in conjunction with a pre-existing national generally applicable ban on holiday driving, causes an essential intra-Community goods transit route to be closed, *inter alia*, to the majority of heavy goods traffic for four days, with a short interruption of a few hours, does that failure constitute a sufficiently serious infringement of Community law in order to establish liability on the part of the Member State under the principles of Community law, provided that the other requirements for such liability are met?

3. Where a national authority decides that there is nothing in the provisions of Community law, in particular those concerning the free movement of goods and the general duty of cooperation and solidarity under Article 5 of the EC Treaty (now Article 10 EC), to preclude, and thus no ground on which to ban, a political demonstration of 28 hours' duration which, in conjunction with a pre-existing national generally applicable ban on holiday driving, causes an essential intra-Community goods transit route to be closed, *inter alia*, to the majority of heavy goods traffic for four days, with a short interruption of a few hours, does that decision constitute a sufficiently serious infringement of Community law in order to establish liability on the part of the Member State under the principles of Community law, provided that the other requirements for such liability are met?

4. Is the objective of an officially authorised political demonstration, namely that of working for a healthy environment and of drawing attention to the danger to public health caused by the constant increase in the transit traffic of heavy goods vehicles, to be deemed to be of a higher order than the provisions of Community law on the free movement of goods under Article 28 EC?

5. Is there loss giving rise to a claim founded on State liability where the person incurring the loss can prove that he was in a position to earn income, in the present case from the international transport of goods by means of the heavy goods vehicles operated by him but rendered idle by the 28 hour demonstration, yet is unable to prove the loss of a specific transport journey?

6. If the reply to Question 4 is in the negative:

In order to comply with the obligation of cooperation and solidarity incumbent under Article 5 of the EC Treaty (now Article 10 EC) on national authorities, in particular the courts, and with the principle of effectiveness, must application of national rules of substantive or procedural law curtailing the ability to assert claims which are well founded under Community law, such as in the present case a claim founded on State liability, be deferred pending full elucidation of the substance of the claim at Community law, if necessary following a reference to the Court of Justice for a preliminary ruling?’

**Admissibility**

26.

The Republic of Austria harbours doubts as to the admissibility of the present reference and submits essentially that the questions referred by the Oberlandesgericht Innsbruck are purely hypothetical and irrelevant to the determination of the dispute in the main proceedings.

27.

The legal action brought by Schmidberger, seeking to establish the liability of a Member State for breach of Community law, requires the company to adduce evidence of genuine damage resulting from the alleged breach.

28. Before the two national courts successively seised of the dispute Schmidberger failed to establish either the existence of specific individual loss - by substantiating with specific evidence the statement that its heavy goods vehicles had to use the Brenner motorway on the days when the demonstration took place there, as part of transport operations between Germany and Italy - or, if appropriate, that it had complied with its obligation to mitigate the damage that it claims to have suffered, by explaining why it was not able to choose a route other than the one closed.

29. In those circumstances, answers to the questions referred are not necessary in order to enable the referring court to decide the case or, at least, the request for a preliminary ruling is premature as long as the facts have not been found and relevant evidence has not been fully adduced before that court.

30. In that regard, according to settled case-law, the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such Community law as is necessary for them to give judgment in cases upon which they are called to adjudicate (see, *inter alia*, Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 33; Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 18; Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22, and Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 31).

31. In the context of that cooperation, it is for the national court seised of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, *inter alia*, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-153/00 *Der Weduwe* [2002] ECR I-11319, paragraph 31, and Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905, paragraph 41).

32. However, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court (see, to that effect, *PreussenElektra*, cited above, paragraph 39). The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (*Bosman*, paragraph 60; *Der Weduwe*, paragraph 32, and *Bacardi-Martini and Cellier des Dauphins*, paragraph 42).

33. Thus, the Court has held that it has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation or the assessment of the validity of a provision 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, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *Bosman*, paragraph 61, and *Bacardi-Martini and Cellier des Dauphins*, paragraph 43).

34. In the present case, it is by no means clear that the questions referred by the national court fall within one or other of the situations referred to in the case-law cited in the preceding paragraph.

35. The action brought by Schmidberger seeks compensation from the Republic of Austria for the damage which the alleged breach of Community law is said to have caused it, consisting in the fact that the Austrian authorities did not ban the demonstration which resulted in the Brenner motorway being closed to all traffic for a continuous period of almost 30 hours.

36. It follows that the request for an interpretation of Community law made by the national court has undeniably arisen in the context of a genuine dispute between the parties to the main proceedings and which cannot therefore be regarded as hypothetical.

37. Furthermore, it is apparent from the order for reference that the national court has set out in precise and detailed terms the reasons why it considers it necessary for the determination of the dispute before it to refer to the Court various questions on the interpretation of Community law including, in particular, that relating to the factors to be taken into account when taking evidence of the damage allegedly suffered by Schmidberger.

38. Moreover, it follows from the observations submitted by the Member States in response to the notification of the order for reference and by the Commission pursuant to Article 23 of the EC Statute of the Court of Justice that the information in that order enabled them properly to state their position on all the questions submitted to the Court.

39. It is clear from the second paragraph of Article 234 EC that it is for the national court to decide at what stage in the proceedings it is appropriate for that court to refer a question to the Court of Justice for a preliminary ruling (see Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* [1981] ECR 735, paragraph 5, and Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 30).

40. It is equally undeniable that the referring court has defined to the requisite legal standard both the factual and legal context of its request for interpretation of Community law and that it has provided the Court with all the information necessary to enable it to reply usefully to that request.

41. Furthermore, it is logical that the referring court requests the Court, first, to determine which types of damage can be taken into consideration for the purposes of State liability for breach of Community law - and, in particular, requests it to clarify the question whether compensation is in respect only of damage in fact suffered or if it also covers loss of profit based on general estimates, and whether and to what extent the victim must try to avoid or mitigate that loss -, before that court rules on the specific evidence recognised as being relevant by the Court in the assessment of the damage in fact suffered by Schmidberger.

42. Lastly, in the context of an action for liability on the part of a Member State, the referring court not only asks the Court about the requirement that there be damage and the forms which that may take and the detailed rules of evidence in that regard, but also considers it necessary to pose several questions on the other requirements to be met in making out a claim based on such liability and, in particular, as to

whether the conduct of the relevant national authorities in the main case constitutes a breach of Community law and whether that breach is such as to entitle the alleged victim to compensation.

43. In the light of the foregoing, it cannot be maintained that as regards the main proceedings the Court is called upon to rule on a question which is purely hypothetical or irrelevant for the purposes of the decision which the national court is called upon to give.

44. On the contrary, it follows from those considerations that the questions referred by that court meet an objective need for the purpose of settling the dispute before it, in the course of which it is called upon to give a decision capable of taking account of the Court's judgment, and the information provided to the latter, in particular in the order for reference, enables it to reply usefully to those questions.

45. Consequently, the reference for a preliminary ruling made by the Oberlandesgericht Innsbruck is admissible.

**The questions referred for a preliminary ruling**

46. It should be noted at the outset that the questions referred by the national court raise two distinct, albeit related, issues.

47. First, the Court is asked to rule on whether the fact that the Brenner motorway was closed to all traffic for almost 30 hours without interruption, in circumstances such as those at issue in the main proceedings, amounts to a restriction of the free movement of goods and must therefore be regarded as a breach of Community law. Second, the questions relate more specifically to the circumstances in which the liability of a Member State may be established in respect of damage caused to individuals as a result of an infringement of Community law.

48. On the latter question, the national court asks in particular for clarification of whether, and if so to what extent, in circumstances such as those of the case before it, the breach of Community law - if made out - is sufficiently manifest and serious to give rise to liability on the part of the Member State concerned. It also asks the Court about the nature and evidence of the damage to be compensated.

49. Given that, logically, this second series of questions need be examined only if the first issue, as defined in the first sentence of paragraph 47 of the present judgment, is answered in the affirmative, the Court must first give a ruling on the various points raised by that issue, which is essentially the subject of the first and fourth questions.

50. In the light of the evidence in the file of the main case sent by the referring court and the written and oral observations presented to the Court, those questions must be understood as seeking to determine whether the fact that the authorities of a Member State did not ban a demonstration with primarily environmental aims which resulted in the complete closure of a major transit route, such as the Brenner motorway, for almost 30 hours without interruption amounts to an unjustified restriction of the free movement of goods which is a fundamental principle laid down by Articles 30 and 34 of the Treaty, read together, if necessary, with Article 5 thereof.

*Whether there is a restriction of the free movement of goods*

51. It should be stated at the outset that the free movement of goods is one of the fundamental principles of the Community.

52. Thus, Article 3 of the EC Treaty (now, after amendment, Article 3 EC), inserted in the first part thereof, entitled 'Principles', provides in subparagraph (c) that for the purposes set out in Article 2 of the Treaty the activities of the Community are to include an internal market characterised by the abolition, as between Member States, of obstacles to *inter alia* the free movement of goods.

53. The second paragraph of Article 7a of the EC Treaty (now, after amendment, Article 14 EC) provides that the internal market is to comprise an area without internal frontiers in which the free movement of goods is ensured in accordance with the provisions of the Treaty.

54. That fundamental principle is implemented primarily by Articles 30 and 34 of the Treaty.

55. In particular, Article 30 provides that quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. Similarly, Article 34 prohibits, between Member States, quantitative restrictions on exports and all measures having equivalent effect.

56. It is settled case-law since the judgment in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5) that those provisions, taken in their context, must be understood as being intended to eliminate all barriers, whether direct or indirect, actual or potential, to trade flows in intra-Community trade (see, to that effect, Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraph 29).

57. In this way the Court held in particular that, as an indispensable instrument for the realisation of a market without internal frontiers, Article 30 does not prohibit only measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State (*Commission* v *France*, cited above, paragraph 30).

58. The fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as is a positive act (*Commission* v *France*, cited above, paragraph 31).

59. Consequently, Articles 30 and 34 of the Treaty require the Member States not merely themselves to refrain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 of the Treaty, to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory (*Commission* v *France*, cited above, paragraph 32). Article 5 of the Treaty requires the Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty and to refrain from any measures which could jeopardise the attainment of the objectives of that Treaty.

60. Having regard to the fundamental role assigned to the free movement of goods in the Community system, in particular for the proper functioning of the internal market, that obligation upon each Member State to ensure the free movement of products in its territory by taking the measures necessary and appropriate for the purposes of preventing any restriction due to the acts of individuals applies without the need to distinguish between cases where such acts affect the flow of imports or exports and those affecting merely the transit of goods.

61. Paragraph 53 of the judgment in *Commission* v *France*, cited above, shows that the case giving rise to that judgment concerned not only imports but also the transit through France of products from other Member States.

62. It follows that, in a situation such as that at issue in the main proceedings, where the competent national authorities are faced with restrictions on the effective exercise of a fundamental freedom enshrined in the Treaty, such as the free movement of goods, which result from actions taken by individuals, they are required to take adequate steps to ensure that freedom in the Member State concerned even if, as in the main proceedings, those goods merely pass through Austria en route for Italy or Germany.

63. It should be added that that obligation of the Member States is all the more important where the case concerns a major transit route such as the Brenner motorway, which is one of the main land links for trade between northern Europe and the north of Italy.

64. In the light of the foregoing, the fact that the competent authorities of a Member State did not ban a demonstration which resulted in the complete closure of a major transit route such as the Brenner motorway for almost 30 hours on end is capable of restricting intra-Community trade in goods and must, therefore, be regarded as constituting a measure of equivalent effect to a quantitative restriction which is, in principle, incompatible with the Community law obligations arising from Articles 30 and 34 of the Treaty, read together with Article 5 thereof, unless that failure to ban can be objectively justified.

*Whether the restriction may be justified*

65. In the context of its fourth question, the referring court asks essentially whether the purpose of the demonstration on 12 and 13 June 1998 - during which the demonstrators sought to draw attention to the threat to the environment and public health posed by the constant increase in the movement of heavy goods vehicles on the Brenner motorway and to persuade the competent authorities to reinforce measures to reduce that traffic and the pollution resulting therefrom in the highly sensitive region of the Alps - is such as to frustrate Community law obligations relating to the free movement of goods.

66. However, even if the protection of the environment and public health, especially in that region, may, under certain conditions, constitute a legitimate objective in the public interest capable of justifying a restriction of the fundamental freedoms guaranteed by the Treaty, including the free movement of goods, it should be noted, as the Advocate General pointed out at paragraph 54 of his Opinion, that the specific aims of the demonstration are not in themselves material in legal proceedings such as those instituted by Schmidberger, which seek to establish the liability of a Member State in respect of an alleged breach of Community law, since that liability is to be inferred from the fact that the national authorities did not prevent an obstacle to traffic from being placed on the Brenner motorway.

67.

Indeed, for the purposes of determining the conditions in which a Member State may be liable and, in particular, with regard to the question whether it infringed Community law, account must be taken only of the action or omission imputable to that Member State.

68.

In the present case, account should thus be taken solely of the objective pursued by the national authorities in their implicit decision to authorise or not to ban the demonstration in question.

69.

It is apparent from the file in the main case that the Austrian authorities were inspired by considerations linked to respect of the fundamental rights of the demonstrators to freedom of expression and freedom of assembly, which are enshrined in and guaranteed by the ECHR and the Austrian Constitution.

70.

In its order for reference, the national court also raises the question whether the principle of the free movement of goods guaranteed by the Treaty prevails over those fundamental rights.

71.

According to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (see, *inter alia*, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 37, and Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25).

72.

The principles established by that case-law were reaffirmed in the preamble to the Single European Act and subsequently in Article F.2 of the Treaty on European Union (*Bosman*, cited above, paragraph 79). That provision states that '[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

73.

It follows that measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community (see, *inter alia*, *ERT*, cited above, paragraph 41, and Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14).

74.

Thus, since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.

75.

It is settled case-law that where, as in the main proceedings, a national situation falls within the scope of Community law and a reference for a preliminary ruling is made to the Court, it must provide the national courts with all the criteria of interpretation needed to determine whether that situation is compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the ECHR (see to that effect, *inter alia*, Case 12/86 *Demirel* [1987] ECR 3719, paragraph 28).

76.

In the present case, the national authorities relied on the need to respect fundamental rights guaranteed by both the ECHR and the Constitution of the Member State concerned in deciding to allow a restriction to be imposed on one of the fundamental freedoms enshrined in the Treaty.

77.

The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter.

78.

First, whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances, be subject to restrictions for the reasons laid down in Article 36 of that Treaty or for overriding requirements relating to the public interest, in accordance with the Court's consistent case-law since the judgment in Case 120/78 *Rewe-Zentral* (‘*Cassis de Dijon*’) [1979] ECR 649.

79.

Second, whilst the fundamental rights at issue in the main proceedings are expressly recognised by the ECHR and constitute the fundamental pillars of a democratic society, it nevertheless follows from the express wording of paragraph 2 of Articles 10 and 11 of the Convention that freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions 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, to that effect, Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 26, Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 42, and Eur. Court HR, Steel and Others v. The United Kingdom judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, § 101).

80.

Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed (see, to that effect, Case C-62/90 *Commission* v *Germany* [1992] ECR I-2575, paragraph 23, and Case C-404/92 P *X* v *Commission* [1994] ECR I-4737, paragraph 18).

81.

In those circumstances, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.

82.

The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights.

83.

As regards the main case, it should be emphasised at the outset that the circumstances characterising it are clearly distinguishable from the situation in the case giving rise to the judgment in *Commission* v *France*, cited above, referred to by Schmidberger as a relevant precedent in the course of its legal action against Austria.

84.

By comparison with the points of fact referred to by the Court at paragraphs 38 to 53 of the judgment in *Commission* v *France*, cited above, it should be noted, first, that the demonstration at issue in the main proceedings took place following a request for authorisation presented on the basis of national law and after the competent authorities had decided not to ban it.

85.

Second, because of the presence of demonstrators on the Brenner motorway, traffic by road was obstructed on a single route, on a single occasion and during a period of almost 30 hours. Furthermore, the obstacle to the free movement of goods resulting from that demonstration was limited by comparison with both the geographic scale and the intrinsic seriousness of the disruption caused in the case giving rise to the judgment in *Commission* v *France*, cited above.

86.

Third, it is not in dispute that by that demonstration, citizens were exercising their fundamental rights by manifesting in public an opinion which they considered to be of importance to society; it is also not in dispute that the purpose of that public demonstration was not to restrict trade in goods of a particular type or from a particular source. By contrast, in *Commission* v *France*, cited above, the objective pursued by the demonstrators was clearly to prevent the movement of particular products originating in Member States other than the French Republic, by not only obstructing the transport of the goods in question, but also destroying those goods in transit to or through France, and even when they had already been put on display in shops in the Member State concerned.

87.

Fourth, in the present case various administrative and supporting measures were taken by the competent authorities in order to limit as far as possible the disruption to road traffic. Thus, in particular, those authorities, including the police, the organisers of the demonstration and various motoring organisations cooperated in order to ensure that the demonstration passed off smoothly. Well before the date on which it was due to take place, an extensive publicity campaign had been launched by the media and the motoring organisations, both in Austria and in neighbouring countries, and various alternative routes had been designated, with the result that the economic operators concerned were duly informed of the traffic restrictions applying on the date and at the site of the proposed demonstration and were in a position timeously to take all steps necessary to obviate those restrictions. Furthermore, security arrangements had been made for the site of the demonstration.

88.

Moreover, it is not in dispute that the isolated incident in question did not give rise to a general climate of insecurity such as to have a dissuasive effect on intra-Community trade flows as a whole, in contrast to the serious and repeated disruptions to public order at issue in the case giving rise to the judgment in *Commission* v *France*, cited above.

89.

Finally, concerning the other possibilities envisaged by Schmidberger with regard to the demonstration in question, taking account of the Member States' wide margin of discretion, in circumstances such as those of the present case the competent national authorities were entitled to consider that an outright ban on the demonstration would have constituted unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public.

90.

The imposition of stricter conditions concerning both the site - for example by the side of the Brenner motorway - and the duration - limited to a few hours only - of the demonstration in question could have been perceived as an excessive restriction, depriving the action of a substantial part of its scope. Whilst the competent national authorities must endeavour to limit as far as possible the inevitable effects upon free movement of a demonstration on the public highway, they must balance that interest with that of the demonstrators, who seek to draw the aims of their action to the attention of the public.

91.

An action of that type usually entails inconvenience for non-participants, in particular as regards free movement, but the inconvenience may in principle be tolerated provided that the objective pursued is essentially the public and lawful demonstration of an opinion.

92.

In that regard, the Republic of Austria submits, without being contradicted on that point, that in any event, all the alternative solutions which could be countenanced would have risked reactions which would have been difficult to control and would have been liable to cause much more serious disruption to intra-Community trade and public order, such as unauthorised demonstrations, confrontation between supporters and opponents of the group organising the demonstration or acts of violence on the part of the demonstrators who considered that the exercise of their fundamental rights had been infringed.

93.

Consequently, the national authorities were reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim of that demonstration could not be achieved in the present case by measures less restrictive of intra-Community trade.

94.

In the light of those considerations, the answer to the first and fourth questions must be that the fact that the authorities of a Member State did not ban a demonstration in circumstances such as those of the main case is not incompatible with Articles 30 and 34 of the Treaty, read together with Article 5 thereof.

*The conditions for liability of the Member State*

95.

It follows from the answer given to the first and fourth questions that, having regard to all the circumstances of a case such as that before the referring court, the competent national authorities cannot be said to have committed a breach of Community law such as to give rise to liability on the part of the Member State concerned.

96.

In those circumstances, there is no need to rule on the other questions referred concerning some of the conditions necessary for a Member State to incur liability for damage caused to individuals by that Member State's infringement of Community law.

**Costs**

97.

The costs incurred by the Austrian, Greek, Italian, Netherlands and Finnish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main 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,

in answer to the questions referred to it by the Oberlandesgericht Innsbruck by order of 1 February 2000, hereby rules:

**The fact that the authorities of a Member State did not ban a demonstration in circumstances such as those of the main case is not incompatible with Articles 30 and 34 of the EC Treaty (now, after amendment, Articles 28 EC and 29 EC), read together with Article 5 of the EC Treaty (now Article 10 EC).**

## Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH

In Case C-36/02,

REFERENCE for a preliminary ruling under Article 234 EC,

from the Bundesverwaltungsgericht (Germany), made by decision of 24 October 2001, received at the Court on 12 February 2002, in proceedings between:

**Omega Spielhallen- und Automatenaufstellungs-GmbH**

v

**Oberbürgermeisterin der Bundesstadt Bonn,**

THE COURT (First Chamber),

[…]

1 This reference for a preliminary ruling concerns the interpretation of Articles 49 to 55 EC on the freedom to provide services and Articles 28 to 30 EC on the free movement of goods.

2 The question referred to the Court of Justice by the Bundesverwaltungsgericht (Federal Administrative Court, Germany) was raised in an appeal on a point of law before that court by Omega Spielhallen- und Automatenaufstellungs-GmbH ('Omega'), in which that company challenged the compatibility with Community law of a prohibition order issued against it by the Oberbürgermeisterin der Bundesstadt Bonn ('the Bonn police authority') on 14 September 1994.

**Facts, main proceedings and question referred**

3 Omega, a German company, had, since 1 August 1994, been operating an installation known as a 'laserdrome', normally used for the practice of 'laser sport' in Bonn (Germany). The installation continued to be used after 14 September 1994, Omega having obtained authorisation to continue its use on a provisional basis by an order of the Verwaltungsgericht Köln (Administrative Court, Cologne) of 18 November 1994. The equipment used by Omega in its establishment, which included sub-machine-gun-type laser targeting devices and sensory tags fixed either in the firing corridors or to jackets worn by players, was initially developed from a children's toy freely available on the market. That equipment having proved technically inadequate, Omega turned, from a date not specified but later than 2 December 1994, to equipment supplied by the British company Pulsar International Ltd (which subsequently became Pulsar Advanced Games Systems Ltd, hereinafter referred to as 'Pulsar'). However, a franchising contract with Pulsar was not concluded until 29 May 1997.

4 Even before the public opening of the 'laserdrome', a part of the population manifested its opposition to the project. At the beginning of 1994, the Bonn police authority ordered Omega to supply it with a precise description of the working of the game intended in the 'laserdrome' and, by letter of 22 February 1994, warned it of its intention to issue a prohibition order in the event of it being possible to 'play at killing' people there. Omega replied, on 18 March 1994, that the game merely involved hitting fixed sensory tags installed in the firing corridors.

5 Having noticed that the object of the game played in the 'laserdrome' also included hitting sensory tags placed on the jackets worn by players, the Bonn police authority issued an order against Omega on 14 September 1994, forbidding it from 'facilitating or allowing in its […] establishment games with the object of firing on human targets using a laser beam or other technical devices (such as infrared, for example), thereby, by recording shots hitting their targets, "playing at killing" people', on pain of a DEM 10 000 fine for each game played in breach of the order.

6 That order was issued under powers conferred by Paragraph 14(1) of the Ordnungsbehördengesetz Nordrhein-Westfalen (Law governing the North Rhine-Westphalia Police authorities; 'the OBG NW'), which provides:

'The police authorities may take measures necessary to avert a risk to public order or safety in an individual case'.

7 According to the prohibition order of 14 September 1994, the games which took place in Omega's establishment constituted a danger to public order, since the acts of simulated homicide and the trivialisation of violence thereby engendered were contary to fundamental values prevailing in public opinion.

8 Omega's objection against that order was rejected by the Bezirksregierung Köln (Cologne District Authority) on 6 November 1995. By judgement of 3 September 1998, the Verwaltungsgericht Köln (Cologne Administrative Court) dismissed the ensuing court action. Omega's appeal was also dismissed, on 27 September 2000, by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the Land of North Rhine-Westphalia) (Germany).

9 Omega then appealed on a point of law to the Bundesverwaltungsgericht (Federal Administrative Court). In support of its appeal, it argued, amongst numerous other pleas, that the contested order infringed Community law, particularly the freedom to provide services under Article 49 EC, since its 'laserdrome' had to use equipment and technology supplied by the British company Pulsar.

10 The Bundesverwaltungsgericht takes the view that, under national law, Omega's appeal must be dismissed. It is, however, uncertain whether that result is compatible with Community law, particularly Articles 49 to 55 EC on the freedom to provide services and Articles 28 to 30 EC on the free movement of goods.

11 According to the Bundesverwaltungsgericht, the Oberverwaltungsgericht was right to hold that the commercial exploitation of a 'killing game' in Omega's 'laserdrome' constituted an affront to human dignity, a concept established in the first sentence of Paragraph 1(1) of the German Basic (Constitutional) Law.

12 The referring court states that human dignity is a constitutional principle which may be infringed either by the degrading treatment of an adversary, which is not the case here, or by the awakening or strengthening in the player of an attitude denying the fundamental right of each person to be acknowledged and respected, such as the representation, as in this case, of fictitious acts of violence for the purposes of a game. It states that a cardinal constitutional principle such as human dignity cannot be waived in the context of an entertainment, and that, in national law, the fundamental rights invoked by Omega cannot alter that assessment.

13 Concerning the application of Community law, the referring court considers that the contested order infringes the freedom to provide services under Article 49 EC. Omega concluded a franchising agreement with a British company, which is being prevented from providing services to its German customer, whereas it supplies comparable services in the Member State where it is established. There might also be an infringement of the free movement of goods under Article 28 EC, in so far as Omega wishes to acquire in the United Kingdom goods to equip its 'laserdrome', particularly laser targeting devices.

14 The national court considers that the case in the main proceedings gives an opportunity to spell out in greater detail the conditions which Community law places on the restriction of a certain category of supplies of services or the importation of certain goods. It point out that, under the case-law of the Court of Justice, obstacles to freedom to provide services arising from national measures which are applicable without distinction are permissible only if those measures are justified by overriding reasons relating to the public interest, are such as to guarantee the achievement of the intended aim and do not go beyond what is necessary in order to achieve it. It is immaterial, for the purposes of assessing the need for and the proportionality of those measures, that another Member State may have taken different protection measures (Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraphs 31, 35 and 36; Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraphs 29, 33 and 34).

15 The national court queries, however, whether, in the light of the judgment in Case C-275/92 *Schindler* [1994] ECR I-1039, a common legal conception in all Member States is a precondition for one of those States being enabled to restrict at its discretion a certain category of provisions of goods or services protected by the EC Treaty. Should *Schindler* have to be interpreted in that way, it could be difficult to confirm the contested order if it were not possible to deduce a common legal conception as regards the assessment in Member States of games for entertainment with simulated killing actions.

16 It states that the judgments in *Läärä* and *Zenatti*, delivered after *Schindler*, could give the impression that the Court of Justice no longer adheres strictly to the need for a common conception of law in order to restrict the freedom to provide services. If that were the case, it argues, Community law would no longer prevent the order in question from being confirmed. By reason of the fundamental importance of the principle of human dignity, in Community law as well as German law, there would be no need to enquire further as to the proportionality of the national measure restricting the freedom to provide services.

17 In those circumstances, the Bundesverwaltungsgericht decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is it compatible with the provisions on freedom to provide services and the free movement of goods contained in the Treaty establishing the European Community for a particular commercial activity – in this case the operation of a so-called "laserdrome" involving simulated killing action – to be prohibited under national law because it offends against the values enshrined in the constitution?'

**Admissibility of the question referred**

18 The Bonn police authority questions the admissibility of the question referred and, more particularly, the applicability of the rules of Community law on fundamental freedoms in this dispute. In its view, the prohibition order of 14 September 1994 has not affected any operation of a cross-border nature and cannot therefore have restricted the fundamental freedoms guaranteed by the Treaty. It argues that, at the date on which the order was adopted, the installation which Pulsar had offered to supply to Omega had not yet been delivered and no franchising agreement required Omega to adopt the variant of the game concerned by the order.

19 It should, however, be recalled that, according to settled case-law, it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. Consequently, where the questions referred involve the interpretation of Community law, the Court is, in principle, obliged to give a ruling (see, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 18; Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 21; Case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 19; Case C-476/01 *Kapper* [2004] ECR I-0000, paragraph 24).

20 Moreover, it also follows from that case-law that the Court can refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *PreussenElektra*, paragraph 39; *Canal Satélite Digital*, paragraph 19; *Adolf Truley*, paragraph 22; *Kapper*, paragraph 25).

21 That is not the case here. Even if the documents before the Court show that, at the time the order was adopted on 14 September 1994, Omega had not yet formally concluded supply or franchising agreements with the company established in the United Kingdom, it is sufficient to note that, having regard to its forward-looking nature and the content of the prohibition which it lays down, that order is capable of restricting the future development of contractual relations between the two parties. Therefore, the question put by the referring court, which concerns the interpretation of the Treaty provisions guaranteeing the freedom to provide services and the free movement of goods, is not obviously without relation to the actual facts of the main action or its purpose.

22 The question referred by the Bundesverwaltungsgericht must therefore be declared admissible.

**The question referred**

23 By its question, the referring court asks, first, whether the prohibition of an economic activity for reasons arising from the protection of fundamental values laid down by the national constitution, such as, in this case, human dignity, is compatible with Community law, and, second, whether the ability which Member States have, for such reasons, to restrict fundamental freedoms guaranteed by the Treaty, namely the freedom to provide

services and the free movement of goods, is subject, as the judgment in *Schindler* might suggest, to the condition that that restriction be based on a legal conception that is common to all Member States.

24 As a preliminary issue, it needs to be determined to what extent the restriction which the referring court has found to exist is capable of affecting the freedom to provide services and the free movement of goods, which are governed by different Treaty provisions.

25 In that respect, this Court finds that the contested order, by prohibiting Omega from operating its 'laserdrome' in accordance with the form of the game developed by Pulsar and lawfully marketed by it in the United Kingdom, particularly under the franchising system, affects the freedom to provide services which Article 49 EC guarantees both to providers and to the persons receiving those services established in another Member State. Moreover, in so far as use of the form of the game developed by Pulsar involves the use of specific equipment, which is also lawfully marketed in the United Kingdom, the prohibition imposed on Omega is likely to deter it from acquiring the equipment in question, thereby infringing the free movement of goods ensured by Article 28 EC.

26 However, where a national measure affects both the freedom to provide services and the free movement of goods, the Court will, in principle, examine it in relation to just one of those two fundamental freedoms if it is clear that, in the circumstances of the case, one of those freedoms is entirely secondary in relation to the other and may be attached to it (see, to that effect, *Schindler*, paragraph 22; *Canal Satélite Digital*, paragraph 31; Case C-71/02 *Karner* [2004] ECR I-0000, paragraph 46).

27 In the circumstances of this case, the aspect of the freedom to provide services prevails over that of the free movement of goods. The Bonn police authority and the Commission of the European Communities have rightly pointed out that the contested order restricts the importation of goods only as regards equipment specifically designed for the prohibited variant of the laser game and that that is an unavoidable consequence of the restriction imposed with regard to supplies of services by Pulsar. Therefore, as the Advocate General has concluded in paragraph 32 of her Opinion, there is no need to make an independent examination of the compatibility of that order with the Treaty provisions governing the free movement of goods.

28 Concerning justification for the restriction of the freedom to provide services imposed by the order of 14 September 1994, Article 46 EC, which applies here by virtue of Article 55 EC, allows restrictions justified for reasons of public policy, public security or public health. In this case, the documents before the Court show that the grounds relied on by the Bonn police authority in adopting the prohibition order expressly mention the fact that the activity concerned constitutes a danger to public policy. Moreover, reference to a danger to public policy also appears in Paragraph 14(1) of the OBG NW, empowering police authorities to take necessary measures to avert that danger.

29 In these proceedings, it is undisputed that the contested order was adopted independently of any consideration linked to the nationality of the providers or recipients of the services placed under a restriction. In any event, since measures for safeguarding public policy fall within a derogation from the freedom to provide services set out in Article 46 EC, it is not necessary to verify whether those measures are applied without distinction both to national providers of services and those established in other Member States.

30 However, the possibility of a Member State relying on a derogation laid down by the Treaty does not prevent judicial review of measures applying that derogation (Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 7). In addition, the concept of 'public policy' in the Community context, particularly as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the Community institutions (see, by analogy with the free movement of workers, *Van Duyn*, paragraph 18; Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 33). Thus, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (Case C-54/99 *Église de Scientologie* [2000] ECR I-1335, paragraph 17).

31 The fact remains, however, that the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty (*Van Duyn*, paragraph 18, and *Bouchereau*, paragraph 34).

32 In this case, the competent authorities took the view that the activity concerned by the prohibition order was a threat to public policy by reason of the fact that, in accordance with the conception prevailing in public opinion,

the commercial exploitation of games involving the simulated killing of human beings infringed a fundamental value enshrined in the national constitution, namely human dignity. According to the Bundesverwaltungsgericht, the national courts which heard the case shared and confirmed the conception of the requirements for protecting human dignity on which the contested order is based, that conception therefore having to be regarded as in accordance with the stipulations of the German Basic Law.

33 It should be recalled in that context that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect (see, inter alia, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71).

34 As the Advocate General argues in paragraphs 82 to 91 of her Opinion, the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.

35 Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services (see, in relation to the free movement of goods, *Schmidberger*, paragraph 74).

36 However, measures which restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures (see, in relation to the free movement of capital, *Église de Scientologie*, paragraph 18).

37 It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected. Although, in paragraph 60 of *Schindler*, the Court referred to moral, religious or cultural considerations which lead all Member States to make the organisation of lotteries and other games with money subject to restrictions, it was not its intention, by mentioning that common conception, to formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity.

38 On the contrary, as is apparent from well-established case-law subsequent to *Schindler*, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State (see, to that effect, *Läärä*, paragraph 36; *Zenatti*, paragraph 34; Case C-6/01 *Anomar and Others* [2003] ECR I-0000, paragraph 80).

39 In this case, it should be noted, first, that, according to the referring court, the prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany. It should also be noted that, by prohibiting only the variant of the laser game the object of which is to fire on human targets and thus 'play at killing' people, the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities.

40 In those circumstances, the order of 14 September 1994 cannot be regarded as a measure unjustifiably undermining the freedom to provide services.

41 In the light of the above considerations, the answer to the question must be that Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity.

**Costs**

[…]

On those grounds, the Court of Justice (First Chamber) hereby rules:

**Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity.**

## Case C-144/04, *Werner Mangold v Rüdiger Helm*

In Case C-144/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Arbeitsgericht München (Germany), made by decision of 26 February 2004, registered at the Court on 17 March 2004, in the proceedings

**Werner Mangold**

v

**Rüdiger Helm**,

THE COURT (Grand Chamber),

[…]

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Clauses 2, 5 and 8 of the Framework Agreement on fixed-term contracts concluded on 18 March 1999 ('the Framework Agreement'), put into effect by Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43), and of Article 6 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The reference has been made in the course of proceedings brought by Mr Mangold against Mr Helm concerning a fixed-term contract by which the former was employed by the latter ('the contract').

**Legal context**

*The relevant provisions of Community law*

The Framework Agreement

3 According to Clause 1, '[t]he purpose of this Framework Agreement is to:

(a) improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;

(b) establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships'.

4 Clause 2(1) of the Framework Agreement provides:

'This agreement applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State.'

5 Under Clause 5(1) of the Framework Agreement:

‘To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

(a) objective reasons justifying the renewal of such contracts or relationships;

(b) the maximum total duration of successive fixed-term employment contracts or relationships;

(c) the number of renewals of such contracts or relationships.’

6 Clause 8(3) of the Framework Agreement provides that:

‘Implementation of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement.’

Directive 2000/78

7 Directive 2000/78 was adopted on the basis of Article 13 EC. The 1st, 4th, 8th and 25th recitals in the preamble to that directive are worded as follows:

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

…

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

…

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

…

(25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.’

8 According to Article 1, ‘the purpose of … Directive [2000/78] is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards

employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.

9 Article 2 of Directive 2000/78, headed 'Concept of discrimination', states in subparagraphs 1 and 2(a) that:

'(1) For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

(2) For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1.'

10 Article 3 of Directive 2000/78, headed 'Scope', provides in subparagraph 1:

'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

…

(c) employment and working conditions, including dismissals and pay;

…'.

11 Article 6(1) of Directive 2000/78 provides:

'Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.'

12 In accordance with the first paragraph of Article 18 of Directive 2000/78, the Member States were to adopt the laws, regulations and administrative provisions necessary to comply with that directive by 2 December 2003 at the latest. However, under the second paragraph of that article:

'In order to take account of particular conditions, Member States may, if necessary, have an additional period of three years from 2 December 2003, that is to say a total of six years, to implement the provisions of this Directive on age and disability discrimination. In that event they shall inform the Commission forthwith. Any Member State which chooses to use this additional period shall report annually to the Commission on the steps it is taking to

tackle age and disability discrimination and on the progress it is making towards implementation. The Commission shall report annually to the Council.'

13 The Federal Republic of Germany having requested such an additional period for the implementation of the directive, so far as that Member State is concerned the period allowed will not expire until 2 December 2006.

*The relevant provisions of national law*

14 Paragraph 1 of the Beschäftigungsförderungsgesetz (Law to promote employment), as amended by the law of 25 September 1996 (BGBl. 1996 I, p. 1476) ('the BeschFG 1996'), provided:

'(1) Fixed-term employment contracts shall be authorised for a maximum term of two years. Within that maximum limit of two years a fixed-term contract may be renewed three times at most.

(2) Fixed-term employment contracts shall be authorised exempt from the condition set out in paragraph 1 if the employee has reached the age of 60 when the fixed-term employment contract begins.

(3) Employment contracts within the meaning of paragraphs 1 and 2 shall not be authorised where there is a close connection with a previous employment contract of indefinite duration or with a previous fixed-term employment contract within the meaning of paragraph 1 concluded with the same employer. Such close connection shall be presumed to exist where the interval between two employment contracts is less than four months.

(4) The possibility of limiting the term of employment contracts for other reasons shall remain unaltered.

…'.

15 By virtue of Paragraph 1(6) of the BeschFG 1996, those rules were applicable until 31 December 2000.

16 Directive 1999/70 implementing the Framework Agreement was transposed into German law by the Law on part-time working and fixed-term contracts amending and repealing provisions of employment law (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen) of 21 December 2000 (BGBl. 2000, p. 1966, 'the TzBfG'). That law entered into force on 1 January 2001.

17 Paragraph 1 of the TzBfG, headed 'Objective', provides that:

'This law is intended to encourage part-time working, to fix the conditions in which fixed-term contracts may be concluded and to prevent discrimination against workers employed part-time and workers employed under a fixed-term contract.'

18 Paragraph 14 of the TzBfG, which regulates fixed-term contracts, provides that:

'(1) A fixed-term employment contract may be concluded if there are objective grounds for doing so. Objective grounds exist in particular where:

1. the operational manpower requirements are only temporary,

2. the fixed term follows a period of training or study in order to facilitate the employee's entry into subsequent employment,

3. one employee replaces another,

4. the particular nature of the work justifies the fixed term,

5. the fixed term is a probationary period,

6. reasons relating to the employee personally justify the fixed term,

7. the employee is paid out of budgetary funds provided for fixed-term employment and he is employed on that basis, or

8. the term is fixed by common agreement before a court.

(2) The term of an employment contract may be limited in the absence of objective reasons for a maximum period of two years. Within that maximum period a fixed-term contract may be renewed three times at most. The conclusion of a fixed-term employment contract within the meaning of the first sentence shall not be authorised if that contract is immediately preceded by an employment relationship of fixed or indefinite duration with the same employer. A collective agreement may fix the number or renewals or the maximum duration of the fixed term in derogation from the first sentence.

(3) The conclusion of a fixed-term employment contract shall not require objective justification if the worker has reached the age of 58 by the time the fixed-term employment relationship begins. A fixed term shall not be permitted where there is a close connection with a previous employment contract of indefinite duration concluded with the same employer. Such close connection shall be presumed to exist where the interval between two employment contracts is less than six months.

(4) The limitation of the term of an employment contract must be fixed in writing in order to be enforceable.'

19 Paragraph 14(3) of the TzBfG has been amended by the First Law for the provision of modern services on the labour market of 23 December 2002 (BGBl. 2002 I, p. 14607, 'the Law of 2002'). The new version of that provision, which took effect on 1 January 2003, is henceforth worded as follows:

'A fixed-term employment contract shall not require objective justification if when starting the fixed-term employment relationship the employee has reached the age of 58. It shall not be permissible to set a fixed term where there is a close connection with a previous employment contract of indefinite duration concluded with the same employer. Such close connection shall be presumed to exist where the interval between two employment contracts is less than six months. Until 31 December 2006 the first sentence shall be read as referring to the age of 52 instead of 58.'

**The main proceedings and the questions referred for a preliminary ruling**

20 On 26 June 2003 Mr Mangold, then 56 years old, concluded with Mr Helm, who practises as a lawyer, a contract that took effect on 1 July 2003.

21 Article 5 of that contract provided that:

'1. The employment relationship shall start on 1 July 2003 and last until 28 February 2004.

2. The duration of the contract shall be based on the statutory provision which is intended to make it easier to conclude fixed-term contracts of employment with older workers (the provisions of the fourth sentence, in conjunction with those of the fourth sentence, of Paragraph 14(3) of the TzBfG …), since the employee is more than 52 years old.

3. The parties have agreed that there is no reason for the fixed term of this contract other than that set out in paragraph 2 above. All other grounds for limiting the term of employment accepted in principle by the legislature are expressly excluded from this agreement.'

22 According to Mr Mangold, paragraph 5, inasmuch as it limits the term of his contract, is, although such a limitation is in keeping with Paragraph 14(3) of the TzBfG, incompatible with the Framework Agreement and with Directive 2000/78.

23 Mr Helm argues that Clause 5 of the Framework Agreement requires the Member States to introduce measures to prevent abuse arising from the use of successive fixed-term contracts of employment, in particular,

by requiring objective reasons justifying the renewal of such contracts, or by fixing the maximum total duration of such fixed-term employment relationships or contracts, or by limiting the number of renewals of such contracts or relationships.

24 He takes the view that even if the fourth sentence of Paragraph 14(3) of the TzBfG does not expressly lay down such restrictions in respect of older workers, there is in fact an objective reason, within the meaning of Clause 5(1)(a) of the Framework Agreement, that justifies the conclusion of a fixed-term contract of employment, which is the difficulty those workers have in finding work having regard to the features of the labour market.

25 The Arbeitsgericht München is doubtful whether the first sentence of Paragraph 14(3) of the TzBfG is compatible with Community law.

26 First, that court considers that that provision is contrary to the prohibition of 'regression' (reduction of protection) laid down in Clause 8(3) of the Framework Agreement in that, on the transposition into national law of Directive 1999/70, that provision lowered from 60 to 58 the age of persons excluded from protection against the use of fixed-term contracts of employment where that use is not justified by an objective reason and, in consequence, the general level of protection enjoyed by that class of workers. Such a provision is also, in its opinion, contrary to Clause 5 of the Framework Agreement which seeks to prevent abuse of such contracts, in that it lays down no restriction on the conclusion of such contracts by many workers falling into a class categorised by age only.

27 Second, the national court is uncertain whether rules such as those contained in Paragraph 14(3) of the TzBfG are compatible with Article 6 of Directive 2000/78, in that the lowering, by the Law of 2002, from 58 to 52 of the age at which it is authorised to conclude fixed-term contracts, with no objective justification, does not guarantee the protection of older persons in work. Nor is the principle of proportionality observed.

28 It is true that the national court finds that, on the date of the conclusion of the contract, namely, 26 June 2003, the period prescribed for transposition of Directive 2000/78 into national law had not yet expired. None the less, it notes that, in accordance with paragraph 45 of the judgment in Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, a Member State to which a directive is addressed may not, during the period prescribed for transposition, adopt measures that may seriously compromise the attainment of the result prescribed by the directive.

29 Now, in the case in the main proceedings, the Law of 2002's amendment of Paragraph 14(3) of the TzBfG came into force on 1 January 2003, that is to say, after Directive 2000/78 was published in the *Official Journal of the European Communities,* but before the period allowed by Article 18 of that directive for its transposition had expired.

30 Third, the Arbeitsgericht München raises the question whether the national court is bound, in proceedings between individuals, to set aside rules of domestic law incompatible with Community law. In this respect it considers that the primacy of Community law must lead the court to find that Paragraph 14(3) of the TzBfG is inapplicable in its entirety and that, therefore, it is necessary to apply the fundamental rule laid down in Paragraph 14(1), in accordance with which there must be some objective reason for the conclusion of a fixed-term contract of employment.

31 Those were the circumstances in which the Arbeitsgericht München decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1(a) Is Clause 8(3) of the Framework Agreement … to be interpreted, when transposed into domestic law, as prohibiting a reduction of protection following from the lowering of the age limit from 60 to 58?

1(b) Is Clause 5(1) of the Framework Agreement … to be interpreted as precluding a provision of national law which – like the provision at issue in this case – does not contain any of the three restrictions set out in paragraph 1 of that clause?

2. Is Article 6 of … Directive 2000/78 … to be interpreted as precluding a provision of national law which, like the provision at issue in this case, authorises the conclusion of fixed-term employment contracts, without any

objective reason, with workers aged 52 and over, contrary to the principle requiring justification on objective grounds?

3. If one of those three questions is answered in the affirmative: must the national court refuse to apply the provision of domestic law which is contrary to Community law and apply the general principle of internal law, under which fixed terms of employment are permissible only if they are justified on objective grounds?'

**Admissibility of the reference for a preliminary ruling**

32 At the hearing the admissibility of the reference for a preliminary ruling was challenged by the Federal Republic of Germany, on the grounds that the dispute in the main proceedings was fictitious or contrived. Indeed, in the past Mr Helm has publicly argued a case identical to Mr Mangold's, to the effect that Paragraph 14(3) of the TzBfG is unlawful.

33 It is first of all to be noted in that respect that, pursuant to Article 234 EC, where a question on the interpretation of the Treaty or of subordinate acts of the institutions of the Community is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon (see, inter alia, Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 22).

34 In the context of that procedure for making a reference, the national court, which alone has direct knowledge of the facts of the case, is in the best position to assess, with full knowledge of the matter before it, the need for a preliminary ruling to enable it to give judgment (Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 23; C-146/93 *McLachlan* [1994] ECR I-3229, paragraph 20; Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraph 10; and C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 43.

35 Consequently, where the question submitted by the national court concerns the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 20; *Leclerc-Siplec*, paragraph 11; Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 10; and *Inspire Art*, paragraph 44).

36 Nevertheless, the Court considers that it may, if need be, examine the circumstances in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (Case 149/82 *Robards* [1983] ECR 171, paragraph 19; *Meilicke*, paragraph 25; and *Inspire Art*, paragraph 45).

37 It is in the light of that function that the Court has considered that it has no jurisdiction to give a preliminary ruling on a question raised before a national court where the interpretation of Community law has no connection whatever with the circumstances or purpose of the main proceedings.

38 However, in the case in the main proceedings, it hardly seems arguable that the interpretation of Community law sought by the national court does actually respond to an objective need inherent in the outcome of a case pending before it. In fact, it is common ground that the contract has actually been performed and that its application raises a question of interpretation of Community law. The fact that the parties to the dispute in the main proceedings are at one in their interpretation of Paragraph 14(3) of the TzBfG cannot affect the reality of that dispute.

39 The order for reference must, therefore, be regarded as admissible.

**Concerning the questions referred for a preliminary ruling**

*On Question 1(b)*

40 In Question 1(b), which it is appropriate to consider first, the national court asks whether, on a proper construction of Clause 5 of the Framework Agreement, it is contrary to that provision for rules of domestic law

such as those at issue in the main proceedings to contain none of the restrictions provided for by that clause in respect of the use of fixed-term contracts of employment.

41 Here it is to be noted that Clause 5(1) of the Framework Agreement is supposed to 'prevent abuse arising from the use of successive fixed-term employment contracts or relationships'.

42 Now, as the parties to the main proceedings confirmed at the hearing, the contract is the one and only contract concluded between them.

43 In those circumstances, interpretation of Clause 5(1) of the Framework Agreement is obviously irrelevant to the outcome of the dispute before the national court and, accordingly, there is no need to answer Question 1(b).

*On Question 1(a)*

44 By Question 1(a), the national court seeks to ascertain whether on a proper construction of Clause 8(3) of the Framework Agreement, domestic legislation such as that at issue in the main proceedings which, on transposing Directive 1999/70, lowered from 60 to 58 the age above which fixed-term contracts of employment may be concluded without restrictions, is contrary to that provision.

45 As a preliminary point, it is to be noted that, in the case in the main proceedings, the contract was concluded on 26 June 2003, that is to say, when the TzBfG, as amended by the Law of 2002 which lowered the age above which it is permissible to conclude fixed-term contracts of employment from 58 to 52, was in force. In the instant case, it is common ground that Mr Mangold was engaged by Mr Helm at the age of 56.

46 Nevertheless, the national court considers that an interpretation of Clause 8(3) would be helpful to it in assessing the validity of the lawfulness of Paragraph 14(3) of the TzBfG, in its original version, in so far as, if that latter provision should not be in keeping with Community law, the result would be that its amendment by the Law of 2002 would be invalid.

47 In any case, it is to be declared that the German legislature had already, when Directive 1999/70 was transposed into domestic law, lowered from 60 to 58 the age at which fixed-term contracts of employment might be concluded.

48 According to Mr Mangold, that reduction of protection, like that under the Law of 2002, is contrary to Clause 8(3) of the Framework Agreement.

49 In contrast, the German Government takes the view that that lowering of the relevant age was offset by giving workers bound by a fixed-term contract new social guarantees, such as the laying down of a general prohibition of discrimination and the extending to small businesses, and to short-term employment relationships, of the restrictions provided for in respect of recourse to that kind of contract.

50 In this connection, it appears from the very wording of Clause 8(3) of the Framework Agreement that implementation of the agreement cannot provide the Member States with valid grounds for reducing the general level of protection for workers previously guaranteed in the domestic legal order in the sphere covered by that agreement.

51 The term 'implementation', used without any further precision in Clause 8(3) of the Framework Agreement, does not refer only to the original transposition of Directive 1999/70 and especially of the Annex thereto containing the Framework Agreement, but must also cover all domestic measures intended to ensure that the objective pursued by the directive may be attained, including those which, after transposition in the strict sense, add to or amend domestic rules previously adopted.

52 In contrast, reduction of the protection which workers are guaranteed in the sphere of fixed-term contracts is not prohibited as such by the Framework Agreement where it is in no way connected to the implementation of that agreement.

53 Now, it is clear from both the order for reference and the observations submitted by the German Government at the hearing that, as the Advocate General has noted in paragraphs 75 to 77 of his Opinion, the successive reductions of the age above which the conclusion of a fixed-term contract is permissible without restrictions are justified, not by the need to put the Framework Agreement into effect but by the need to encourage the employment of older persons in Germany.

54 In those circumstances, the reply to be given to Question 1(a) is that on a proper construction of Clause 8(3) of the Framework Agreement, domestic legislation such as that at issue in the main proceedings which, for reasons connected with the need to encourage employment and irrespective of the implementation of that agreement, has lowered the age above which fixed-term contracts of employment may be concluded without restrictions, is not contrary to that provision.

*On the second and third questions*

55 By its second and third questions, which may appropriately be considered together, the national court seeks in essence to ascertain whether Article 6(1) of Directive 2000/78 must be interpreted as precluding a provision of domestic law such as that at issue in the main proceedings which authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52. If so, the national court asks what conclusions it must draw from that interpretation.

56 In this regard, it is to be noted that, in accordance with Article 1, the purpose of Directive 2000/78 is to lay down a general framework for combating discrimination on any of the grounds referred to in that article, which include age, as regards employment and occupation.

57 Paragraph 14(3) of the TzBfG, however, by permitting employers to conclude without restriction fixed-term contracts of employment with workers over the age of 52, introduces a difference of treatment on the grounds directly of age.

58 Specifically with regard to differences of treatment on grounds of age, Article 6(1) of Directive 2000/78 provides that the Member States may provide that such differences of treatment 'shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary'. According to subparagraph (a) of the second paragraph of Article 6(1), those differences may include inter alia 'the setting of special conditions on access to employment and vocational training, employment and occupation … for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection' and, under subparagraphs (b) and (c), the fixing of conditions of age in certain special circumstances.

59 As is clear from the documents sent to the Court by the national court, the purpose of that legislation is plainly to promote the vocational integration of unemployed older workers, in so far as they encounter considerable difficulties in finding work.

60 The legitimacy of such a public-interest objective cannot reasonably be thrown in doubt, as indeed the Commission itself has admitted.

61 An objective of that kind must as a rule, therefore, be regarded as justifying, 'objectively and reasonably', as provided for by the first subparagraph of Article 6(1) of Directive 2000/78, a difference of treatment on grounds of age laid down by Member States.

62 It still remains to be established whether, according to the actual wording of that provision, the means used to achieve that legitimate objective are 'appropriate and necessary'.

63 In this respect the Member States unarguably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy.

64 However, as the national court has pointed out, application of national legislation such as that at issue in the main proceedings leads to a situation in which all workers who have reached the age of 52, without distinction,

whether or not they were unemployed before the contract was concluded and whatever the duration of any period of unemployment, may lawfully, until the age at which they may claim their entitlement to a retirement pension, be offered fixed-term contracts of employment which may be renewed an indefinite number of times. This significant body of workers, determined solely on the basis of age, is thus in danger, during a substantial part of its members' working life, of being excluded from the benefit of stable employment which, however, as the Framework Agreement makes clear, constitutes a major element in the protection of workers.

65 In so far as such legislation takes the age of the worker concerned as the only criterion for the application of a fixed-term contract of employment, when it has not been shown that fixing an age threshold, as such, regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned, is objectively necessary to the attainment of the objective which is the vocational integration of unemployed older workers, it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued. Observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued (see, to that effect, Case C-476/99 *Lommers* [2002] ECR I-2891, paragraph 39). Such national legislation cannot, therefore, be justified under Article 6(1) of Directive 2000/78.

66 The fact that, when the contract was concluded, the period prescribed for the transposition into domestic law of Directive 2000/78 had not yet expired cannot call that finding into question.

67 First, the Court has already held that, during the period prescribed for transposition of a directive, the Member States must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive (*Inter-Environnement Wallonie*, paragraph 45).

68 In this connection it is immaterial whether or not the rule of domestic law in question, adopted after the directive entered into force, is concerned with the transposition of the directive (see, to that effect, Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraphs 58 and 59).

69 In the case in the main proceedings the lowering, pursuant to Paragraph 14(3) of the TzBfG, of the age above which it is permissible to conclude fixed-term contracts from 58 to 52 took place in December 2002 and that measure was to apply until 31 December 2006.

70 The mere fact that, in the circumstances of the case, that provision is to expire on 31 December 2006, just a few weeks after the date by which the Member State must have transposed the directive, is not in itself decisive.

71 On the one hand, it is apparent from the very wording of the second subparagraph of Article 18 of Directive 2000/78 that where a Member State, like the Federal Republic of Germany in this case, chooses to have recourse to an additional period of three years from 2 December 2003 in order to transpose the directive, that Member State 'shall report annually to the Commission on the steps it is taking to tackle age … discrimination and on the progress it is making towards implementation'.

72 That provision implies, therefore, that the Member State, which thus exceptionally enjoys an extended period for transposition, is progressively to take concrete measures for the purpose of there and then approximating its legislation to the result prescribed by that directive. Now, that obligation would be rendered redundant if the Member State were to be permitted, during the period allowed for implementation of the directive, to adopt measures incompatible with the objectives pursued by that act.

73 On the other hand, as the Advocate General has observed in point 96 of his Opinion, on 31 December 2006 a significant proportion of the workers covered by the legislation at issue in the main proceedings, including Mr Mangold, will already have reached the age of 58 and will therefore still fall within the specific rules laid down by Paragraph 14(3) of the TzBfG, with the result that that class of persons becomes definitively liable to be excluded from the safeguard of stable employment by the use of a fixed-term contract of employment, regardless of the fact that the age condition fixed at 52 will cease to apply at the end of 2006.

74 In the second place and above all, Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with Article 1 thereof, the sole purpose of the directive is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation', the source of the actual principle underlying the prohibition of those forms

of discrimination being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States.

75 The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law. Where national rules fall within the scope of Community law, which is the case with Paragraph 14(3) of the TzBfG, as amended by the Law of 2002, as being a measure implementing Directive 1999/70 (see also, in this respect, paragraphs 51 and 64 above), and reference is made to the Court for a preliminary ruling, the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with such a principle (Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraphs 30 to 32).

76 Consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age, in particular so far as the organisation of appropriate legal remedies, the burden of proof, protection against victimisation, social dialogue, affirmative action and other specific measures to implement such a directive are concerned.

77 In those circumstances it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law (see, to that effect, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 21, and Case C-347/96 *Solred* [1998] ECR I-937, paragraph 30).

78 Having regard to all the foregoing, the reply to be given to the second and third questions must be that Community law and, more particularly, Article 6(1) of Directive 2000/78, must be interpreted as precluding a provision of domestic law such as that at issue in the main proceedings which authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52.

It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.

**Costs**

[…]

On those grounds, the Court (Grand Chamber) hereby rules:

1. **On a proper construction of Clause 8(3) of the Framework Agreement on fixed-term contracts concluded on 18 March 1999, put into effect by Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, domestic legislation such as that at issue in the main proceedings, which for reasons connected with the need to encourage employment and irrespective of the implementation of that agreement, has lowered the age above which fixed-term contracts of employment may be concluded without restrictions, is not contrary to that provision.**

2. **Community law and, more particularly, Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding a provision of domestic law such as that at issue in the main proceedings which authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52.**

**It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.**

## Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*

In Case C-414/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decision of 17 March 2016, received at the Court on 27 July 2016, in the proceedings

**Vera Egenberger**

v

**Evangelisches Werk für Diakonie und Entwicklung eV,**

THE COURT (Grand Chamber),

[…]

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 4(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The request has been made in proceedings between Ms Vera Egenberger and Evangelisches Werk für Diakonie und Entwicklung eV ('Evangelisches Werk') concerning a claim by Ms Egenberger for compensation for discrimination on grounds of religion allegedly suffered by her in a recruitment procedure.

**Legal context**

**EU law**

3 Recitals 4, 23, 24 and 29 of Directive 2000/78 state:

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

…

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

(24) The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member

States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.

…

(29) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.'

4 Article 1 of Directive 2000/78 provides:

'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

5 Article 2(1), (2) and (5) of Directive 2000/78 provides:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

…

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.'

6 Article 4 of that directive reads as follows:

'1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.'

7 Article 9(1) of the directive provides:

‘Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.’

8 Article 10(1) of the directive provides:

‘Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.’

**German law**

*The GG*

9 Article 4(1) and (2) of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany, ‘the GG’) provides:

‘(1) Freedom of belief and of conscience and freedom to profess a religious or philosophical creed shall be inviolable.

(2) The undisturbed practice of religion shall be guaranteed.’

10 In accordance with Article 140 of the GG, the provisions of Articles 136 to 139 and 141 of the Weimar Constitution of 11 August 1919 (‘the WRV’) are an integral part of the GG.

11 Article 137 of the WRV provides:

‘1. There shall be no State church.

2. Freedom of association to form religious societies shall be guaranteed. There shall be no restrictions on the combination of religious societies within the territory of the State.

3. Each religious society shall arrange and administer its affairs independently within the limits of the law that applies to everyone. It shall confer its offices without the involvement of the State or the civil municipality.

…

7. Associations which devote themselves to the communal nurture of a philosophical belief shall be equated with religious societies.’

12 According to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court, Germany), the holders of the churches’ right of self-determination guaranteed by Article 140 of the GG in conjunction with Article 137(3) of the WRV are not only the churches themselves as religious communities but also all institutions affiliated to them in a particular way, if and to the extent that they are called on, in accordance with the churches’ faith-defined self-perception and with their own purpose or task, to undertake and fulfil the churches’ mandate and mission.

*The AGG*

13 The Allgemeines Gleichbehandlungsgesetz (General Law on equal treatment) of 14 August 2006 (BGBl. 2006 I, p. 1897, ‘the AGG’) aims to transpose Directive 2000/78 into German law.

14 Paragraph 1 of the AGG, defining the objective of the law, states:

‘The objective of this law is to prevent or eliminate discrimination on grounds of race, ethnic origin, sex, religion or belief, disability, age or sexual identity.’

15 Paragraph 7(1) of the AGG provides:

‘Workers must not be discriminated against on any of the grounds mentioned in Paragraph 1; this applies also where the person responsible for the discrimination merely assumes in the course of the discrimination that one of the grounds mentioned in Paragraph 1 exists.’

16 Under Paragraph 9 of the AGG:

‘1. Without prejudice to Paragraph 8 [of this law], a difference of treatment on grounds of religion or belief in connection with employment by religious societies, institutions affiliated to them regardless of their legal form, or associations which devote themselves to the communal nurture of a religion or belief shall also be permitted if a particular religion or belief constitutes a justified occupational requirement, having regard to the self-perception of the religious society or association concerned, in view of its right of self-determination or because of the type of activity.

2. The prohibition of difference of treatment on grounds of religion or belief shall not affect the right of the religious societies, institutions affiliated to them regardless of their legal form, or associations which devote themselves to the communal nurture of a religion or belief, mentioned in subparagraph 1, to be able to require their employees to act in good faith and loyalty in accordance with their self-perception.’

17 Paragraph 15 of the AGG reads as follows:

‘1. Where there is an infringement of the prohibition of discrimination, the employer shall be required to make good the damage caused thereby. This shall not apply if the employer is not responsible for the breach of duty.

2. For damage which is not pecuniary damage, the employee may claim appropriate compensation in money. In the case of non-recruitment, the compensation may not exceed three months’ pay if the employee would not have been recruited even if the selection had been free from discrimination.

…’

*Ecclesiastical law of the Evangelische Kirche in Deutschland*

18 The Grundordnung der Evangelischen Kirche in Deutschland (Basic Code of the Protestant Church in Germany) of 13 July 1948, as last amended by Kirchengesetz (church law) of 12 November 2013, is the basis of the ecclesiastical law of the Evangelische Kirche in Deutschland (Protestant Church in Germany, ‘the EKD’).

19 Adopted pursuant to Article 9(b) of that basic code, the Richtlinie des Rates der Evangelischen Kirche in Deutschland über die Anforderungen der privatrechtlichen beruflichen Mitarbeit in der Evangelischen Kirche in Deutschland und des Diakonischen Werkes (Guidelines of the Council of the Protestant Church in Germany on the requirements for occupational work under private law in the EKD and for the Diaconal Work, ‘the EKD Employment Guidelines’) of 1 July 2005, as amended, provides in Paragraph 2(1):

‘The service of the Church is defined by the mission to bear witness to the Gospel in word and deed. All women and men who work in employment relationships in the Church and Diaconate contribute in different ways to making it possible to fulfil that mission. That mission is the basis of the rights and duties of employers and workers.’

20 Paragraph 3 of the EKD Employment Guidelines provides:

‘1. Occupational work in the Protestant Church and its Diaconate presupposes in principle membership of a member church of the [EKD] or of a church with which the [EKD] is in communion.

2. For tasks which are not to be regarded as proclamation [of the Gospel], pastoral care, instruction or direction, an exception may be made to subparagraph 1 where other suitable workers cannot be found. In that case persons who belong to another member church of the Working Group of Christian Churches in Germany or the Association of Protestant Free Churches may also be recruited. Recruitment of persons who do not meet the requirements of subparagraph 1 must be examined in each individual case having regard to the size of the workplace or institution and its other workers and the duties to be performed in the particular environment. This is without prejudice to the second sentence of Paragraph 2(1).'

21 Entitled 'Ecclesio-diaconal mission', Paragraph 2 of the Dienstvertragsordnung der Evangelischen Kirche in Deutschland (EKD Regulation on contracts of employment) of 25 August 2008, which governs the general conditions of work of employees of the EKD under private law, issued by the Central Office of the Diaconal Work and other works and institutions, provides:

'Service in the Church is defined by the mission to proclaim the gospel of Jesus Christ in word and deed. Diaconal service is an expression of the life and essence of the Protestant Church.'

22 Under Paragraph 4 of the EKD Regulation on contracts of employment, 'General duties':

'Workers contribute according to their gifts, tasks and areas of responsibility to the fulfilment of their ecclesial and diaconal mission. Their whole conduct in service and outside service must correspond to the responsibility which they have accepted as workers in the service of the Church.'

23 The EKD Employment Guidelines and the EKD Regulation on contracts of employment both apply to Evangelisches Werk.

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

24 In November 2012 Evangelisches Werk published an offer of fixed-term employment for a project for producing a parallel report on the United Nations International Convention on the Elimination of All Forms of Racial Discrimination. According to the offer of employment, the work to be done extended to accompanying the process for drawing up the country reports on that convention for 2012 to 2014; drawing up the parallel report to the country report on Germany, and observations and specialist contributions; project-related representation of the diaconate of Germany vis-à-vis the political world, the general public and human rights organisations, and collaboration in certain bodies; providing information and coordinating the opinion-forming process in relation to the association; and organisation, administration and reporting in relation to the work.

25 The offer of employment also specified the conditions to be satisfied by candidates. One of these read as follows:

'We presuppose membership of a Protestant church or a church belonging to the [Working Group of Christian Churches in Germany] and identification with the diaconal mission. Please state your church membership in your curriculum vitae.'

26 Ms Egenberger, of no denomination, applied for the post offered. Although her application was shortlisted after a preliminary selection by Evangelisches Werk, she was not invited to an interview. The candidate who was eventually successful had stated with respect to his church membership that he was a 'Protestant Christian active in the Berlin regional church'.

27 Since she considered that her application had been rejected because she did not belong to any denomination, Ms Egenberger brought an action before the Arbeitsgericht Berlin (Labour Court, Berlin, Germany), seeking for Evangelisches Werk to be ordered to pay her EUR 9 788.65 in accordance with Paragraph 15(2) of the AGG. She argued that the taking of religion into account in the recruitment procedure, as was apparent from the advertisement of the post in question, was not compatible with the prohibition of discrimination in the AGG, if interpreted in accordance with EU law, and that Paragraph 9(1) of the AGG could not justify the discrimination of which she had been the victim.

28 Evangelisches Werk submitted that in the present case a difference of treatment on grounds of religion was justified under Paragraph 9(1) of the AGG. The right to require membership of a Christian church was, in the

view of Evangelisches Werk, covered by the churches' right of self-determination protected by Article 140 of the GG in conjunction with Article 137(3) of the WRV. Such a right was consistent with EU law, by reason in particular of the provisions of Article 17 TFEU. Moreover, because of the nature of the activity to which the offer of employment at issue in the main proceedings related, membership of a church constituted a justified occupational requirement, having regard to the ecclesial self-perception of Evangelisches Werk.

29 The Arbeitsgericht Berlin (Labour Court, Berlin) allowed Ms Egenberger's action in part. It held that she had been the victim of discrimination, but limited the compensation to EUR 1 957.73. After her appeal against that decision was dismissed by the Landesarbeitsgericht Berlin-Brandenburg (Higher Labour Court for Berlin and Brandenburg, Germany), Ms Egenberger brought an appeal on a point of law before the referring court, seeking payment of appropriate compensation.

30 The Bundesarbeitsgericht (Federal Labour Court, Germany) considers that the outcome of the dispute in the main proceedings depends on whether the differentiation according to church membership by Evangelisches Werk was lawful under Paragraph 9(1) of the AGG. However, that provision must be interpreted in conformity with EU law. The outcome of the dispute therefore depends on the interpretation of Article 4(2) of Directive 2000/78, which Paragraph 9 of the AGG was intended to transpose into national law. The referring court observes that the difference of treatment must also comply with the constitutional provisions and principles of the Member States and with the general provisions of EU law and Article 17 TFEU.

31 In the first place, the referring court observes that, according to the express intention of the German legislature, Article 4(2) of Directive 2000/78 was transposed into German law in Paragraph 9 of the AGG in such a way that the legal provisions and practices in force at the time of adoption of the directive were maintained. The legislature took that decision in the light of the case-law of the Bundesverfassungsgericht (Federal Constitutional Court) on the churches' privilege of self-determination. In accordance with that case-law, judicial review should be limited to a review of plausibility on the basis of the church's self-perception. It follows that, where the church's self-perception itself distinguishes between activities 'close to' and activities 'remote from' proclamation of the church's message, the courts should not review whether and to what extent that distinction is justified. Even if a church's self-perception meant that all posts were to be filled by reference to religious affiliation, whatever the nature of the posts, that would have to be accepted without more extensive judicial review. The question arises, however, of whether that interpretation of Paragraph 9(1) of the AGG is consistent with EU law.

32 According to the referring court, neither from the wording of Article 4(2) of Directive 2000/78 nor from the recitals of that directive does it follow that an employer such as Evangelisches Werk can itself determine authoritatively that religion, regardless of the nature of the activity concerned, is a justified occupational requirement, having regard to the employer's ethos, and that the national courts can carry out only a review of plausibility in that respect. On the contrary, the statement in that provision that religion must constitute a 'genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos' could speak in favour of the national courts having the jurisdiction and the obligation to carry out a review going beyond a mere review of plausibility.

33 The referring court observes, however, that, in the opinion of some German legal writers, Article 4(2) of Directive 2000/78 must be interpreted in accordance with primary law, more particularly Declaration No 11 on the status of churches and non-confessional organisations annexed to the Final Act of the Treaty of Amsterdam ('Declaration No 11') or Article 17 TFEU.

34 In the second place, the referring court observes that it will have to decide, if need be, taking into account the whole body of national law and the methods of interpretation recognised by that law, whether and to what extent Paragraph 9(1) of the AGG can be interpreted consistently with Article 4(2) of Directive 2000/78, as interpreted by the Court, without requiring an interpretation *contra legem*, or whether that provision of the AGG must be disapplied.

35 The referring court asks whether the prohibition of discrimination on grounds of religion or belief in Article 21(1) of the Charter of Fundamental Rights of the European Union ('the Charter') confers a subjective right on an individual which can be enforced by that person before the national courts and which, in disputes between private persons, requires those courts to disapply national provisions which are not compatible with that prohibition.

36 The referring court further notes that the Court has not yet stated whether the obligation to disapply national provisions that are incompatible with the prohibition of discrimination on grounds of religion or belief in Article 21(1) of the Charter also applies where an employer such as Evangelisches Werk, in order to justify a difference of treatment on grounds of religion, relies not only on provisions of national constitutional law but also on those of primary law of the EU, in this case Article 17 TFEU.

37 In the third place, the referring court observes that it will also have to answer the question, if need be, of what requirements related to religion may, in a case such as that at issue in the main proceedings, by reason of the nature of the activity or the context in which it is carried out, be regarded as constituting a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos, within the meaning of Article 4(2) of Directive 2000/78.

38 The European Court of Human Rights has indeed identified individual criteria in cases concerning conflicts of loyalty, referring inter alia to Directive 2000/78, but those criteria concerned existing employment relationships and were essentially specific to the individual cases.

39 In those circumstances, the referring court is uncertain whether such criteria are relevant for the interpretation of Article 4(2) of Directive 2000/78 where the difference of treatment on grounds of religion takes place at the recruitment stage, and whether Article 17 TFEU has an effect on the interpretation of that provision.

40 The question also arises of whether the national courts must carry out a comprehensive review, or merely a review of plausibility, or simply a review as to abuse, where they are required to ascertain whether, taking into account the nature of the activity concerned or the context in which it is carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos, within the meaning of Article 4(2) of Directive 2000/78.

41 In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 4(2) of Directive [2000/78] to be interpreted as meaning that an employer, such as the defendant in the present case, or the church on its behalf, may itself authoritatively determine whether a particular religion of an applicant, by reason of the nature of the activities or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer or church's ethos?

(2) If the answer to Question 1 is in the negative:

In a case such as the present, is it necessary to disapply a provision of national law — such as, in this case, the first alternative of Paragraph 9(1) of the AGG — which provides that a difference of treatment on the ground of religion in the context of employment with religious bodies and the organisations affiliated to them is also lawful where a particular religion, in accordance with the self-perception of the religious community, having regard to its right of self-determination, constitutes a justified occupational requirement?

(3) If the answer to Question 1 is in the negative:

What requirements are there as regards the nature of the activity or the context in which it is carried out, as genuine, legitimate and justified occupational requirements, having regard to the organisation's ethos, in accordance with Article 4(2) of Directive [2000/78]?'

**Consideration of the questions referred**

**Question 1**

42 By its first question, the referring court essentially asks whether Article 4(2) of Directive 2000/78 must be interpreted as meaning that a church or other organisation whose ethos is based on religion or belief intending to recruit an employee may itself determine authoritatively the occupational activities for which religion, by reason of the nature of the activity concerned or the context in which it is carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation.

43 It should be noted, as a preliminary point, that it is not disputed between the parties to the main proceedings that the rejection of Ms Egenberger's application on the ground that she was of no denomination constitutes a difference of treatment on grounds of religion within the meaning of Article 4(2) of Directive 2000/78.

44 That said, in accordance with the settled case-law of the Court, in interpreting a provision of EU law it is necessary to consider not only its wording but also its context and the objectives of the legislation of which it forms part, and in particular the origin of that legislation (see, to that effect, judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2015:433, paragraph 30).

45 As regards, first, the wording of the first subparagraph of Article 4(2) of Directive 2000/78, it follows from that provision that a church or other organisation the ethos of which is based on religion or belief may lay down a requirement related to religion or belief if, having regard to the nature of the activity concerned or the context in which it is carried out, 'religion or belief constitute[s] a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos'.

46 Clearly, if review of compliance with those criteria were, in the event of doubt as to that compliance, the task not of an independent authority such as a national court but of the church or organisation intending to practise a difference of treatment on grounds of religion or belief, it would be deprived of effect.

47 As regards, secondly, the objective of Directive 2000/78 and the context of Article 4(2) of the directive, it must be recalled that that directive's objective, as stated in Article 1, is to lay down a general framework for combating discrimination on the grounds inter alia of religion or belief as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. The directive is thus a specific expression, in the field covered by it, of the general prohibition of discrimination laid down in Article 21 of the Charter.

48 In order to ensure that that general principle is observed, Article 9 of Directive 2000/78, read in the light of recital 29 of the directive, requires the Member States to provide procedures, including judicial procedures, for enforcement of the obligations under the directive. Moreover, Article 10 of the directive requires the Member States to take the necessary measures, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it is for the respondent to prove that there has been no breach of that principle.

49 Furthermore, Article 47 of the Charter, which applies to a dispute such as that in the main proceedings, given that the AGG implements Directive 2000/78 in German law for the purposes of Article 51(1) of the Charter and that the dispute concerns a person who was the subject of a difference of treatment on grounds of religion in connection with access to employment, lays down the right of individuals to effective judicial protection of their rights under EU law (see, to that effect, judgment of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraph 50).

50 While Directive 2000/78 thus aims to protect the fundamental right of workers not to be discriminated against on grounds of their religion or belief, the fact remains that, by means of Article 4(2), that directive also aims to take into account the right of autonomy of churches and other public or private organisations whose ethos is based on religion or belief, as recognised by Article 17 TFEU and Article 10 of the Charter, which corresponds to Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950.

51 The objective of Article 4(2) of Directive 2000/78 is thus to ensure a fair balance between the right of autonomy of churches and other organisations whose ethos is based on religion or belief, on the one hand, and, on the other hand, the right of workers, inter alia when they are being recruited, not to be discriminated against on grounds of religion or belief, in situations where those rights may clash.

52 To that end, that provision sets out the criteria to be taken into account in the balancing exercise which must be performed in order to ensure a fair balance between those competing fundamental rights.

53 In the event of a dispute, however, it must be possible for the balancing exercise to be the subject if need be of review by an independent authority, and ultimately by a national court.

54 In this context, the fact that Article 4(2) of Directive 2000/78 refers to national legislation in force at the date of adoption of the directive and national practices existing at that date cannot be interpreted as authorising the Member States to withdraw compliance with the criteria set out in that provision from the scope of effective judicial review.

55 In the light of the foregoing, it must be concluded that, where a church or other organisation whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment by it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of Directive 2000/78 are satisfied in the particular case.

56 Article 17 TFEU cannot invalidate that conclusion.

57 To begin with, the wording of that provision corresponds in substance to that of Declaration No 11. The fact that Declaration No 11 is expressly mentioned in recital 24 of Directive 2000/78 shows that the EU legislature must have taken that declaration into account when adopting the directive, especially Article 4(2), since that provision refers precisely to the national legislation and practices in force on the date of adoption of the directive.

58 Next, it must be stated that Article 17 TFEU expresses the neutrality of the European Union towards the organisation by the Member States of their relations with churches and religious associations and communities. On the other hand, that article is not such as to exempt compliance with the criteria set out in Article 4(2) of Directive 2000/78 from effective judicial review.

59 Having regard to all the above considerations, the answer to Question 1 is that Article 4(2) of Directive 2000/78, read in conjunction with Articles 9 and 10 of the directive and Article 47 of the Charter, must be interpreted as meaning that, where a church or other organisation whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment with it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of that directive are satisfied in the particular case.

**Question 3**

60 By its third question, which should be considered before the second question, the referring court essentially asks what the criteria should be for ascertaining in the particular case whether, having regard to the ethos of the church or organisation in question, religion or belief constitutes, in view of the nature of the activity concerned or the context in which it is carried out, a genuine, legitimate and justified occupational requirement within the meaning of Article 4(2) of Directive 2000/78.

61 In this respect, it is true that in the balancing exercise provided for in Article 4(2) of Directive 2000/78, recalled in paragraphs 51 and 52 above, the Member States and their authorities, including judicial authorities, must, except in very exceptional cases, refrain from assessing whether the actual ethos of the church or organisation concerned is legitimate (see, to that effect, ECtHR, 12 June 2014, *Fernández Martínez v. Spain*, CE:ECHR:2014:0612JUD005603007, § 129). They must nonetheless ensure that there is no infringement of the right of workers not to be discriminated against on grounds inter alia of religion or belief. Thus, by virtue of Article 4(2), the purpose of the examination is to ascertain whether the occupational requirement imposed by the church or organisation, by reason of the nature of the activities concerned or the context in which they are carried out, is genuine, legitimate and justified, having regard to that ethos.

62 As regards the interpretation of the concept of ‘genuine, legitimate and justified occupational requirement’ in Article 4(2) of Directive 2000/78, it follows expressly from that provision that it is by reference to the ‘nature’ of the activities concerned or the ‘context’ in which they are carried out that religion or belief may constitute such an occupational requirement.

63 Thus the lawfulness from the point of view of that provision of a difference of treatment on grounds of religion or belief depends on the objectively verifiable existence of a direct link between the occupational requirement imposed by the employer and the activity concerned. Such a link may follow either from the nature of the activity, for example where it involves taking part in the determination of the ethos of the church or organisation in question or contributing to its mission of proclamation, or else from the circumstances in which the activity is to be carried out, such as the need to ensure a credible presentation of the church or organisation to the outside world.

64 Furthermore, the occupational requirement must, as required by Article 4(2) of Directive 2000/78, be 'genuine, legitimate and justified', having regard to the ethos of the church or organisation. Although in principle, as stated in paragraph 61 above, it is not for the national courts to rule on the ethos as such on which the purported occupational requirement is founded, they are nevertheless called on to decide on a case-by-case basis whether those three criteria are satisfied from the point of view of that ethos.

65 With respect to those criteria, it should be stated, first, as regards the 'genuine' nature of the requirement, that the use of that adjective means that, in the mind of the EU legislature, professing the religion or belief on which the ethos of the church or organisation is founded must appear necessary because of the importance of the occupational activity in question for the manifestation of that ethos or the exercise by the church or organisation of its right of autonomy.

66 Secondly, as regards the 'legitimate' nature of the requirement, the use of that term shows that the EU legislature wished to ensure that the requirement of professing the religion or belief on which the ethos of the church or organisation is founded is not used to pursue an aim that has no connection with that ethos or with the exercise by the church or organisation of its right of autonomy.

67 Thirdly, as regards the 'justified' nature of the requirement, that term implies not only that compliance with the criteria in Article 4(2) of Directive 2000/78 can be reviewed by a national court, but also that the church or organisation imposing the requirement is obliged to show, in the light of the factual circumstances of the case, that the supposed risk of causing harm to its ethos or to its right of autonomy is probable and substantial, so that imposing such a requirement is indeed necessary.

68 The requirement in Article 4(2) of Directive 2000/78 must comply with the principle of proportionality. While that provision, unlike Article 4(1) of the directive, does not expressly provide that the requirement must be 'proportionate', it nonetheless provides that any difference of treatment must take account of the 'general principles of Community law'. As the principle of proportionality is one of the general principles of EU law (see, to that effect, judgments of 6 March 2014, *Siragusa*, C-206/13, EU:C:2014:126, paragraph 34 and the case-law cited, and of 9 July 2015, *K and A*, C-153/14, EU:C:2015:453, paragraph 51), the national courts must ascertain whether the requirement in question is appropriate and does not go beyond what is necessary for attaining the objective pursued.

69 In the light of those considerations, the answer to Question 3 is that Article 4(2) of Directive 2000/78 must be interpreted as meaning that the genuine, legitimate and justified occupational requirement it refers to is a requirement that is necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organisation. That requirement must comply with the principle of proportionality.

**Question 2**

70 By its second question, the referring court essentially asks whether a national court is required, in a dispute between individuals, to disapply a provision of national law which it is not possible to interpret in conformity with Article 4(2) of Directive 2000/78.

71 It must be recalled that it is for the national courts, taking into account the whole body of rules of national law and applying methods of interpretation recognised by that law, to decide whether and to what extent a national provision such as Paragraph 9(1) of the AGG can be interpreted in conformity with Article 4(2) of Directive 2000/78, without having recourse to an interpretation *contra legem* of the national provision (see, to that effect, judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraphs 31 and 32 and the case-law cited).

72 The Court has held, moreover, that the requirement to interpret national law in conformity with EU law includes the obligation for national courts to change their established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive (judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 33 and the case-law cited).

73 Consequently, a national court cannot validly consider that it is impossible for it to interpret a provision of national law in conformity with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law (see, to that effect, judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 34).

74 In the present case, therefore, it is for the referring court to ascertain whether the national provision in question lends itself to an interpretation in conformity with Directive 2000/78.

75 In the event that it is impossible to interpret the national provision at issue in the main proceedings in conformity with EU law, it must be pointed out, first, that Directive 2000/78 does not itself establish the principle of equal treatment in the field of employment and occupation, which originates in various international instruments and the constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds, including religion and belief, as may be seen from its title and from Article 1 (see, to that effect, judgment of 10 May 2011, *Römer*, C-147/08, EU:C:2011:286, paragraph 59 and the case-law cited).

76 The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law (see, with respect to the principle of non-discrimination on grounds of age, judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 47).

77 As regards its mandatory effect, Article 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals (see, by analogy, judgment of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56, paragraph 39; of 6 June 2000, *Angonese*, C-281/98, EU:C:2000:296, paragraphs 33 to 36; of 3 October 2000, *Ferlini*, C-411/98, EU:C:2000:530, paragraph 50; and of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union*, C-438/05, EU:C:2007:772, paragraphs 57 to 61).

78 Secondly, it must be pointed out that, like Article 21 of the Charter, Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.

79 Consequently, in the situation mentioned in paragraph 75 above, the national court would be required to ensure within its jurisdiction the judicial protection for individuals flowing from Articles 21 and 47 of the Charter, and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.

80 That conclusion is not called into question by the fact that a court may, in a dispute between individuals, be called on to balance competing fundamental rights which the parties to the dispute derive from the provisions of the FEU Treaty or the Charter, and may even be obliged, in the review that it must carry out, to make sure that the principle of proportionality is complied with. Such an obligation to strike a balance between the various interests involved has no effect on the possibility of relying on the rights in question in such a dispute (see, to that effect, judgments of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333, paragraphs 77 to 80, and of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union*, C-438/05, EU:C:2007:772, paragraphs 85 to 89).

81 Further, where the national court is called on to ensure that Articles 21 and 47 of the Charter are observed, while possibly balancing the various interests involved, such as respect for the status of churches as laid down in Article 17 TFEU, it will have to take into consideration the balance struck between those interests by the EU legislature in Directive 2000/78, in order to determine the obligations deriving from the Charter in circumstances such as those at issue in the main proceedings (see, by analogy, judgment of 22 November 2005, *Mangold*,

C-144/04, EU:C:2005:709, paragraph 76, and order of 23 April 2015, *Commission* v *Vanbreda Risk & Benefits*, C-35/15 P(R), EU:C:2015:275, paragraph 31).

82 In the light of the foregoing, the answer to Question 2 is that a national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 4(2) of Directive 2000/78, to ensure within its jurisdiction the judicial protection deriving for individuals from Articles 21 and 47 of the Charter and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.

**Costs**

[…]

On those grounds, the Court (Grand Chamber) hereby rules:

**(1)** Article 4(2) of **Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, read in conjunction with Articles 9 and 10 of the directive and Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, where a church or other organisation whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment with it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of that directive are satisfied in the particular case.**

**(2) Article 4(2) of Directive 2000/78 must be interpreted as meaning that the genuine, legitimate and justified occupational requirement it refers to is a requirement that is necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organisation. That requirement must comply with the principle of proportionality.**

**(3) A national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 4(2) of Directive 2000/78, to ensure within its jurisdiction the judicial protection deriving for individuals from Articles 21 and 47 of the Charter of Fundamental Rights of the European Union and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.**

LECTURE 4: FUNDAMENTAL RIGHTS IN THE EU INTERNAL MARKET (II)/ ECONOMIC FREEDOMS AND SOCIAL RIGHTS IN BALANCE?

The EU internal market is built on free movement rights construed as fundamental rights. Those rights enable above all commodities or economically active persons to move around freely. Moving around freely nevertheless also entails at least some possibility to go abroad and establish oneself in a jurisdiction that has lower or less burdensome regulatory standards in terms of labour law or social security protection. As a result, EU internal market law is said to enable social dumping. The Court of Justice has never accepted the premise that the internal market necessarily downgrades social protection legislation, which in itself constitutes the translation of fundamental social rights. Indeed, it has tried to balance, in a nuanced way, economic free movement and social protection rights. In this lecture, we analyse to what extent the European Union has indeed done so and whether the legal doctrines thus established allow indeed to reconcile an economic and social European integration project. Attention will also be paid to the fundamental rights nature of certain social rights and to the more general question asked during this course as to whether fundamental rights occupy a special place in EU internal market reasoning.

*Materials to read*:

- Court of Justice, 11 December 2007, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:772.
- Court of Justice, 18 December 2007, Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, ECLI:EU:C:2007:809.
- D. Schiek, *EU Social and Labour Rights and EU Internal Market Law*, Study for the EMPL Committee of the European Parliament, 2015 (via eCampus).

## Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*

In Case C-438/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom), made by decision of 23 November 2005, received at the Court on 6 December 2005, in the proceedings

**International Transport Workers' Federation,**

**Finnish Seamen's Union,**

v

**Viking Line ABP,**

**OÜ Viking Line Eesti,**

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, A. Rosas, K. Lenaerts, U. Lõhmus and L. Bay Larsen, Presidents of Chambers, R. Schintgen (Rapporteur), R. Silva de Lapuerta, K. Schiemann, J. Makarczyk, P. Kūris, E. Levits and A. Ó Caoimh, Judges,

Advocate General: M. Poiares Maduro,

Registrar: L. Hewlett, Principal Administrator,

[…]

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation first, of Article 43 EC, and secondly, of Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ 1986 L 378, p. 1).

2 The reference has been made in connection with a dispute between the International Transport Workers' Federation ('ITF') and the Finnish Seamen's Union (Suomen Merimies-Unioni ry, 'FSU'), on the one hand, and Viking Line ABP ('Viking') and its subsidiary OÜ Viking Line Eesti ('Viking Eesti'), on the other, concerning actual or threatened collective action liable to deter Viking from reflagging one of its vessels from the Finnish flag to that of another Member State.

**Legal context**

*Community law*

3 Article 1(1) of Regulation No 4055/86 provides:

'Freedom to provide maritime transport services between Member States and between Member States and third countries shall apply in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.'

*National law*

4 According to the order for reference, Article 13 of the Finnish constitution, which confers on all individuals the freedom to form trade unions and freedom of association in order to safeguard other interests, has been interpreted as allowing trade unions to initiate collective action against companies in order to defend workers' interests.

5 In Finland, however, the right to strike is subject to certain limitations. Thus, according to Finland's Supreme Court, it may not be relied on, inter alia, where the strike is *contra bonos mores* or is prohibited under national law or under Community law.

**The dispute in the main proceedings and questions referred**

6 Viking, a company incorporated under Finnish law, is a large ferry operator. It operates seven vessels, including the *Rosella* which, under the Finnish flag, plies the route between Tallinn (Estonia) and Helsinki (Finland).

7 FSU is a Finnish union of seamen which has about 10 000 members. The crew of the *Rosella* are members of the FSU. FSU is affiliated to the ITF, which is an international federation of transport workers' unions with its headquarters in London (United Kingdom). The ITF groups together 600 unions in 140 different States.

8 According to the order for reference, one of the principal ITF policies is its 'Flag of Convenience' ('FOC') policy. The primary objectives of this policy are, on the one hand, to establish a genuine link between the flag of the ship and the nationality of the owner and, on the other, to protect and enhance the conditions of seafarers on FOC ships. ITF considers that a vessel is registered under a flag of convenience where the beneficial ownership and control of the vessel is found to lie in a State other than the State of the flag. In accordance with the ITF policy, only unions established in the State of beneficial ownership have the right to conclude collective agreements covering the vessel concerned. The FOC campaign is enforced by boycotts and other solidarity actions amongst workers.

9 So long as the *Rosella* is under the Finnish flag, Viking is obliged under Finnish law and the terms of a collective bargaining agreement to pay the crew wages at the same level as those applicable in Finland. Estonian crew wages are lower than Finnish crew wages. The *Rosella* was running at a loss as a result of direct competition from Estonian vessels operating on the same route with lower wage costs. As an alternative to selling the vessel, Viking sought in October 2003 to reflag it by registering it in either Estonia or Norway, in order to be able to enter into a new collective agreement with a trade union established in one of those States.

10 In accordance with Finnish law, Viking gave notice of its plans to the FSU and to the crew of the *Rosella*. During meetings between the parties, FSU made clear that it was opposed to those plans.

11 On 4 November 2003, FSU sent an email to ITF which referred to the plan to reflag the *Rosella*. The email further stated that 'the *Rosella* was beneficially owned in Finland and that FSU therefore kept the right to negotiate with Viking'. FSU asked ITF to pass this information on to all affiliated unions and to request them not to enter into negotiations with Viking.

12 On 6 November 2003, ITF sent a circular ('the ITF circular') to its affiliates asking them to refrain from entering into negotiations with Viking or Viking Eesti. The affiliates were expected to follow this recommendation because of the principle of solidarity between trade unions and the sanctions which they could face if they failed to comply with that circular.

13 The manning agreement for the *Rosella* expired on 17 November 2003 and therefore FSU was, as from that date, no longer under an obligation of industrial peace under Finnish law. Consequently, it gave notice of a strike requiring Viking, on the one hand, to increase the manning on the *Rosella* by eight and, on the other, to give up its plans to reflag the *Rosella*.

14 Viking conceded the extra eight crew but refused to give up its plans to reflag.

15 FSU was still not prepared, however, to agree to a renewal of the manning agreement and, by letter of 18 November 2003, it indicated that it would only accept such renewal on two conditions: first, that Viking, regardless of a possible change of the *Rosella*'s flag, gave an undertaking that it would continue to follow Finnish law, the collective bargaining agreement, the general agreement and the manning agreement on the Rosella and, second, that the possible change of flag would not lead to any laying-off of employees on any Finnish flag vessel belonging to Viking, or to changes to the terms and conditions of employment without the consent of the employees. In press statements FSU justified its position by the need to protect Finnish jobs.

16 On 17 November 2003, Viking started legal proceedings before the employment tribunal (Finland) for a declaration that, contrary to the view of the FSU, the manning agreement remained binding on the parties. On the basis of its view that the manning agreement was at an end, FSU gave notice, in accordance with Finnish law on industrial dispute mediation, that it intended to commence strike action in relation to the *Rosella* on 2 December 2003.

17 On 24 November 2003, Viking learnt of the existence of the ITF circular. The following day it brought proceedings before the Court of First Instance of Helsinki (Finland) to restrain the planned strike action. A preparatory hearing date was set for 2 December 2003.

18 According to the referring court, FSU was fully aware of the fact that its principal demand, that in the event of reflagging the crew should continue to be employed on the conditions laid down by Finnish law and the applicable collective agreement, would render reflagging pointless, since the whole purpose of such reflagging was to enable Viking to reduce its wage costs. Furthermore, a consequence of reflagging the *Rosella* to Estonia would be that Viking would, at least as regards the *Rosella*, no longer be able to claim State aid which the Finnish Government granted to Finnish flag vessels.

19 In the course of conciliation proceedings, Viking gave an undertaking, at an initial stage, that the reflagging would not involve any redundancies. Since FSU nevertheless refused to defer the strike, Viking put an end to the dispute on 2 December 2003 by accepting the trade union's demands and discontinuing judicial proceedings. Furthermore, it undertook not to commence reflagging prior to 28 February 2005.

20 On 1 May 2004, the Republic of Estonia became a member of the European Union.

21 Since the *Rosella* continued to run at a loss, Viking pursued its intention to reflag the vessel to Estonia. Because the ITF circular remained in force, on account of the fact that the ITF had never withdrawn it, the request to affiliated unions from the ITF in relation to the *Rosella* consequently remained in effect.

22 On 18 August 2004, Viking brought an action before the High Court of Justice of England and Wales, Queen's Bench Division (Commercial Court) (United Kingdom), requesting it to declare that the action taken by ITF and FSU was contrary to Article 43 EC, to order the withdrawal of the ITF circular and to order FSU not to infringe the rights which Viking enjoys under Community law.

23 By decision of 16 June 2005, that court granted the form of order sought by Viking, on the grounds that the actual and threatened collective action by the ITF and FSU imposed restrictions on freedom of establishment contrary to Article 43 EC and, in the alternative, constituted unlawful restrictions on freedom of movement for workers and freedom to provide services under Articles 39 EC and 49 EC.

24 On 30 June 2005, ITF and FSU brought an appeal against that decision before the referring court. In support of their appeal they claimed, inter alia, that the right of trade unions to take collective action to preserve jobs is a fundamental right recognised by Title XI of the EC Treaty and, in particular, Article 136 EC, the first paragraph of which provides that '[t]he Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion'.

25 It was argued that the reference to the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers incorporated a reference to the right to strike recognised by those legal

instruments. Consequently, the trade unions had the right to take collective action against an employer established in a Member State to seek to persuade him not to move part or all of his undertaking to another Member State.

26 The question therefore arises whether the Treaty intends to prohibit trade union action where it is aimed at preventing an employer from exercising his right of establishment for economic reasons. By analogy with the Court's rulings regarding Title VI of the Treaty (Case C-67/96 *Albany* [1999] ECR I-5751; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451; and Case C-222/98 *Van der Woude* [2000] ECR I-7111), it is argued that Title III of the Treaty and the articles relating to free movement of persons and of services do not apply to 'genuine trade union activities'.

27 In those circumstances, since it considered that the outcome of the case before it depended on the interpretation of Community law, the Court of Appeal (England and Wales) (Civil Division) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'*Scope of the free movement provisions*

(1) Where a trade union or association of trade unions takes collective action against a private undertaking so as to require that undertaking to enter into a collective bargaining agreement with a trade union in a particular Member State which has the effect of making it pointless for that undertaking to re-flag a vessel in another Member State, does that action fall outside the scope of Article 43 EC and/or Regulation No 4055/86 by virtue of the EC's social policy including, inter alia, Title XI of the EC Treaty and, in particular, by analogy with the Court's reasoning in … *Albany* (paragraphs 52 to 64)?

*Horizontal direct effect*

(2) Do Article 43 EC and/or Regulation No 4055/86 have horizontal direct effect so as to confer rights on a private undertaking which may be relied on against another private party and, in particular, a trade union or association of trade unions in respect of collective action by that union or association of unions?

*Existence of restrictions on free movement*

(3) Where a trade union or association of trade unions takes collective action against a private undertaking so as to require that undertaking to enter into a collective bargaining agreement with a trade union in a particular Member State, which has the effect of making it pointless for that undertaking to re-flag a vessel in another Member State, does that action constitute a restriction for the purposes of Article 43 EC and/or Regulation No 4055/86?

(4) Is a policy of an association of trade unions which provides that vessels should be flagged in the registry of the country in which the beneficial ownership and control of the vessel is situated so that the trade unions in the country of beneficial ownership of a vessel have the right to conclude collective bargaining agreements in respect of that vessel, a directly discriminatory, indirectly discriminatory or non-discriminatory restriction under Article 43 EC or Regulation No 4055/86?

(5) In determining whether collective action by a trade union or association of trade unions is a directly discriminatory, indirectly discriminatory or non-discriminatory restriction under Article 43 EC or Regulation No 4055/86, is the subjective intention of the union taking the action relevant or must the national court determine the issue solely by reference to the objective effects of that action?

*Establishment/services*

(6) Where a parent company is established in Member State A and intends to undertake an act of establishment by reflagging a vessel to Member State B to be operated by an existing wholly owned subsidiary in Member State B which is subject to the direction and control of the parent company:

(a) is threatened or actual collective action by a trade union or association of trade unions which would seek to render the above a pointless exercise capable of constituting a restriction on the parent company's right of establishment under Article 43, and

(b) after reflagging of the vessel, is the subsidiary entitled to rely on Regulation No 4055/86 in respect of the provision of services by it from Member State B to Member State A?

*Justification*

Direct discrimination

(7) If collective action by a trade union or association of trade unions is a directly discriminatory restriction under Article 43 EC or Regulation No 4055/86, can it, in principle, be justified on the basis of the public policy exception set out in Article 46 EC on the basis that:

(a) the taking of collective action (including strike action) is a fundamental right protected by Community law; and/or

(b) the protection of workers?

The policy of [ITF]: objective justification

(8) Does the application of a policy of an association of trade unions which provides that vessels should be flagged in the registry of the country in which the beneficial ownership and control of the vessel is situated so that the trade unions in the country of beneficial ownership of a vessel have the right to conclude collective bargaining agreements in respect of that vessel, strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services, and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition?

FSU's actions: objective justification

(9) Where:

– a parent company in Member State A owns a vessel flagged in Member State A and provides ferry services between Member State A and Member State B using that vessel;

– the parent company wishes to re-flag the vessel to Member State B to apply terms and conditions of employment which are lower than in Member State A;

– the parent company in Member State A wholly owns a subsidiary in Member State B and that subsidiary is subject to its direction and control;

– it is intended that the subsidiary will operate the vessel once it has been re-flagged in Member State B with a crew recruited in Member State B covered by a collective bargaining agreement negotiated with an ITF affiliated trade union in Member State B;

– the vessel will remain beneficially owned by the parent company and be bareboat chartered to the subsidiary;

– the vessel will continue to provide ferry services between Member State A and Member State B on a daily basis;

– a trade union established in Member State A takes collective action so as to require the parent and/or subsidiary to enter into a collective bargaining agreement with it which will apply terms and conditions acceptable to the union in Member State A to the crew of the vessel even after reflagging and which has the effect of making it pointless for the parent to re-flag the vessel to Member State B,

does that collective action strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition?

(10) Would it make any difference to the answer to [Question] 9 if the parent company provided an undertaking to a court on behalf of itself and all the companies within the same group that they will not by reason of the reflagging terminate the employment of any person employed by them (which undertaking did not require the renewal of short term employment contracts or prevent the redeployment of any employee on equivalent terms and conditions)?'

**The questions referred**

*Preliminary observations*

28 It must be borne in mind that, in accordance with settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 234 EC, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. However, the Court has regarded itself as not having jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious, inter alia, that the interpretation 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 (see Case C-415/93 *Bosman* [1995] ECR I-4921 and Case C-350/03 *Schulte* [2005] ECR I-9215, paragraph 43).

29 In the present case, the reference for a preliminary ruling concerns the interpretation, first, of provisions of the Treaty on freedom of establishment, and secondly, of Regulation No 4055/86 applying the principle of freedom to provide services to maritime transport.

30 However, since the question on freedom to provide services can arise only after the reflagging of the *Rosella* envisaged by Viking, and since, on the date on which the questions were referred to the Court, the vessel had not yet been re-flagged, the reference for a preliminary ruling is hypothetical and thus inadmissible in so far as it relates to the interpretation of Regulation No 4055/86.

31 In those circumstances, the questions referred by the national court can be answered only in so far as they concern the interpretation of Article 43 EC.

*The first question*

32 By its first question, the national court is essentially asking whether Article 43 EC must be interpreted as meaning that collective action initiated by a trade union or a group of trade unions against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, falls outside the scope of that article.

33 In this regard, it must be borne in mind that, according to settled case-law, Articles 39 EC, 43 EC and 49 EC do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17; Case 13/76 *Donà* [1976] ECR 1333, paragraph 17; *Bosman*, paragraph 82; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 47; Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 31; and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 120).

34 Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, limiting application of the prohibitions laid down by these articles to acts of a public authority would risk creating inequality in its application (see, by analogy, *Walrave and Koch*, paragraph 19; *Bosman*, paragraph 84; and *Angonese*, paragraph 33).

35 In the present case, it must be stated, first, that the organisation of collective action by trade unions must be regarded as covered by the legal autonomy which those organisations, which are not public law entities, enjoy pursuant to the trade union rights accorded to them, inter alia, by national law.

36 Secondly, as FSU and ITF submit, collective action such as that at issue in the main proceedings, which may be the trade unions' last resort to ensure the success of their claim to regulate the work of Viking's employees collectively, must be considered to be inextricably linked to the collective agreement the conclusion of which FSU is seeking.

37 It follows that collective action such as that described in the first question referred by the national court falls, in principle, within the scope of Article 43 EC.

38 This view is not called into question by the various arguments put forward by FSU, ITF and certain Member States which submitted observations to the Court to support the position contrary to that set out in the previous paragraph.

39 First of all, the Danish Government submits that the right of association, the right to strike and the right to impose lock-outs fall outside the scope of the fundamental freedom laid down in Article 43 EC since, in accordance with Article 137(5) EC, as amended by the Treaty of Nice, the Community does not have competence to regulate those rights.

40 In that respect it is sufficient to point out that, even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law (see, by analogy, in relation to social security, Case C-120/95 *Decker* [1998] ECR I-1831, paragraphs 22 and 23, and Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 18 and 19; in relation to direct taxation, Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 21, and Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29).

41 Consequently, the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the application of Article 43 EC.

42 Next, according to the observations of the Danish and Swedish Governments, the right to take collective action, including the right to strike, constitutes a fundamental right which, as such, falls outside the scope of Article 43 EC.

43 In that regard, it must be recalled that the right to take collective action, including the right to strike, is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, adopted on 9 July 1948 by the International Labour Organisation – and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

44 Although the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices. In addition, as is apparent from paragraph 5 of this judgment, under Finnish law the right to strike may not be relied on, in particular, where the strike is *contra bonos mores* or is prohibited under national law or Community law.

45 In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods (see Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 74) or freedom to provide services (see Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 35).

46 However, in *Schmidberger* and *Omega*, the Court held that the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty and considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (see, to that effect, *Schmidberger*, paragraph 77, and *Omega*, paragraph 36).

47 It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Article 43 EC inapplicable to the collective action at issue in the main proceedings.

48 Finally, FSU and ITF submit that the Court's reasoning in *Albany* must be applied by analogy to the case in the main proceedings, since certain restrictions on freedom of establishment and freedom to provide services are inherent in collective action taken in the context of collective negotiations.

49 In that regard, it should be noted that in paragraph 59 of *Albany*, having found that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers, the Court nevertheless held that the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the EC Treaty (now, Article 81(1) EC) when seeking jointly to adopt measures to improve conditions of work and employment.

50 The Court inferred from this, in paragraph 60 of *Albany*, that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.

51 The Court must point out, however, that that reasoning cannot be applied in the context of the fundamental freedoms set out in Title III of the Treaty.

52 Contrary to the claims of FSU and ITF, it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree.

53 Furthermore, the fact that an agreement or an activity are excluded from the scope of the provisions of the Treaty on competition does not mean that that agreement or activity also falls outside the scope of the Treaty provisions on the free movement of persons or services since those two sets of provisions are to be applied in different circumstances (see, to that effect, Case C-519/04 P *Meca-Medina and Majcen* v *Commission* [2006] ECR I-6991).

54 Finally, the Court has held that the terms of collective agreements are not excluded from the scope of the Treaty provisions on freedom of movement for persons (Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47; Case C-35/97 *Commission* v *France* [1998] ECR I-5325; and Case C-400/02 *Merida* [2004] ECR I-8471).

55 In the light of the foregoing, the answer to the first question must be that Article 43 EC is to be interpreted as meaning that, in principle, collective action initiated by a trade union or a group of trade unions against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article.

*The second question*

56 By that question, the referring court is asking in essence whether Article 43 EC is such as to confer rights on a private undertaking which may be relied on against a trade union or an association of trade unions.

57 In order to answer that question, the Court would point out that it is clear from its case-law that the abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy (*Walrave and Koch*, paragraph 18; *Bosman*, paragraph 83; *Deliège*, paragraph 47; *Angonese*, paragraph 32; and *Wouters and Others*, paragraph 120).

58 Moreover, the Court has ruled, first, that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down, and, second, that the prohibition on prejudicing a fundamental freedom laid down in a provision of the Treaty that is mandatory in nature, applies in particular to all agreements intended to regulate paid labour collectively (see, to that effect, Case 43/75 *Defrenne* [1976] ECR 455, paragraphs 31 and 39).

59 Such considerations must also apply to Article 43 EC which lays down a fundamental freedom.

60 In the present case, it must be borne in mind that, as is apparent from paragraphs 35 and 36 of the present judgment, the collective action taken by FSU and ITF is aimed at the conclusion of an agreement which is meant to regulate the work of Viking's employees collectively, and, that those two trade unions are organisations which are not public law entities but exercise the legal autonomy conferred on them, inter alia, by national law.

61 It follows that Article 43 EC must be interpreted as meaning that, in circumstances such as those in the main proceedings, it may be relied on by a private undertaking against a trade union or an association of trade unions.

62 This interpretation is also supported by the case-law on the Treaty provisions on the free movement of goods, from which it is apparent that restrictions may be the result of actions by individuals or groups of such individuals rather than caused by the State (see Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraph 30, and *Schmidberger*, paragraphs 57 and 62).

63 The interpretation set out in paragraph 61 of the present judgment is also not called into question by the fact that the restriction at issue in the proceedings before the national court stems from the exercise of a right conferred by Finnish national law, such as, in this case, the right to take collective action, including the right to strike.

64 It must be added that, contrary to the claims, in particular, of ITF, it does not follow from the case-law of the Court referred to in paragraph 57 of the present judgment that that interpretation applies only to quasi-public organisations or to associations exercising a regulatory task and having quasi-legislative powers.

65 There is no indication in that case-law that could validly support the view that it applies only to associations or to organisations exercising a regulatory task or having quasi-legislative powers. Furthermore, it must be pointed out that, in exercising their autonomous power, pursuant to their trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers, trade unions participate in the drawing up of agreements seeking to regulate paid work collectively.

66 In the light of those considerations, the answer to the second question must be that Article 43 EC is capable of conferring rights on a private undertaking which may be relied on against a trade union or an association of trade unions.

*The third to tenth questions*

67 By those questions, which can be examined together, the national court is essentially asking the Court of Justice whether collective action such as that at issue in the main proceedings constitutes a restriction within the meaning of Article 43 EC and, if so, to what extent such a restriction may be justified.

The existence of restrictions

68 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 or firms referred to in Article 48 EC (Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, paragraph 15).

69 Furthermore, the Court has considered that, even though the provisions of the Treaty concerning freedom of establishment 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 also comes within the definition contained in Article 48 EC. The rights guaranteed by Articles 43 EC to 48 EC would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State (*Daily Mail and General Trust*, paragraph 16).

70 Secondly, according to the settled case-law of the Court, the definition of establishment within the meaning of those articles of the Treaty involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period and registration of a vessel cannot be separated from the exercise of the freedom of establishment where the vessel serves as a vehicle for the pursuit of an economic activity that includes fixed establishment in the State of registration (Case C-221/89 *Factortame and Others* [1991] ECR I-3905, paragraphs 20 to 22).

71 The Court concluded from this that the conditions laid down for the registration of vessels must not form an obstacle to freedom of establishment within the meaning of Articles 43 EC to 48 EC (*Factortame and Others*, paragraph 23).

72 In the present case, first, it cannot be disputed that collective action such as that envisaged by FSU has the effect of making less attractive, or even pointless, as the national court has pointed out, Viking's exercise of its right to freedom of establishment, inasmuch as such action prevents both Viking and its subsidiary, Viking Eesti, from enjoying the same treatment in the host Member State as other economic operators established in that State.

73 Secondly, collective action taken in order to implement ITF's policy of combating the use of flags of convenience, which seeks, primarily, as is apparent from ITF's observations, to prevent shipowners from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, must be considered to be at least liable to restrict Viking's exercise of its right of freedom of establishment.

74 It follows that collective action such as that at issue in the main proceedings constitutes a restriction on freedom of establishment within the meaning of Article 43 EC.

Justification of the restrictions

75 It is apparent from the case-law of the Court that a restriction on freedom of establishment can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest. But even if that were the case, it would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it (see, inter alia, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and *Bosman*, paragraph 104).

76 ITF, supported, in particular, by the German Government, Ireland and the Finnish Government, maintains that the restrictions at issue in the main proceedings are justified since they are necessary to ensure the protection of a fundamental right recognised under Community law and their objective is to protect the rights of workers, which constitutes an overriding reason of public interest.

77 In that regard, it must be observed that the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty (see, to that effect, *Schmidberger*, paragraph 74) and that the protection of workers is one of the overriding reasons of public interest recognised by the Court (see, inter alia, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 36; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 27; and Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 33).

78 It must be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an 'internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', but also 'a policy in the social sphere'. Article 2 EC states that the Community is to have as its task, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities' and 'a high level of employment and of social protection'.

79 Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.

80 In the present case, it is for the national court to ascertain whether the objectives pursued by FSU and ITF by means of the collective action which they initiated concerned the protection of workers.

81 First, as regards the collective action taken by FSU, even if that action – aimed at protecting the jobs and conditions of employment of the members of that union liable to be adversely affected by the reflagging of the *Rosella* – could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat.

82 This would be the case, in particular, if it transpired that the undertaking referred to by the national court in its 10th question was, from a legal point of view, as binding as the terms of a collective agreement and if it was of such a nature as to provide a guarantee to the workers that the statutory provisions would be complied with and the terms of the collective agreement governing their working relationship maintained.

83 In so far as the exact legal scope to be attributed to an undertaking such as that referred to in the 10th question is not clear from the order for reference, it is for the national court to determine whether the jobs or conditions of employment of that trade union's members who are liable to be affected by the reflagging of the *Rosella* were jeopardised or under serious threat.

84 If, following that examination, the national court came to the conclusion that, in the case before it, the jobs or conditions of employment of the FSU's members liable to be adversely affected by the reflagging of the *Rosella* are in fact jeopardised or under serious threat, it would then have to ascertain whether the collective action initiated by FSU is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective.

85 In that regard, it must be pointed out that, even if it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action meets those requirements, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance, based on the file in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment in the particular case before it.

86 As regards the appropriateness of the action taken by FSU for attaining the objectives pursued in the case in the main proceedings, it should be borne in mind that it is common ground that collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members (European Court of Human Rights, *Syndicat national de la police belge* v *Belgium*, of 27 October 1975, Series A, No 19, and *Wilson, National Union of Journalists and Others* v *United Kingdom* of 2 July 2002, 2002-V, § 44).

87 As regards the question of whether or not the collective action at issue in the main proceedings goes beyond what is necessary to achieve the objective pursued, it is for the national court to examine, in particular, on the one hand, whether, under the national rules and collective agreement law applicable to that action, FSU did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking, and, on the other, whether that trade union had exhausted those means before initiating such action.

88 Secondly, in relation to the collective action seeking to ensure the implementation of the policy in question pursued by ITF, it must be emphasised that, to the extent that that policy results in shipowners being prevented from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be objectively justified. Nevertheless, as the national court points out, the objective of that policy is also to protect and improve seafarers' terms and conditions of employment.

89 However, as is apparent from the file submitted to the Court, in the context of its policy of combating the use of flags of convenience, ITF is required, when asked by one of its members, to initiate solidarity action against the beneficial owner of a vessel which is registered in a State other than that of which that owner is a national, irrespective of whether or not that owner's exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees. Therefore, as Viking argued during the hearing without being contradicted by ITF in that regard, the policy of reserving the right of collective negotiations to trade unions of the State of which the beneficial owner of a vessel is a national is also applicable where the vessel is registered in a State which guarantees workers a higher level of social protection than they would enjoy in the first State.

90 In the light of those considerations, the answer to the third to tenth questions must be that Article 43 EC is to be interpreted to the effect that collective action such as that at issue in the main proceedings, which seeks to induce an undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that article. That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.

**Costs**

91 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 43 EC is to be interpreted as meaning that, in principle, collective action initiated by a trade union or a group of trade unions against a private undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article.**

2. **Article 43 EC is capable of conferring rights on a private undertaking which may be relied on against a trade union or an association of trade unions.**

3. **Article 43 EC is to be interpreted to the effect that collective action such as that at issue in the main proceedings, which seeks to induce a private undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that article.**

**That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.**

# Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*

In Case C-341/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Arbetsdomstolen (Sweden), made by decision of 15 September 2005, received at the Court on 19 September 2005, in the proceedings

**Laval un Partneri Ltd**

v

**Svenska Byggnadsarbetareförbundet,**

**Svenska Byggnadsarbetareförbundets avd. 1, Byggettan,**

**Svenska Elektrikerförbundet,**

THE COURT (Grand Chamber),

[…]

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Articles 12 EC and 49 EC and 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).

2 The reference was made in the context of proceedings between Laval un Partneri Ltd ('Laval'), a company incorporated under Latvian law and having its registered office in Riga (Latvia), on the one hand, and Svenska Byggnadsarbetareförbundet (Swedish building and public works trade union, 'Byggnads'), Svenska Byggnadsarbetareförbundet avdelning 1, Byggettan (local branch No 1 of that trade union, 'Byggettan') and Svenska Elektrikerförbundet (Swedish electricians' trade union, 'Elektrikerna'), on the other, brought by Laval for the purposes of obtaining, first, a declaration that the collective action by Byggnads and Byggettan affecting all Laval's worksites and the Elektrikerna sympathy action consisting of blockading all electrical work being carried out is unlawful, second, an order that such action should cease, and, third, an order that the trade unions pay compensation for the loss suffered by Laval.

**Legal context**

*Community law*

3 Recitals 6, 13, 17 and 22 in the preamble to Directive 96/71 state:

'… the transnationalisation of the employment relationship raises problems with regard to the legislation applicable to the employment relationship; … it is in the interests of the parties to lay down the terms and conditions governing the employment relationship envisaged;

… the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary

work in the territory of a Member State where the services are provided; … such coordination can be achieved only by means of Community law;

… the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers;

… this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions'.

4 Article 1 of Directive 96/71 provides:

'1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.

…

3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

(a) …

or

(b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting

…'

5 Article 3 of that directive provides:

'Terms and conditions of employment

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

– by law, regulation or administrative provision,

and/or

– by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, in so far as they concern the activities referred to in the Annex:

(a) maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

(e) health, safety and hygiene at work;

(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

(g) equality of treatment between men and women and other provisions on non-discrimination.

For the purposes of this directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

…

7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.

8. "Collective agreements or arbitration awards which have been declared universally applicable" means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

– collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned,

and/or

– collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory,

provided that their application to the undertakings referred to in Article 1(1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:

– are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and

– are required to fulfil such obligations with the same effects.

…

10. This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:

– terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions;

– terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.'

6 According to Article 4 of Directive 96/71:

‘Cooperation on information

1. For the purposes of implementing this directive, Member States shall, in accordance with national legislation and/or practice, designate one or more liaison offices or one or more competent national bodies.

2. Member States shall make provision for cooperation between the public authorities which, in accordance with national legislation, are responsible for monitoring the terms and conditions of employment referred to in Article 3. Such cooperation shall in particular consist in replying to reasoned requests from those authorities for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities.

The Commission and the public authorities referred to in the first subparagraph shall cooperate closely in order to examine any difficulties which might arise in the application of Article 3(10).

Mutual administrative assistance shall be provided free of charge.

3. Each Member State shall take the appropriate measures to make the information on the terms and conditions of employment referred to in Article 3 generally available.

4. Each Member State shall notify the other Member States and the Commission of the liaison offices and/or competent bodies referred to in paragraph 1.’

*National law*

The transposition of Directive 96/71

7 It is apparent from the Court’s file that Sweden does not have a system for declaring collective agreements universally applicable, and, in order to avoid the creation of discriminatory situations, Swedish law does not require foreign undertakings to apply Swedish collective agreements, since not all Swedish employers are bound by a collective agreement.

8 Directive 96/71 was transposed in Sweden by the Law on the posting of workers (lag om utstationering av arbetstagare (1999:678) (‘Law on the posting of workers’)). According to the procedural documents, terms and conditions of employment applicable to posted workers in relation to Article 3(1), first subparagraph, (a), (b) and (d) to (g) of Directive 96/71 are laid down by law within the meaning of the first indent of the first subparagraph of Article 3(1) of the directive. The Swedish legislation does not provide, however, for minimum rates of pay as referred to in the Article 3(1), first subparagraph, (c).

9 It is clear from the file that the liaison office (Arbetsmiljöverket, ‘the liaison office’), set up in accordance with Article 4(1) of Directive 96/71, is responsible, inter alia, for informing interested persons of the existence of collective agreements that may be applicable in the event of workers being posted to Sweden and for referring such interested persons to the parties to the collective agreement for further information.

The right to take collective action

10 Chapter 2 of the Swedish Basic Law (Regeringsformen) sets out the freedoms and fundamental rights enjoyed by citizens. Under Article 17 thereof, workers’ associations, employers and employers’ associations have the right to take collective action, unless otherwise provided by law or agreement.

11 The Law on workers’ participation in decisions (Medbestämmandelagen, ‘the MBL’) of 10 June 1976 lays down rules applicable to the right of association and of negotiation, collective agreements, mediation of collective labour disputes and the obligation of social peace, and contains provisions restricting the right of trade unions to take collective action.

12 It is apparent from Article 41 of the MBL that there is a mandatory social truce between employers and workers bound by a collective agreement and it is prohibited, inter alia, to take collective action with the aim of obtaining amendments to the agreement. However, collective action is authorised where management and labour have not entered into a collective agreement between themselves.

13 Article 42 of the MBL provides:

'Employers' or workers' associations shall not be entitled to organise or encourage illegal collective action in any way whatsoever. Nor shall they be entitled to participate in any illegal collective action, by providing support or in any other way. An association which is itself bound by a collective agreement shall also, in the event of collective action which its members are preparing to take or are taking, seek to prevent such action or help to bring it to an end.

If any illegal collective action is taken, third parties shall be prohibited from participating in it.

The provisions of the first two sentences of the first paragraph shall apply only if an association takes collective action by reason of terms and conditions of employment falling directly within the scope of the present Law'.

14 As the case-law on the first paragraph of Article 42 of the MBL, it is prohibited to take collective action with the aim of having a collective agreement between other parties set aside or amended. In the '*Britannia*' judgment (1989, No 120), the Arbetsdomstolen held that that prohibition extends to collective action taken in Sweden in order to have a collective agreement concluded between foreign parties in a workplace abroad set aside or amended, if such collective action is prohibited by the foreign legislation applicable to the signatories to that collective agreement.

15 By the 'Lex Britannia', which entered into force on 1 July 1991, the legislature sought to reduce the scope of the principle expounded in the *Britannia* judgment. The Lex Britannia consists of three provisions inserted into the MBL, namely Articles 25a, 31a and the third paragraph of Article 42.

16 It is apparent from the explanations provided by the national court that, since the introduction of the third paragraph of Article 42 of the MBL, collective action against a foreign employer carrying out temporary activities in Sweden is no longer prohibited where, considered as a whole, the particular situation suggests that the link with that Member State is too tenuous for the MBL to be deemed to apply directly to the terms and conditions of employment in question.

The collective agreement for the building sector

17 Byggnads is a trade union which groups together workers in the construction sector in Sweden. According to Byggnads' observations, in 2006, it comprised 31 local sections, including Byggettan, and had a membership of 128 000, 95 000 being of working age. Its membership included carpenters and builders, masons, parquet layers, workers in the construction and road sector, and plumbers. Around 87% of building sector workers were affiliated to that trade union.

18 A collective agreement was entered into between, on the one hand, Byggnads, in its capacity as the central organisation representing building workers, and the central organisation for employers in the construction sector (Sveriges Byggindustrier) ('the collective agreement for the building sector').

19 The collective agreement for the building sector contains specific rules relating to working time and annual leave, matters in which collective agreements may depart from the legislative provisions. In addition, the agreement includes provisions relating to temporary unemployment and waiting time, reimbursement of travelling expenses and subsistence allowances, employment protection, training leave and training.

20 Being a party to the collective agreement for the building sector also requires the undertakings concerned to accept a number of pecuniary obligations. Thus, they are required to pay to Byggettan a sum equal to 1.5% of total gross wages for the purposes of the pay review which that section of the trade union carries out, and to the insurance company, FORA, sums representing first, 0.8% of total gross wages for the purposes of a charge 'Tilläggsören' [penny supplement] or 'special building supplement', and, second, a further 5.9% for the purposes of a number of insurance premiums.

21 The ‘tilläggsören’ or ‘special building supplement’ is intended to finance group life insurance contracts, contingency contracts and insurance contracts covering accidents occurring outside working hours, the research fund for Swedish building undertakings (Svenska Byggbranschens Utvecklingsfond), the Galaxen organisation, managed by employers and which has as its objective the adaptation of work places for persons with reduced mobility and the re-training of such persons, the promotion of training development in building trades and administrative and management costs.

22 The various insurance contracts proposed by FORA guarantee workers supplementary retirement insurance, payment of health benefits, unemployment benefits, compensation for accidents at work, and financial assistance for survivors in the event of the death of the worker.

23 After signing the collective agreement for the building sector, employers, including those who post workers to Sweden, are, in principle, bound by all the terms of that agreement, although some of those rules are applicable on a case-by-case basis according to, in essence, the nature of the site and the way in which the work is carried out.

Determination of wages

24 It is apparent from the observations of the Swedish Government that, in Sweden, employees’ remuneration is decided on by management and labour by way of collective negotiation. Generally, collective agreements do not provide for a minimum wage as such. The lowest level of pay appearing in numerous collective agreements is aimed at employees without qualifications or work experience, which means that, as a general rule, it concerns only a very small number of persons. As regards other employees, their pay is determined by way of negotiations conducted at the place of work, having regard to the qualifications of the particular employee and the tasks performed by the latter.

25 According to the observations submitted in this case by the three defendant trade unions, in the collective agreement for the building sector, performance-related pay follows the usual model of remuneration in the construction sector. The rules on performance-related pay require new pay agreements to be concluded in respect of each construction project. It is open to the employers and the local branch of the trade union, however, to agree on the application of an hourly wage in respect of a specific site. No system of monthly wages is applicable to the type of workers concerned in the main proceedings.

26 According to those trade unions, negotiations on pay are conducted in the context of a social truce which must follow the conclusion of a collective agreement. The agreement on pay is concluded, in principle, at local level between the trade union and the employer. If management and labour fail to reach an agreement at this level, negotiations on pay are centralised, at which point Byggnads acts as the principal party on the side of the employees. If management and labour still do not reach an agreement in such negotiations, the basic wage is then determined according to the ‘fall-back clause’. According to those trade unions, the ‘fall-back’ wage, which in fact represents only a negotiating mechanism of last resort, and does not constitute a minimum wage, amounted to SEK 109 approximately (EUR 12) per hour for the second half of 2004.

**The dispute in the main proceedings**

27 It is apparent from the order of reference that Laval is a company incorporated under Latvian law, whose registered office is in Riga. Between May and December 2004, it posted around 35 workers to Sweden to work on building sites operated by L&P Baltic Bygg AB (‘Baltic’), a company incorporated under Swedish law whose entire share capital was held by Laval until the end of 2003, inter alia, for the purposes of the construction of school premises in Vaxholm.

28 Laval, which had signed, on 14 September and 20 October 2004, in Latvia, collective agreements with the Latvian building sector’s trade union, was not bound by any collective agreement entered into with Byggnads, Byggettan or Elektrikerna, none of whose members were employed by Laval. Around 65% of the Latvian workers concerned were members of the building workers’ trade union in their State of origin.

29 It is clear from the file that, in June 2004, contacts were established between Byggettan, on the one hand, and Baltic and Laval, on the other, and negotiations were begun with a view to Laval’s signing the collective agreement for the building sector. Laval asked for wages and other terms and conditions of employment to be

defined in parallel with the negotiations, so that the level of pay and terms and conditions of employment would already be fixed by the time that agreement was signed. Byggettan agreed to this request, even though, generally, the negotiation of a collective agreement needs to have been completed before discussions on wages and other terms and conditions of employment are entered into in the framework of the mandatory social truce. Byggettan refused to allow the introduction of a system of monthly wages, but did agree to Laval's proposal on the principle of an hourly wage.

30 According to the order for reference, during the negotiations held on 15 September 2004, Byggettan had demanded that Laval, first, sign the collective agreement for the building sector in respect of the Vaxholm site, and secondly, guarantee that the posted workers would receive an hourly wage of SEK 145 (approximately EUR 16). That hourly wage was based on statistics on wages for the Stockholm (Sweden) region for the first quarter of 2004, relating to professionally-qualified builders and carpenters. Byggettan declared that it was prepared to take collective action forthwith in the event that Laval failed to agree to this.

31 According to the documents on the file, during the procedure before the Arbedstomstolen, Laval stated that it would pay its workers a monthly wage of SEK 13 600 (approximately EUR 1 500), which would be supplemented by benefits in kind in respect of meals, accommodation and travel amounting to SEK 6 000 (approximately EUR 660) per month.

32 If the collective agreement for the building sector had been signed, Laval would have been bound, in principle, by all its terms, including those relating to the pecuniary obligations to Byggettan and FORA set out in paragraph 20 of this judgment. A proposal to subscribe to insurance contracts with FORA was made to Laval by way of a declaration form sent to it in December 2004.

33 Since those negotiations were not successful, Byggettan requested Byggnads to take measures to initiate the collective action against Laval announced at the meeting of 15 September 2004. Notice was given in October 2004.

34 Blockading ('blockad') of the Vaxholm building site began on 2 November 2004. The blockading consisted, inter alia, of preventing the delivery of goods onto the site, placing pickets and prohibiting Latvian workers and vehicles from entering the site. Laval asked the police for assistance but they explained that since the collective action was lawful under national law they were not allowed to intervene or to remove physical obstacles blocking access to the site.

35 At the end of November 2004, Laval spoke to the liaison office referred to in paragraph 9 above in order to obtain information on the terms and conditions of employment which it had to apply in Sweden, on whether or not there was a minimum wage and on the nature of any contributions which it had to pay. By letter of 2 December 2004, the liaison office's head of legal affairs informed Laval that it was required to apply the provisions to which the law on the posting of workers refers, that it was for management and labour to agree on wage issues, that the minimum requirements under the collective agreements also applied to foreign posted workers, and that, if a foreign employer was having to pay double contributions, the matter could be brought before the courts. In order to ascertain what provisions under the agreements were applicable, Laval had to speak to management and labour in the sector concerned.

36 At the mediation meeting arranged on 1 December 2005 and at the conciliation hearing held before the Arbetsdomstolen on 20 December 2005, Laval was requested by Byggettan to sign the collective agreement for the building sector before the issue of wages was dealt with. If Laval had accepted that proposal, the collective action would have ceased immediately, and the social truce, which would have allowed negotiations on wages to begin, would have come into effect. Laval, however, refused to sign the agreement, since it was not possible for it to know in advance what conditions would be imposed on it in relation to wages.

37 In December 2004, the collective action directed against Laval intensified. On 3 December 2004, Elektrikerna initiated sympathy action. That measure had the effect of preventing Swedish undertakings belonging to the organisation of electricians' employers from providing services to Laval. At Christmas, the workers posted by Laval went back to Latvia and did not return to the site in question.

38 In January 2005, other trade unions announced sympathy actions, consisting of a boycott of all Laval's sites in Sweden, with the result that the undertaking was no longer able to carry out its activities in that Member State.

In February 2005, the town of Vaxholm requested that the contract between it and Baltic be terminated, and on 24 March 2005 the latter was declared bankrupt.

**The questions referred**

39 On 7 December 2004, Laval commenced proceedings before the Arbetsdomstolen against Byggnads, Byggettan and Elektrikerna, seeking a declaration that both the blockading and the sympathy action affecting all its worksites were illegal and an order that such action should cease. It also sought an order that the trade unions pay compensation for the damage suffered. By decision of 22 December 2004, the national court dismissed Laval's application for an interim order that the collective action should be brought to an end.

40 Since it wished to ascertain whether Articles 12 EC and 49 EC and Directive 96/71 preclude trade unions from attempting, by means of collective action, to force a foreign undertaking which posts workers to Sweden to apply a Swedish collective agreement, the Arbetsdomstolen decided on 29 April 2005 to make a reference to the Court of Justice for a preliminary ruling. In its order for reference, of 15 September 2005, the national court refers the following questions for a preliminary ruling:

'(1) Is it compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of any discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC … for trade unions to attempt, by means of collective action in the form of a blockade ('blockad'), to force a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions of employment, such as that described in the decision of the Arbetsdomstolen [of 29 April 2005 (collective agreement for the building sector)], if the situation in the host country is such that the legislation to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?

(2) The [MBL] prohibits a trade union from taking collective action with the intention of circumventing a collective agreement concluded by other parties. That prohibition applies, however, pursuant to a special provision contained in part of the law known as the "Lex Britannia", only where a trade union takes collective action in relation to conditions of work to which the [MBL] is directly applicable, which means in practice that the prohibition is not applicable to collective action against a foreign undertaking which is temporarily active in Sweden and which brings its own workforce. Do the rules of the EC Treaty on the freedom to provide services and the prohibition of discrimination on grounds of nationality and the provisions of Directive 96/71 preclude application of the latter rule – which, together with other parts of the Lex Britannia, mean in practice that Swedish collective agreements become applicable and take precedence over foreign collective agreements already concluded – to collective action in the form of a blockade taken by Swedish trade unions against a foreign temporary provider of services in Sweden?'

41 By order of the President of the Court of Justice of 15 November 2005, the application for a ruling to be given in this case under the accelerated procedure provided for in the first paragraph of Article 104a of the Rules of Procedure was dismissed.

**Admissibility**

42 Byggnads, Byggettan and Elektrikerna challenge the admissibility of the reference for a preliminary ruling.

43 First of all, they claim that there is no link between the questions referred and the facts of the case in the main proceedings. The national court asks the Court of Justice to interpret provisions relating to freedom to provide services and Directive 96/71, although Laval is established in Sweden, in accordance with Article 43 EC, through its subsidiary, Baltic, in which it held 100% of the share capital until the end of 2003. Since the share capital of Laval and of Baltic were held by the same persons, and those companies had the same representatives and used the same trademark, they should be regarded as one and the same economic entity from the point of view of Community law, even though they constitute two separate legal persons. Therefore, Laval was under an obligation to pursue its activity in Sweden under the conditions laid down for its own nationals by the legislation of that Member State, for the purposes of the second paragraph of Article 43 EC.

44 Secondly, they submit that the purpose of the dispute in the main proceedings is to enable Laval to circumvent Swedish law and, for that reason, the dispute, at least in part, is artificial. Laval, whose activity consists of placing, on a temporary basis, staff of Latvian origin with companies which carry on their activities on the

Swedish market, is seeking to escape all the obligations under Swedish legislation and rules relating to collective agreements and, by relying on the provisions of the Treaty on services and on Directive 96/71, is making an improper attempt to take advantage of the possibilities offered by Community law.

45 In this regard, it must be recalled that, in proceedings under Article 234 EC, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. Similarly, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, inter alia, Case C-326/00 *IKA* [2003] ECR I-1703, paragraph 27; Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33, and Case C-419/04 *Conseil général de la Vienne* [2006] ECR I-5645, paragraph 19).

46 Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19, and *Conseil général de la Vienne*, paragraph 20).

47 Furthermore, it must be borne in mind that the Court must take account, under the division of jurisdiction between the Community judicature and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set (see, inter alia, Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 10, and Case C-136/03 *Dörr and Ünal* [2005] ECR I-4759, paragraph 46, *Conseil général de la Vienne*, paragraph 24).

48 In this case, as the Advocate General pointed out in paragraph 97 of his Opinion, the national court seeks an interpretation of Articles 12 EC and 49 EC, and of the provisions of Directive 96/71 concerning the posting of workers in the framework of the provision of services. It is apparent from the order for reference that those questions have been submitted in the context of the dispute between Laval and Byggnads, Byggettan and Elektrikerna concerning collective action taken by the latter following Laval's refusal to sign the collective agreement for the building sector, that the dispute concerns the terms and conditions of employment applicable to Latvian workers posted by Laval to a building site in Sweden, the work being carried out by an undertaking belonging to the Laval group, and that, following collective action and suspension of the work, the posted workers returned to Latvia.

49 Accordingly, it is clear that the questions referred do have a bearing on the subject-matter of the case in the main proceedings, as described by the national court, and that the factual context in which the questions put to it are set does not support the view that the dispute in question is artificial.

50 It follows that the reference for a preliminary ruling is admissible.

**The first question**

51 By its first question, the national court is asking whether it is compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of any discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC, for trade unions to attempt, by means of collective action in the form of a blockade, to force a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions of employment, such as the collective agreement for the building sector, if the situation in the host country is characterised by the fact that the legislation to implement that directive has no express provision concerning the application of terms and conditions of employment in collective agreements.

52 It is clear from the order of reference that the collective action initiated by Byggnads and Byggettan was motivated by Laval's refusal to guarantee its workers posted in Sweden the hourly wage demanded by those trade

unions, even though that Member State does not provide for minimum rates of pay, and Laval's refusal to sign the collective agreement for the building sector, some terms of which lay down, in relation to certain matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in that article.

53 Accordingly, the national court's first question must be understood as asking, in essence, whether Articles 12 EC and 49 EC, and Directive 96/71, are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment concerning the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive, save for minimum rates of pay, are contained in legislative provisions, from attempting, by means of collective action in the form of blockading sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers, and to sign a collective agreement, the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.

*The relevant provisions of Community law*

54 In order to ascertain the provisions of Community law applicable to a case such as that in the main proceedings, it must be noted that, according to the settled case-law of the Court, Article 12 EC, which lays down the general principle of the prohibition of discrimination on grounds of nationality, applies independently only to situations governed by Community law for which the Treaty lays down no specific prohibition of discrimination (see Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 25, and Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 57).

55 So far as the freedom to provide services is concerned, that principle was given specific expression and effect by Article 49 EC (Case C-22/98 *Becu and Others* [1999] ECR I-5665, paragraph 32, and Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 17). It is for that reason unnecessary to rule on Article 12 EC.

56 As regards the temporary posting of workers to another Member State so that they can carry out construction work or public works in the context of services provided by their employer, it is clear from the settled case-law of the Court that Articles 49 EC and 50 EC preclude a Member State from prohibiting a person providing services established in another Member State from moving freely on its territory with all his staff and also preclude that Member State from making the movement of staff in question subject to more restrictive conditions. To impose such conditions on the person providing services established in another Member State discriminates against that person in relation to his competitors established in the host country who are able to use their own staff without restrictions, and moreover affects his ability to provide the service (Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 12).

57 Conversely, Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by management and labour relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established (see, in particular, Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223, paragraph 14, and Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 21). The application of such rules must, however, be appropriate for securing the attainment of the objective which they pursue, that is, the protection of posted workers, and must not go beyond what is necessary in order to attain that objective (see, to that effect, inter alia, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 35 and Case C-341/02 *Commission* v *Germany* [2005] ECR I-2733, paragraph 24).

58 In that context, the Community legislature adopted Directive 96/71, with a view, as is clear from recital 6 in the preamble to that directive, to laying down, in the interests of the employers and their personnel, the terms and conditions governing the employment relationship where an undertaking established in one Member State posts workers on a temporary basis to the territory of another Member State for the purposes of providing a service.

59 It follows from recital 13 to Directive 96/71 that the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers there.

60 Nevertheless, Directive 96/71 did not harmonise the material content of those mandatory rules for minimum protection. That content may accordingly be freely defined by the Member States, in compliance with the Treaty and the general principles of Community law (Case C-490/04 *Commission* v *Germany* [2007] ECR I-0000, paragraph19).

61 Consequently, since the facts at issue in the main proceedings, as described in the order of reference, occurred in 2004, that is to say, on a date subsequent to the expiry of the period allowed to the Member States for transposing Directive 96/71, that date being fixed for 16 December 1999, and since those facts fall within the scope of that directive, the first question must be examined with regard to the provisions of that directive interpreted in the light of Article 49 EC (Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraphs 25 to 27 and 45), and, where appropriate, with regard to the latter provision itself.

*The possibilities available to the Member States for determining the terms and conditions of employment applicable to posted workers, including minimum rates of pay*

62 In the context of the procedure established by Article 234 EC providing for cooperation between national courts and the Court of Justice, and in order to provide the national court with an answer which will be of use to it and enable it to determine the case before it (C-334/95 *Krüger* [1997] ECR I-4517, paragraph 22; C-88/99 *Roquette Frères* [2000] ECR I-10465, paragraph 18, and Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 23), it is appropriate to examine the possibilities available to the Member States for determining the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g), including minimum rates of pay, which undertakings are to guarantee workers they post in the framework of the transnational provision of services.

63 It is clear from both the order for reference and the observations submitted in the course of the present proceedings that underlying the dispute is, first, as regards the determination of the terms and conditions of the employment of posted workers relating to those matters, the fact that minimum rates of pay constitute the only term of employment which, in Sweden, is not laid down in accordance with one of the means provided for in Directive 96/71 and, second, the requirement imposed on Laval to negotiate with trade unions in order to ascertain the wages to be paid to its workers and to sign the collective agreement for the building sector.

64 According to the first and second indents of the first subparagraph of Article 3(1) of Directive 96/71, the terms and conditions of employment covering the matters referred to in (a) to (g) thereof are established, in relation to the transnational provision of services in the construction sector, either by law, regulation or administrative provision, or by collective agreements or arbitration awards which have been declared universally applicable. Collective agreements and arbitration awards for the purposes of that provision are those which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

65 The second subparagraph of Article 3(8) of Directive 96/71 also gives Member States the possibility, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, to base themselves on those which are generally applicable to all similar undertakings in the industry concerned or those which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout the national territory.

66 It is clear from the wording of that provision that recourse to the latter possibility requires, first, that the Member State must so decide, and second, that the application of collective agreements to undertakings which post workers should guarantee equality of treatment in the matters listed in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 between the latter undertakings and national undertakings in the profession or industry concerned which are in a similar position. Equality of treatment, within the meaning of Article 3(8) of the directive, is deemed to exist where national undertakings are subject to the same obligations, as regards those matters, as posting undertakings, and where each are required to fulfil such obligations with the same effects.

67 It is common ground that, in Sweden, the terms and conditions of employment covering the matters listed in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, save for minimum rates of pay, have been laid down by law. It is also not disputed that the collective agreements have not been declared universally applicable, and that that Member State has not made use of the possibility provided for in the second subparagraph of Article 3(8) of that directive.

68 It must be noted, in this respect, that since the purpose of Directive 96/71 is not to harmonise systems for establishing terms and conditions of employment in the Member States, the latter are free to choose a system at the national level which is not expressly mentioned among those provided for in that directive, provided that it does not hinder the provision of services between the Member States.

69 It is clear from the file that the national authorities in Sweden have entrusted management and labour with the task of setting, by way of collective negotiations, the wage rates which national undertakings are to pay their workers and that, as regards undertakings in the construction sector, such a system requires negotiation on a case-by-case basis, at the place of work, having regard to the qualifications and tasks of the employees concerned.

70 As regards the requirements as to pay which can be imposed on foreign service providers, it should be recalled that the first subparagraph of Article 3(1) of Directive 96/71 relates only to minimum rates of pay. Therefore, that provision cannot be relied on to justify an obligation on such service providers to comply with rates of pay such as those which the trade unions seek in this case to impose in the framework of the Swedish system, which do not constitute minimum wages and are not, moreover, laid down in accordance with the means set out in that regard in Article 3(1) and (8) of the directive.

71 It must therefore be concluded at this stage that a Member State in which the minimum rates of pay are not determined in accordance with one of the means provided for in Article 3(1) and (8) of Directive 96/71 is not entitled, pursuant to that directive, to impose on undertakings established in other Member States, in the framework of the transnational provision of services, negotiation at the place of work, on a case-by-case basis, having regard to the qualifications and tasks of the employees, so that the undertakings concerned may ascertain the wages which they are to pay their posted workers.

72 It is necessary to assess further, the obligations on undertakings established in another Member State which stem from such a system for determining wages with regard to Article 49 EC.

*Matters which may be covered by the terms and conditions of work applicable to posted workers*

73 In order to ensure that the nucleus of mandatory rules for minimum protection are observed, the first subparagraph of Article 3(1) of Directive 96/71 provides that Member States are to ensure that, whatever the law applicable to the employment relationship, in the framework of the transnational provision of services, undertakings guarantee workers posted to their territory the terms and conditions of employment covering the matters listed in that provision, namely: maximum work periods and minimum rest periods; minimum paid annual holidays; the minimum rates of pay, including overtime rates; the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; health, safety and hygiene at work; protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; and equality of treatment between men and women and other provisions on non-discrimination.

74 That provision seeks, first, to ensure a climate of fair competition between national undertakings and undertakings which provide services transnationally, in so far as it requires the latter to afford their workers, as regards a limited list of matters, the terms and conditions of employment laid down in the host Member State by law, regulation or administrative provision or by collective agreements or arbitration awards within the meaning of Article 3(8) of Directive 96/71, which constitute mandatory rules for minimum protection.

75 That provision thus prevents a situation arising in which, by applying to their workers the terms and conditions of employment in force in the Member State of origin as regards those matters, undertakings established in other Member States would compete unfairly against undertakings of the host Member State in the framework of the transnational provision of services, if the level of social protection in the host Member State is higher.

76 Secondly, that provision seeks to ensure that posted workers will have the rules of the Member States for minimum protection as regards the terms and conditions of employment relating to those matters applied to them while they work on a temporary basis in the territory of that Member State.

77 The consequence of affording such minimum protection – if the level of protection resulting from the terms and conditions of employment granted to posted workers in the Member State of origin, as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, is lower than the level of minimum

protection afforded in the host Member State – is to enable those workers to enjoy better terms and conditions of employment in the host Member State.

78 However, in the case in the main proceedings, it is apparent from paragraph 19 of this judgment that, in respect of some of the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, in particular as regards working time and annual leave, certain terms of the collective agreement for the building sector depart from the provisions of Swedish law which lay down the terms and conditions of employment applicable to posted workers, by establishing more favourable terms.

79 It is true that Article 3(7) of Directive 96/71 provides that paragraphs 1 to 6 are not to prevent application of terms and conditions of employment which are more favourable to workers. In addition, according to recital 17, the mandatory rules for minimum protection in force in the host country must not prevent the application of such terms and conditions.

80 Nevertheless, Article 3(7) of Directive 96/71 cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe. Moreover, such an interpretation would amount to depriving the directive of its effectiveness.

81 Therefore – without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a commitment made to their own posted staff, the terms of which might be more favourable – the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision.

82 Moreover, it must be pointed out that, pursuant to the first indent of Article 3(10) of Directive 96/71, Member States may apply terms and conditions of employment on matters other than those specifically referred to in Article 3(1), first subparagraph, (a) to (g), in compliance with the Treaty and, in the case of public policy provisions, on a basis of equality of treatment, to national undertakings and to the undertakings of other Member States.

83 In the main proceedings, certain terms of the collective agreement for the building sector relate to matters which are not specifically referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71. In that regard, it follows from paragraph 20 of this judgment that signing that collective agreement entails undertakings accepting pecuniary obligations such as those requiring them to pay to Byggettan a sum equal to 1.5% of total gross wages for the purposes of the pay review which that section trade union carries out, and to the insurance company, FORA, first, 0.8% of total gross wages for the purposes of a charge called the 'special building supplement', and, second, a further 5.9% for the purposes of a number of insurance premiums.

84 It is common ground, however, that those obligations were imposed without the national authorities' having had recourse to Article 3(10) of Directive 96/71. The terms of the collective agreement for the building sector in question were in fact established through negotiation between management and labour; not being bodies governed by public law, they cannot avail themselves of that provision by citing grounds of public policy in order to maintain that collective action such as that at issue in the main proceedings complies with Community law.

85 It is also necessary to assess from the point of view of Article 49 EC the collective action taken by the trade unions in the case in the main proceedings, both in so far as it seeks to force a service provider established in another Member State to enter into negotiations on the wages to be paid to posted workers and in so far as it seeks to force that service provider to sign a collective agreement the terms of which lay down, as regards some of the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, more favourable conditions than those stemming from the relevant legislative provisions, while other terms cover matters not referred to in that provision.

*Assessment of the collective action at issue in the case in the main proceedings from the point of view of Article 49 EC*

86 As regards use of the means available to the trade unions to bring pressure to bear on the relevant parties to sign a collective agreement and to enter into negotiations on pay, the defendants in the main proceedings and the Danish and Swedish Governments submit that the right to take collective action in the context of negotiations with an employer falls outside the scope of Article 49 EC, since, pursuant to Article 137(5) EC, as amended by the Treaty of Nice, the Community has no power to regulate that right.

87 In this regard, it suffices to point out that, even though, in the areas in which the Community does not have competence, the Member States remain, in principle, free to lay down the conditions for the existence and exercise of the rights at issue, they must nevertheless exercise that competence consistently with Community law (see, by analogy, as regards social security, Case C-120/95 *Decker* [1998] ECR I-1831, paragraphs 22 and 23, and Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 18 and 19; as regards direct taxation, Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 21, and Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29).

88 Therefore, the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the domain of freedom to provide services.

89 According to the observations of the Danish and Swedish Governments, the right to take collective action constitutes a fundamental right which, as such, falls outside the scope of Article 49 EC and Directive 96/71.

90 In that regard, it must be recalled that the right to take collective action is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No 87 of the International Labour Organisation concerning Freedom of Association and Protection of the Right to Organise of 9 July 1948 – and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

91 Although the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national law and practices.

92 Although it is true, as the Swedish Government points out, that the right to take collective action enjoys constitutional protection in Sweden, as in other Member States, nevertheless as is clear from paragraph 10 of this judgment, under the Swedish constitution, that right – which, in that Member State, covers the blockading of worksites – may be exercised unless otherwise provided by law or agreement.

93 In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods (see Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 74) or freedom to provide services (see Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 35).

94 As the Court held, in *Schmidberger* and *Omega*, the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty. Such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (see, to that effect, *Schmidberger*, paragraph 77, and *Omega*, paragraph 36).

95 It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Community law inapplicable to such action, taken against an undertaking established in another Member State which posts workers in the framework of the transnational provision of services.

96 It must therefore be examined whether the fact that a Member State's trade unions may take collective action in the circumstances described above constitutes a restriction on the freedom to provide services, and, if so, whether it can be justified.

97 It should be noted that, in so far as it seeks to abolish restrictions on the freedom to provide services stemming from the fact that the service provider is established in a Member State other than that in which the service is to be provided, Article 49 EC became directly applicable in the legal orders of the Member States on expiry of the transitional period and confers on individuals rights which are enforceable by them and which the national courts must protect (see, inter alia, Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 26; Case 13/76 *Donà* [1976] ECR 1333, paragraph 20; Case 206/84 *Commission* v *Ireland* [1986] ECR 3817, paragraph 16; and Case C-208/05 *ITC* [2007] ECR I-181, paragraph 67).

98 Furthermore, compliance with Article 49 EC is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, the provision of services. The abolition, as between Member States, of obstacles to the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraphs 17 and 18; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 83 and 84, and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 120).

99 In the case in the main proceedings, it must be pointed out that the right of trade unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector – certain terms of which depart from the legislative provisions and establish more favourable terms and conditions of employment as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 and others relate to matters not referred to in that provision – is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC.

100 The same is all the more true of the fact that, in order to ascertain the minimum wage rates to be paid to their posted workers, those undertakings may be forced, by way of collective action, into negotiations with the trade unions of unspecified duration at the place at which the services in question are to be provided.

101 It is clear from the case-law of the Court that, since the freedom to provide services is one of the fundamental principles of the Community (see, inter alia, Case 220/83 *Commission* v *France* [1986] ECR 3663, paragraph 17, and Case 252/83 *Commission* v *Denmark* [1986] ECR 3713, paragraph 17), a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it (Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 21; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 37, and Case C-94/04 *Cipolla* [2006] ECR I-11421, paragraph 61).

102 The Swedish Government and the defendant trade unions in the main proceedings submit that the restrictions in question are justified, since they are necessary to ensure the protection of a fundamental right recognised by Community law and have as their objective the protection of workers, which constitutes an overriding reason of public interest.

103 In that regard, it must be pointed out that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty (see, to that effect, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 36; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 27; Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 33, and Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-0000, paragraph 77).

104 It should be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an 'internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', but also 'a policy in the social sphere'. Article 2 EC states that the Community is to have as its task, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities' and 'a high level of employment and of social protection'.

105 Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.

106 In the case in the main proceedings, Byggnads and Byggettan contend that the objective of the blockade carried out against Laval was the protection of workers.

107 In that regard, it must be observed that, in principle, blockading action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers.

108 However, as regards the specific obligations, linked to signature of the collective agreement for the building sector, which the trade unions seek to impose on undertakings established in other Member States by way of collective action such as that at issue in the case in the main proceedings, the obstacle which that collective action forms cannot be justified with regard to such an objective. In addition to what is set out in paragraphs 81 and 83 of the present judgment, with regard to workers posted in the framework of a transnational provision of services, their employer is required, as a result of the coordination achieved by Directive 96/71, to observe a nucleus of mandatory rules for minimum protection in the host Member State.

109 Finally, as regards the negotiations on pay which the trade unions seek to impose, by way of collective action such as that at issue in the main proceedings, on undertakings, established in another Member State which post workers temporarily to their territory, it must be emphasised that Community law certainly does not prohibit Member States from requiring such undertakings to comply with their rules on minimum pay by appropriate means (see *Seco and Desquenne & Giral*, paragraph 14; *Rush Portuguesa*, paragraph 18, and *Arblade and Others*, paragraph 41).

110 However, collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective referred to in paragraph 102 of the present judgment, where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay (see, to that effect, *Arblade and Others*, paragraph 43).

111 In the light of the foregoing, the answer to the first question must be that Article 49 EC and Directive 96/71 are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.

**The second question**

112 By the second question, the national court is asking, in essence, whether, where there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 EC and 50 EC preclude that prohibition from being subject

to the condition that such action must relate to terms and conditions of employment to which the national law applies directly, thereby making it impossible for an undertaking which posts workers to that Member State in the framework of the provision of services and which is bound by a collective agreement subject to the law of another Member State to enforce such a prohibition vis-à-vis those trade unions.

113 That question concerns the application of the provisions of the MBL which introduced a system to combat social dumping, pursuant to which a service provider is not entitled, in the Member State in which it provides its services, to expect any account to be taken of the obligations under collective agreements to which it is already subject in the Member State in which it is established. It follows from such a system that collective action is authorised against undertakings bound by a collective agreement subject to the law of another Member State in the same way as such action is authorised against undertakings which are not bound by any collective agreement.

114 It is clear from settled case-law that the freedom to provide services implies, in particular, the abolition of any discrimination against a service provider on account of its nationality or the fact that it is established in a Member State other than the one in which the service is provided (see, inter alia, Case C-154/89 *Commission* v *France* [1991] ECR I-659, paragraph 12; Case C-180/89 *Commission* v *Italy* ECR I-709, paragraph 15; Case C-198/89 *Commission* v *Greece* ECR I-727, paragraph 16, and *Commission* v *Germany* [2007] paragraph 83).

115 It is also settled case-law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (See, inter alia, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30; Case C-383/05 *Talotta* [2007] ECR I-0000, paragraph 18, and Case C-182/06 *Lakebrink and Peters-Lakebrink* [2007] ECR I-0000, paragraph 27).

116 In that regard, it must be pointed out that national rules, such as those at issue in the case in the main proceedings, which fail to take into account, irrespective of their content, collective agreements to which undertakings that post workers to Sweden are already bound in the Member State in which they are established, give rise to discrimination against such undertakings, in so far as under those national rules they are treated in the same way as national undertakings which have not concluded a collective agreement.

117 It follows from Article 46 EC, which must be interpreted strictly, that discriminatory rules may be justified only on grounds of public policy, public security or public health (see *Commission* v *Germany* [2007] paragraph 86).

118 It is clear from the order for reference that the application of those rules to foreign undertakings which are bound by collective agreements to which Swedish law does not directly apply is intended, first, to allow trade unions to take action to ensure that all employers active on the Swedish labour market pay wages and apply other terms and conditions of employment in line with those usual in Sweden, and secondly, to create a climate of fair competition, on an equal basis, between Swedish employers and entrepreneurs from other Member States.

119 Since none of the considerations referred to in the previous paragraph constitute grounds of public policy, public security or public health within the meaning of Article 46 EC, applied in conjunction with Article 55 EC, it must be held that discrimination such as that in the case in the main proceedings cannot be justified.

120 In the light of the foregoing, the answer to the second question must be that, where there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 EC and 50 EC preclude that prohibition from being subject to the condition that such action must relate to terms and conditions of employment to which the national law applies directly.

**Costs**

121 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 49 EC and Article 3 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 are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.**

2. **Where there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 EC and 50 EC preclude that prohibition from being subject to the condition that such action must relate to terms and conditions of employment to which the national law applies directly.**

LECTURE 5: FUNDAMENTAL RIGHTS IN THE EU INTERNAL MARKET (III): CITIZENSHIP RIGHTS AS FUNDAMENTAL RIGHTS?

The EU's free movement rights are essentially directed towards economically active persons: workers and independent professionals engaged in an economic activity. Over time, however, former or future workers also began to ask for supplementary residence rights for prolonged periods of time in the territory of another EU Member State. To accommodate those requests, the Maastricht Treaty introduced the concept of EU citizenship. According to Article 20 TFEU, every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship. Attached to EU citizenship are (a) the right to move and reside freely within the territory of the Member States; (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

Of those rights, the right to move and reside has proven most controversial; questions have indeed been asked in what circumstances a citizen – non-economically or professionally active – may benefit from residence rights. Such residence rights are important, as a legal resident in another Member State benefits fully from the prohibition of discrimination on grounds of nationality in accordance with Article 18 TFEU. As such, citizenship residence implies entitlements for individuals and potential financial burdens for host States. Analysing the limits of citizenship through the lenses of citizen rights as fundamental rights allows better to understand and explain the value of the EU's citizenship status in the framework of the internal market.

*Materials to read:*

- Court of Justice, 19 September 2013, Case C-140/12, *Pensionsversicherungsanstalt v Peter Brey*, ECLI:EU:C:2013:565.
- Court of Justice, 11 November 2014, Case C-333/13, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, ECLI:EU:C:2014:2358.

- Court of Justice, 8 March 2011, Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, ECLI:EU:C:2011:124.
- Court of Justice, 14 November 2017, Case C-165/16, *Toufik Lounes v Secretary of State for the Home Department*, ECLI:EU:C:2017:862.

## Case C-140/12, *Peter Brey*

In Case C-140/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 14 February 2012, received at the Court on 19 March 2012, in the proceedings

**Pensionsversicherungsanstalt**

v

**Peter Brey,**

THE COURT (Third Chamber),

[…]

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 7(1)(b) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

2 The request has been made in proceedings between Mr Brey and the Pensionsversicherungsanstalt (Pensions Insurance Institution) (Austria), concerning the latter's refusal to grant him the compensatory supplement (Ausgleichzulage) provided for in Austrian legislation to augment his German retirement pension.

**Legal context**

*European Union law*

Directive 2004/38

3 Under recitals 10, 16, 20 and 21 in the preamble to Directive 2004/38:

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

…

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

…

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

(21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.'

4 Article 7(1)(b) of that directive, entitled 'Right of residence for more than three months', provides as follows:

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

…

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State'.

5 Article 8 of Directive 2004/38, entitled 'Administrative formalities for Union citizens', provides:

'1. Without prejudice to Article 5(5), for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities.

2. The deadline for registration may not be less than three months from the date of arrival. A registration certificate shall be issued immediately, stating the name and address of the person registering and the date of the registration. Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions.

3. For the registration certificate to be issued, Member States may only require that

– …

– Union citizens to whom point (b) of Article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein,

– …

4. Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

…'

6 Article 14 of Directive 2004/38, entitled 'Retention of the right of residence', states:

'…

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

…'

7 Under Article 24 of that directive, entitled 'Equal treatment':

'1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

…'

Regulation (EC) No 883/2004

8 As of 1 May 2010, Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum, OJ 2004 L 200, p. 1) has replaced Regulation (EEC) No 1408/71 of the Council 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, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

9 Article 1 of Regulation No 883/2004, as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010 (OJ 2010 L 338, p. 35) ('Regulation No 883/2004'), entitled 'Definitions', provides:

'For the purposes of this Regulation:

…

(j) "residence" means the place where a person habitually resides

…'

10 Article 3 of that regulation, entitled 'Matters covered', is worded as follows:

'1. This Regulation shall apply to all legislation concerning the following branches of social security:

…

(d) old-age benefits;

…

2. Unless otherwise provided for in Annex XI, this Regulation shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner.

3. This Regulation shall also apply to the special non-contributory cash benefits covered by Article 70.

…

5. This Regulation shall not apply to:

(a) social and medical assistance

…'

11 Article 4 of that regulation, entitled 'Equality of treatment', provides:

'Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.'

12 Article 70 of that regulation states:

'1. This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance.

2. For the purposes of this Chapter, "special non-contributory cash benefits" means those which:

(a) are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;

or

(ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,

and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone,

and

(c) are listed in Annex X.

3. Article 7 and the other chapters of this Title shall not apply to the benefits referred to in paragraph 2 of this Article.

4. The benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence.'

13 Annex X to Regulation No 883/2004, entitled 'Special non-contributory cash benefits', includes the following note regarding the Republic of Austria: 'Compensatory supplement (Federal Act of 9 September 1955 on General Social Insurance – [Allgemeines Sozialversicherungsgesetz, BGBl. 189/1955] …)'.

*Austrian law*

14 Paragraph 292(1) of the Federal Act on General Social Insurance (Allgemeines Sozialversicherungsgesetz, BGBl. 189/1955), as amended, from 1 January 2011, by the 2011 Budget Act (Budgetbegleitgesetz 2011, BGBl. 111/201) ('the ASVG') provides that, where a retirement pension plus net revenue from other sources (plus any other amount which should be taken into account) falls short of a specific reference amount, the individual receiving that pension is to be entitled to a compensatory supplement which is equal to the difference between the reference amount and that individual's personal income, so long as he is habitually and lawfully resident in Austria.

15 The Settlement and Residence Act (Niederlassungs- und Aufenthaltsgesetz), as amended by the 2011 Budget Act ('the NAG'), includes the following relevant provisions:

'Paragraph 51

1. On the basis of the Directive on freedom of movement, [European Economic Area ("EEA")] citizens are entitled to reside for periods in excess of three months, if they:

…

(2) have comprehensive sickness insurance cover for themselves and the members of their families and have sufficient resources to support themselves and the members of their families so as not to be obliged to have recourse to social assistance benefits or the compensatory supplement during their period of residence;

…

Registration certificate

Paragraph 53

1. EEA citizens who enjoy a right of residence under European Union law (Paragraphs 51 and 52) must, if they are residing in Austria for longer than three months, notify the authority within four months of their entry. If the conditions (Paragraphs 51 or 52) are satisfied, the authority shall, upon request, issue a registration certificate.

2. As proof of the right of residence under European Union law, a valid passport or identity card must be provided in addition to the following evidence:

…

(2) Under Paragraph 51(1)(2): Evidence of sufficient resources and of comprehensive sickness insurance cover;

…'

**The dispute in the main proceedings and the question referred for a preliminary ruling**

16 Mr Brey and his wife, who are both of German nationality, left Germany and moved to Austria in March 2011. In Germany, Mr Brey receives an invalidity pension of EUR 862.74 per month before tax, and a care allowance of EUR 225 per month. The couple has no other income or assets. Mr Brey's wife received a basic

benefit in Germany; however, because of her move to Austria, she has not received it since 1 April 2011. The monthly rent payable on the couple's apartment in Austria is EUR 532.29.

17 By decision of 2 March 2011, the Pensionsversicherungsanstalt refused Mr Brey's application for a compensatory supplement to be granted with effect from 1 April 2011 on the ground that, owing to his low retirement pension, Mr Brey does not have sufficient resources to establish his lawful residence in Austria.

18 On 22 March 2011, the Bezirkshauptmannschaft Deutschlandberg (first-level Deutschlandberg administrative authority) (Austria) issued Mr Brey and his wife with an EEA citizen registration certificate in accordance with the NAG.

19 Mr Brey brought an action against the decision of 2 March 2011. By judgment delivered on 6 October 2011, the Oberlandesgericht Graz (Higher Regional Court, Graz), upholding the judgment delivered at first instance by the Landesgericht für Zivilsachen Graz (Regional Court for civil law matters, Graz), reversed that decision, with the result that the Pensionsversicherungsanstalt was obliged to grant Mr Brey a compensatory supplement in the amount of EUR 326.82 per month with effect from 1 April 2011.

20 The Pensionsversicherungsanstalt brought an appeal on a point of law against that judgment before the Oberster Gerichtshof (Austrian Supreme Court).

21 In the order for reference, that court notes that, in Case C-160/02 *Skalka* [2004] ECR I-5613, the Court categorised the compensatory supplement as a 'special non-contributory benefit' within the meaning of Article 4(2a) of Regulation No 1408/71 (now Article 70 of Regulation No 883/2004), because it augments a retirement pension or an invalidity pension and is by nature social assistance in so far as it is intended to ensure a minimum means of subsistence for its recipient where his pension is insufficient.

22 According to the referring court, the issue which thus arises in the proceedings pending before it is that of determining whether the EU legislation on residence uses the same concept of 'social assistance' as the EU legislation on social security.

23 If that concept were to be acknowledged as having an identical meaning in both areas, the referring court is of the view that the compensatory supplement could not be regarded as social assistance within the meaning of Directive 2004/38, since it has some social security aspects and falls within the scope of Regulation No 883/2004. Consequently, the right to a compensatory supplement would have no impact on the right of residence.

24 However, the referring court is also of the view that the concept of 'social assistance' could be given its own particular meaning based on the objectives pursued by Directive 2004/38, which is intended, inter alia, to prevent persons who have not made any contribution to financing the social security schemes of a host Member State from becoming an excessive burden on that State's budget. From that perspective, that concept, in the context of the EU legislation on residence, would have to be understood to mean the basic benefits paid by a State out of general taxation, to which all residents are entitled, whether or not those benefits are based on a right or on a state of need and whether or not there is an associated specific risk in terms of social security. In that situation, the compensatory supplement would have to be regarded as social assistance for the purposes of Directive 2004/38.

25 In those circumstances, the Oberster Gerichtshof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is a compensatory supplement to be regarded as a "social assistance" benefit within the terms contemplated in Article 7(1)(b) of Directive 2004/38 … ?'

**The question referred for a preliminary ruling**

*Scope of the question referred*

26 By its question, the referring court asks whether Article 7(1)(b) of Directive 2004/38 should be interpreted as meaning that, for the purposes of that provision, the concept of 'social assistance' covers a benefit such as the compensatory supplement provided for in Paragraph 292(1) of the ASVG.

27 That question has arisen in a dispute in which the competent Austrian authorities refused to grant that benefit to a national of another Member State (Mr Brey) on the grounds that, despite having been issued with a certificate of residence, he could not be regarded as being 'lawfully' resident in Austria for the purposes of Paragraph 292(1) of the ASVG since, under Paragraph 51 of the NAG, the right to reside in Austria for periods in excess of three months requires the person concerned to have, inter alia, 'sufficient resources to support [himself] and the members of [his family] so as not to be obliged to have recourse to social assistance benefits or the compensatory supplement during [his] period of residence'.

28 It is common ground that Paragraph 51 of the NAG is intended to transpose into Austrian law Article 7(1)(b) of Directive 2004/38, which states that all Union citizens are to have the right of residence on the territory of another Member State for a period of longer than three months if they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence.

29 It follows that, even though Mr Brey's right of residence is not directly at issue in the main proceedings, which concern only the grant of the compensatory supplement, the national law itself establishes a direct link between the conditions for obtaining that benefit and the conditions for obtaining the legal right to reside in Austria for periods in excess of three months; the granting of a compensatory supplement is made conditional upon the person in question meeting the requirements for obtaining that right of residence. In that regard, it emerges from the explanation provided by the referring court that, according to the *travaux préparatoires* relating to the amendment made with effect from 1 January 2011 to Paragraph 51(1)(2) of the NAG, that provision, by making explicit reference to the compensatory supplement, is now intended to prevent a national of another Member State from being able to obtain the right to reside in Austria by virtue of EU law where that national applies, during his period of residence, for the compensatory supplement.

30 In those circumstances, it appears that the outcome of the dispute in the main proceedings is dependent on knowing whether a Member State may refuse to grant the compensatory supplement to nationals of other Member States on the grounds that – like Mr Brey – they do not, despite having been issued with a certificate of residence, meet the necessary requirements for obtaining the legal right to reside on the territory of that Member State for a period of longer than three months, since, in order to obtain that right, the person concerned must have sufficient resources not to apply for, inter alia, the compensatory supplement. The nature of that benefit, which is the subject of the referring court's question, must be examined in the context of analysing this issue.

31 In that regard, it should be borne in mind that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it (see, inter alia, Case C-45/06 *Campina* [2007] ECR I-2089, paragraph 30, and Case C-243/09 *Fuß* [2010] ECR I-9849, paragraph 39).

32 The question referred should therefore be reformulated to the effect that the referring court seeks, in essence, to ascertain whether EU law – in particular, Directive 2004/38 – should be interpreted as precluding national legislation, such as that at issue in the main proceedings, which does not allow the grant of a benefit, such as the compensatory supplement provided for in Paragraph 292(1) of the ASVG, to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer than three months, since such a right of residence is conditional upon that national having sufficient resources not to apply for the benefit.

*The right of a Union citizen who is not economically active to receive a benefit, such as the benefit at issue in the main proceedings, in the host Member State*

33 As a preliminary point, it should be borne in mind that, in *Skalka*, the Court ruled that the compensatory supplement provided for in Paragraph 292(1) of the ASVG falls within the scope of Regulation No 1408/71 and therefore constitutes a 'special non-contributory benefit' within the meaning of Article 4(2a) of that regulation, read in conjunction with Annex IIa thereto. Under Article 10a(1) of Regulation No 1408/71, that benefit is to be granted solely by, and at the expense of, the competent institutions of the Member State of residence, in accordance with the legislation of that State.

34 In that regard, the Court found in paragraph 26 of *Skalka* that the Austrian compensatory supplement is classifiable as a 'special benefit' as it augments a retirement pension or an invalidity pension, it is by nature social assistance in so far as it is intended to ensure a minimum means of subsistence for its recipient where his pension is insufficient, and entitlement is dependent on objective criteria defined by law.

35 In addition, the Court held in paragraphs 29 and 30 of that judgment that the Austrian compensatory supplement has to be regarded as 'non-contributory', given that the costs are borne by a social institution which then receives reimbursement in full from the relevant Land, which in turn receives from the Federal budget the sums necessary to finance the benefit, and that at no time do the contributions of insured persons form part of this financing arrangement.

36 It is common ground that there is nothing in the corresponding provisions of Regulation No 883/2004 – namely, Articles 3(3) and 70 of that regulation and Annex X thereto, concerning 'special non-contributory cash benefits' – to suggest that those findings should be qualified.

37 According to the European Commission, it follows from those provisions that the requirement that, in order to receive the compensatory supplement, the person concerned must have a legal right to reside in the host Member State for a period of longer than three months is not consistent with EU law. Anyone who – like Mr Brey – falls within the scope of Regulation No 883/2004 as a retired person who has ceased all employed or self-employed activity has the right, pursuant to Article 70(4) of that regulation, to be paid special non-contributory cash benefits in his Member State of residence. Under Article 1(j) of that regulation, a person's residence is the place where he 'habitually resides', an expression which refers to the Member State in which the person concerned habitually resides and where the habitual centre of his interests is to be found. It follows, according to the Commission, that the requirement laid down in Paragraph 292(1) of the ASVG, read in conjunction with Paragraph 51(1) of the NAG, for such residence to be lawful represents indirect discrimination contrary to Article 4 of Regulation No 883/2004, since it affects only non-Austrian citizens of the Union.

38 Accordingly, it is first necessary to examine whether a Member State may make the grant of a benefit covered by Regulation No 883/2004 to a national of another Member State conditional upon that national meeting the requirements for obtaining a legal right of residence for a period exceeding three months. Only if the answer to that first question is in the affirmative will it be necessary to determine whether that right of residence can be made conditional upon the person concerned having sufficient resources not to apply for the benefit.

The need to meet the necessary requirements for obtaining a legal right of residence for a period exceeding three months

39 It should be noted that Article 70(4) of Regulation No 883/2004 – upon which the Commission relies – sets out a 'conflict rule', the aim of which is to determine, in cases involving special non-contributory cash benefits, the applicable legislation and the institution responsible for paying the benefits in question.

40 That provision is intended not only to prevent the concurrent application of a number of national legislative systems and the complications which might ensue, but also to ensure that persons covered by Regulation No 883/2004 are not left without social security cover because there is no legislation which is applicable to them (see, by analogy, Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 28, and Case C-619/11 *Dumont de Chassart* [2013] ECR, paragraph 38).

41 On the other hand, that provision is not intended to lay down the conditions creating the right to special non-contributory cash benefits. It is for the legislation of each Member State to lay down those conditions (see, to that effect, *Dumont de Chassart*, paragraph 39 and the case-law cited).

42 It cannot therefore be inferred from Article 70(4) of Regulation No 883/2004, read in conjunction with Article 1(j) thereof, that EU law precludes national legislation, such as that at issue in the main proceedings, under which the right to a special non-contributory cash benefit is conditional upon meeting the necessary requirements for obtaining a legal right of residence in the Member State concerned.

43 Regulation No 883/2004 does not set up a common scheme of social security, but allows different national social security schemes to exist and its sole objective is to ensure the coordination of those schemes. It thus allows different schemes to continue to exist, creating different claims on different institutions against which the claimant

possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by EU law (Case C-331/06 *Chuck* [2008] ECR I-1957, paragraph 27, and *Dumont de Chassart*, paragraph 40).

44 The Court has consistently held that there is nothing to prevent, in principle, the granting of social security benefits to Union citizens who are not economically active being made conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host Member State (see, to that effect, Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraphs 61 to 63; Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraphs 32 and 33; Case C-456/02 *Trojani* [2004] ECR I-7573, paragraphs 42 and 43; Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 37; and Case C-158/07 *Förster* [2008] ECR I-8507, paragraph 39).

45 However, it is important that the requirements for obtaining that right of residence – such as, in the case before the referring court, the need to have sufficient resources not to apply for the compensatory supplement – are themselves consistent with EU law.

The requirement to have sufficient resources not to apply for the compensatory supplement

46 It should be borne in mind that the right of nationals of one Member State to reside in the territory of another Member State without being engaged in any activity, whether on an employed or a self-employed basis, is not unconditional. Under Article 21(1) TFEU, the right of every citizen of the Union to reside in the territory of the Member States is recognised subject to the limitations and conditions laid down in the Treaty and by the measures adopted for its implementation (see, to that effect, *Trojani*, paragraphs 31 and 32; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 26; and Case C-291/05 *Eind* [2007] ECR I-10719, paragraph 28).

47 By way of such limitations and conditions, Article 7(1)(b) of Directive 2004/38 provides that a Member State may require nationals of another Member State wishing to have the right of residence on its territory for a period of longer than three months without being economically active to have comprehensive sickness insurance cover in the host Member State and sufficient resources for themselves and their family members not to become a burden on the social assistance system of that Member State during their period of residence (see, to that effect, Case C-480/08 *Teixeira* [2010] ECR I-1107, paragraph 42).

48 By contrast with all the governments which have filed written observations, the Commission submits that, since the compensatory supplement is a special non-contributory cash benefit which falls within the scope of Regulation No 883/2004, it cannot be regarded as 'social assistance' for the purposes of Article 7(1)(b) of Directive 2004/38. Furthermore, according to the Commission, it is clear from the explanatory memorandum for that directive (Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2001) 257 final)) that the 'social assistance' benefits covered by that provision are those which are not currently covered by Regulation No 883/2004. That interpretation is confirmed, it is claimed, by the fact that, according to that explanatory memorandum, social assistance for the purposes of Directive 2004/38 includes free medical assistance, which is specifically excluded from the scope of Regulation No 883/2004 by virtue of Article 3(5) thereof.

49 In that regard, it should be stressed at the outset that the need for the uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose pursued (see, inter alia, Case C-204/09 *Flachglas Torgau* [2012] ECR, paragraph 37, and Case C-260/11 *Edwards and Pallikaropoulos* [2013] ECR, paragraph 29).

50 As has already been stated in paragraphs 33 to 36 above, a benefit such as the compensatory supplement does indeed fall within the scope of Regulation No 883/2004. However, that fact cannot, in and of itself, be decisive for the purposes of interpreting Directive 2004/38. As all the governments which have filed written observations have submitted, the objectives pursued by Regulation No 883/2004 are different to the objectives pursued by that directive.

51 In that regard, it should be borne in mind that Regulation No 883/2004 seeks to achieve the objective set out in Article 48 TFEU by preventing the possible negative effects that the exercise of the freedom of movement

for workers could have on the enjoyment, by workers and their families, of social security benefits (see, to that effect, *Chuck*, paragraph 32).

52 It is in order to achieve that objective that, through the waiver of residence clauses under Article 7 thereof, Regulation No 883/2004 provides, subject to the exceptions set out therein, for the cash benefits falling within its scope to be exportable in the host Member State (see, to that effect, Case C-20/96 *Snares* [1997] ECR I-6057, paragraphs 39 and 40).

53 By contrast, although the aim of Directive 2004/38 is to facilitate and strengthen the exercise of the primary and individual right – conferred directly on all Union citizens by the Treaty – to move and reside freely within the territory of the Member States (see Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraphs 82 and 59; Case C-162/09 *Lassal* [2010] ECR I-9217, paragraph 30; and Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraph 28), it is also intended, as is apparent from Article 1(a) thereof, to set out the conditions governing the exercise of that right (see, to that effect, *McCarthy*, paragraph 33, and Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja* [2011] ECR I-14035, paragraphs 36 and 40), which include, where residence is desired for a period of longer than three months, the condition laid down in Article 7(1)(b) of the directive that Union citizens who do not or no longer have worker status must have sufficient resources.

54 It is apparent from recital 10 in the preamble to Directive 2004/38, in particular, that that condition is intended, inter alia, to prevent such persons becoming an unreasonable burden on the social assistance system of the host Member State (*Ziolkowski and Szeja*, paragraph 40).

55 That condition is based on the idea that the exercise of the right of residence for citizens of the Union can be subordinated to the legitimate interests of the Member States – in the present case, the protection of their public finances (see, by analogy, Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 90; *Zhu and Chen*, paragraph 32; and Case C-408/03 *Commission* v *Belgium* [2006] ECR I-2647, paragraphs 37 and 41).

56 In a similar vein, Article 24(2) of Directive 2004/38 allows a derogation from the principle of equal treatment enjoyed by Union citizens other than workers, self-employed persons, persons who retain such status and members of their families who reside within the territory of the host Member State, by permitting that State not to confer entitlement to social assistance, in particular for the first three months of residence (see Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585, paragraphs 34 and 35).

57 It follows that, while Regulation No 883/2004 is intended to ensure that Union citizens who have made use of the right to freedom of movement for workers retain the right to certain social security benefits granted by their Member State of origin, Directive 2004/38 allows the host Member State to impose legitimate restrictions in connection with the grant of such benefits to Union citizens who do not or no longer have worker status, so that those citizens do not become an unreasonable burden on the social assistance system of that Member State.

58 In those circumstances, the concept of 'social assistance system' as used in Article 7(1)(b) of Directive 2004/38 cannot, contrary to the Commission's assertions, be confined to those social assistance benefits which, pursuant to Article 3(5)(a) of Regulation No 883/2004, do not fall within the scope of that regulation.

59 As several of the governments which have filed observations have pointed out, the opposite interpretation would lead to unjustifiable differences in treatment between Member States, according to how their national social security systems are organised, given that the 'special' nature of a benefit such as the one at issue in the main proceedings – and, as a consequence, the fact that it falls within the scope of Regulation No 883/2004 – depends, inter alia, on whether the grant of that benefit is based, under national law, on objective criteria or solely on the state of need of the person concerned.

60 It follows that, for the purposes of Article 7(1)(b) of Directive 2004/38, the concept of 'social assistance system' must be defined by reference to the objective pursued by that provision, as recalled in paragraphs 53 to 57 above, and not by reference to formal criteria (see, to that effect, *Vatsouras and Koupatantze*, paragraphs 41 and 42, and Case C-571/10 *Kamberaj* [2012] ECR, paragraphs 90 to 92).

61 Accordingly, that concept must be interpreted as covering all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a

burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State (see, to that effect, *Bidar*, paragraph 56; *Eind*, paragraph 29; and *Förster*, paragraph 48; see also, by analogy, Case C-578/08 *Chakroun* [2010] ECR I-1839, paragraph 46, and *Kamberaj*, paragraph 91).

62 As regards the compensatory supplement at issue in the main proceedings, it is clear from paragraphs 33 to 36 above that that benefit may be regarded as coming under the 'social assistance system' of the Member State concerned. As the Court found in paragraphs 29 and 30 of *Skalka*, that benefit, which is intended to ensure a minimum means of subsistence for its recipient where his pension is insufficient, is funded in full by the public authorities, without any contribution being made by insured persons.

63 Consequently, the fact that a national of another Member State who is not economically active may be eligible, in light of his low pension, to receive that benefit could be an indication that that national does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State for the purposes of Article 7(1)(b) of Directive 2004/38 (see, to that effect, *Trojani*, paragraphs 35 and 36).

64 However, the competent national authorities cannot draw such conclusions without first carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned.

65 First, it should be pointed out that there is nothing in Directive 2004/38 to preclude nationals of other Member States from receiving social security benefits in the host Member State (see, by analogy, *Grzelczyk*, paragraph 39).

66 On the contrary, several provisions of that directive specifically state that those nationals may receive such benefits. Thus, as the Commission has rightly pointed out, the very wording of Article 24(2) of that directive shows that it is only during the first three months of residence that, by way of derogation from the principle of equal treatment set out in Article 24(1), the host Member State is not to be under an obligation to confer entitlement to social assistance on Union citizens who do not or no longer have worker status. In addition, Article 14(3) of that directive provides that an expulsion measure is not to be the automatic consequence of recourse to the social assistance system of the host Member State by a Union citizen or a member of his family.

67 Second, it should be noted that the first sentence of Article 8(4) of Directive 2004/38 expressly states that Member States may not lay down a fixed amount which they will regard as 'sufficient resources', but must take into account the personal situation of the person concerned. Moreover, under the second sentence of Article 8(4), the amount ultimately regarded as indicating sufficient resources may not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where that criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

68 It follows that, although Member States may indicate a certain sum as a reference amount, they may not impose a minimum income level below which it will be presumed that the person concerned does not have sufficient resources, irrespective of a specific examination of the situation of each person concerned (see, by analogy, *Chakroun*, paragraph 48).

69 Furthermore, it is clear from recital 16 in the preamble to Directive 2004/38 that, in order to determine whether a person receiving social assistance has become an unreasonable burden on its social assistance system, the host Member State should, before adopting an expulsion measure, examine whether the person concerned is experiencing temporary difficulties and take into account the duration of residence of the person concerned, his personal circumstances, and the amount of aid which has been granted to him.

70 Lastly, it should be borne in mind that, since the right to freedom of movement is – as a fundamental principle of EU law – the general rule, the conditions laid down in Article 7(1)(b) of Directive 2004/38 must be construed narrowly (see, by analogy, *Kamberaj*, paragraph 86, and *Chakroun*, paragraph 43) and in compliance with the limits imposed by EU law and the principle of proportionality (see *Baumbast and R*, paragraph 91; *Zhu and Chen*, paragraph 32; and *Commission* v *Belgium*, paragraph 39).

71 In addition, the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would compromise attainment of the objective of Directive 2004/38, which is, inter alia, to facilitate and strengthen the exercise of Union citizens' primary right to move and reside freely within the territory of the Member States, and the practical effectiveness of that directive (see, by analogy, *Chakroun*, paragraphs 43 and 47).

72 By making the right of residence for a period of longer than three months conditional upon the person concerned not becoming an 'unreasonable' burden on the social assistance 'system' of the host Member State, Article 7(1)(b) of Directive 2004/38, interpreted in the light of recital 10 to that directive, means that the competent national authorities have the power to assess, taking into account a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole. Directive 2004/38 thus recognises a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary (see, by analogy, *Grzelczyk*, paragraph 44; *Bidar*, paragraph 56; and *Förster*, paragraph 48).

73 It is true, as the Advocate General states in point 74 of his Opinion, that, unlike most of the other language versions, the German version of Article 7(1)(b) of Directive 2004/38 does not appear to refer to any such 'system'.

74 However, it is settled case-law that the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement of the uniform application of EU law. In the event of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part (see Case C-372/88 *Cricket St Thomas* [1990] ECR I-1345, paragraphs 18 and 19, and Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 16).

75 It can be seen from paragraphs 64 to 72 above that the mere fact that a national of a Member State receives social assistance is not sufficient to show that he constitutes an unreasonable burden on the social assistance system of the host Member State.

76 As regards the legislation at issue in the main proceedings, it is clear from the explanation provided by the Austrian Government at the hearing that, although the amount of the compensatory supplement depends on the financial situation of the person concerned as measured against the reference amount fixed for granting that supplement, the mere fact that a national of another Member State who is not economically active has applied for that benefit is sufficient to preclude that national from receiving it, regardless of the duration of residence, the amount of the benefit and the period for which it is available, that is to say, regardless of the burden which that benefit places on the host Member State's social assistance system as a whole.

77 Such a mechanism, whereby nationals of other Member States who are not economically active are automatically barred by the host Member State from receiving a particular social security benefit, even for the period following the first three months of residence referred to in Article 24(2) of Directive 2004/38, does not enable the competent authorities of the host Member State, where the resources of the person concerned fall short of the reference amount for the grant of that benefit, to carry out – in accordance with the requirements under, inter alia, Articles 7(1)(b) and 8(4) of that directive and the principle of proportionality – an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned.

78 In particular, in a case such as that before the referring court, it is important that the competent authorities of the host Member State are able, when examining the application of a Union citizen who is not economically active and is in Mr Brey's position, to take into account, inter alia, the following: the amount and the regularity of the income which he receives; the fact that those factors have led those authorities to issue him with a certificate of residence; and the period during which the benefit applied for is likely to be granted to him. In addition, in order to ascertain more precisely the extent of the burden which that grant would place on the national social assistance system, it may be relevant, as the Commission argued at the hearing, to determine the proportion of the beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another Member State.

79 In the present case, it is for the referring court, which alone has jurisdiction to assess the facts, to decide, in light of those elements in particular, whether granting a benefit such as the compensatory supplement to a person in Mr Brey's situation is likely to place an unreasonable burden on the national social assistance system.

80 In the light of all of the foregoing, the answer to the question referred is that EU law – in particular, as it results from Article 7(1)(b), Article 8(4) and Article 24(1) and (2) of Directive 2004/38 – must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, even as regards the period following the first three months of residence, automatically – whatever the circumstances – bars the grant of a benefit, such as the compensatory supplement provided for in Paragraph 292(1) of the ASVG, to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer than three months, since obtaining that right of residence is conditional upon that national having sufficient resources not to apply for the benefit.

**Costs**

[…]

On those grounds, the Court (Third Chamber) hereby rules:

**EU law – in particular, as it results from Article 7(1)(b), Article 8(4) and Article 24(1) and (2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC – must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, even as regards the period following the first three months of residence, automatically – whatever the circumstances – bars the grant of a benefit, such as the compensatory supplement provided for in Paragraph 292(1) of the Federal Act on General Social Insurance (Allgemeines Sozialversicherungsgesetz), as amended, from 1 January 2011, by the 2011 Budget Act (Budgetbegleitgesetzes 2011), to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer than three months, since obtaining that right of residence is conditional upon that national having sufficient resources not to apply for the benefit.**

# Case C-333/13, *Elisabeta and Florin Dano v Jobcenter Leipzig*

In Case C-333/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sozialgericht Leipzig (Germany), made by decision of 3 June 2013, received at the Court on 19 June 2013, in the proceedings

**Elisabeta Dano,**

**Florin Dano**

v

**Jobcenter Leipzig,**

THE COURT (Grand Chamber),

[…]

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 18 TFEU, of point (a) of the first subparagraph, and the second subparagraph, of Article 20(2) TFEU, of Articles 1, 20 and 51 of the Charter of Fundamental Rights of the European Union ('the Charter'), of Articles 4 and 70 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum at OJ 2004 L 200, p. 1), as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010 (OJ 2010 L 338, p. 35) ('Regulation No 883/2004), and of Article 24(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

2 The request has been made in proceedings brought by Ms Dano and her son Florin against Jobcenter Leipzig concerning the latter's refusal to grant them benefits by way of basic provision ('Grundsicherung') that are envisaged by German legislation, namely, for Ms Dano, subsistence benefit ('existenzsichernde Regelleistung') and, for her son, social allowance ('Sozialgeld'), as well as a contribution to accommodation and heating costs.

**Legal context**

*EU law*

Regulation No 1247/92

3 The first to eighth recitals in the preamble to Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ 1992 L 136, p. 1) state as follows:

'… it is necessary to amend Regulation (EEC) No 1408/71 …, as updated by Regulation (EEC) No 2001/83 …, as last amended by Regulation (EEC) No 2195/91 …;

… it is necessary to extend the definition of "member of the family" in Regulation (EEC) No 1408/71 to conform with the case-law of the Court of Justice concerning the interpretation of that expression;

… it is also necessary to take account of the case-law of the Court of Justice stating that certain benefits provided under national laws may fall simultaneously within the categories of both social security and social assistance because of the class of persons to whom such laws apply, their objectives and their manner of application;

… the Court of Justice has stated that, in some of its features, legislation under which such benefits are granted is akin to social assistance in that need is an essential criterion in its implementation and the conditions of entitlement are not based upon the aggregation of periods of employment or contributions, whilst in other features it is close to social security to the extent that there is an absence of discretion in the manner in which such benefits as are provided thereunder are awarded and in that it confers a legally defined position upon beneficiaries;

… Regulation (EEC) No 1408/71 excludes from its scope, by virtue of Article 4(4) thereof, social assistance schemes;

… the conditions referred to and their methods of application are such that a system of coordination which differs from that currently provided for in Regulation (EEC) No 1408/71 and which takes account of the special characteristics of the benefits concerned should be included in that Regulation in order to protect the interests of migrant workers in accordance with the provisions of Article 51 of the Treaty;

… such benefits should be granted, in respect of persons falling within the scope of Regulation (EEC) No 1408/71, solely in accordance with the legislation of the country of residence of the person concerned or of the members of his or her family, with such aggregation of periods of residence completed in any other Member State as is necessary and without discrimination on grounds of nationality;

… it is necessary nevertheless to ensure that the existing system of coordination in Regulation (EEC) No 1408/71 continues to apply to benefits which either do not fall within the special category of benefits referred to or are not expressly included in an Annex to that Regulation; … a new Annex is needed for this purpose'.

Regulation (EC) No 883/2004

4 Regulation No 883/2004 replaced Regulation No 1408/71 from 1 May 2010.

5 Recitals 1, 16 and 37 in the preamble to Regulation No 883/2004 state:

'(1) The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.

…

(16) Within the Community there is in principle no justification for making social security rights dependent on the place of residence of the person concerned; nevertheless, in specific cases, in particular as regards special benefits linked to the economic and social context of the person involved, the place of residence could be taken into account.

…

(37) As the Court of Justice has repeatedly stated, provisions which derogate from the principle of the exportability of social security benefits must be interpreted strictly. This means that they can apply only to benefits which satisfy the specified conditions. It follows that Chapter 9 of Title III of this Regulation can apply only to benefits which are both special and non-contributory and listed in Annex X to this Regulation.'

6 Article 1 of Regulation No 883/2004, headed 'Definitions', provides:

'For the purposes of this Regulation:

…

(l) “legislation” means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1);

…’

7 Article 2(1) of Regulation No 883/2004, relating to the persons covered by the regulation, provides:

‘This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.’

8 Article 3 of Regulation No 883/2004, headed ‘Matters covered’, states:

‘1. This Regulation shall apply to all legislation concerning the following branches of social security:

…

(b) maternity and equivalent paternity benefits;

…

(h) unemployment benefits;

…

2. Unless otherwise provided for in Annex XI, this Regulation shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner.

3. This Regulation shall also apply to the special non-contributory cash benefits covered by Article 70.

…

5. This Regulation shall not apply to:

(a) social and medical assistance …’

9 Article 4 of Regulation No 883/2004, headed ‘Equality of treatment’, provides:

‘Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.’

10 Chapter 9 of Title III of Regulation No 883/2004, relating to ‘Special non-contributory cash benefits’, contains Article 70, which is headed ‘General provision’ and provides:

‘1. This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance.

2. For the purposes of this Chapter, “special non-contributory cash benefits” means those which:

(a) are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;

or

(ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,

and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone,

and

(c) are listed in Annex X.

3. Article 7 and the other chapters of this Title shall not apply to the benefits referred to in paragraph 2 of this Article.

4. The benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence.'

11 Annex X to Regulation No 883/2004, which is entitled 'Special non-contributory cash benefits', specifies the following benefits as regards the Federal Republic of Germany:

'…

(b) Benefits to cover subsistence costs under the basic provision for jobseekers unless, with respect to these benefits, the eligibility requirements for a temporary supplement following receipt of unemployment benefit ([Paragraph] 24(1) of Book II of the Social Code) are fulfilled.'

Directive 2004/38

12 Recitals 10, 16 and 21 in the preamble to Directive 2004/38 state:

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

…

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

…

(21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of jobseekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.'

13 Article 6 of Directive 2004/38, headed 'Right of residence for up to three months', provides in paragraph 1:

'Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.'

14 Article 7(1) of Directive 2004/38 provides:

'All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; …'

15 Article 8 of Directive 2004/38, headed 'Administrative formalities for Union citizens', provides in paragraph 4:

'Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.'

16 Article 14 of Directive 2004/38, headed 'Retention of the right of residence', provides:

'1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.'

17 Article 24 of Directive 2004/38, headed ‘Equal treatment’, provides:

‘1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.’

*German law*

Social Code

18 Paragraph 19a(1) of Book I of the Social Code (Sozialgesetzbuch Erstes Buch; ‘SGB I’) sets out the two main types of benefit granted by way of basic provision for jobseekers:

‘(1) Under the entitlement to basic provision for jobseekers, the following may be claimed:

1. benefits for integration into the labour market,

2. benefits to cover subsistence costs.’

19 In Book II of the Social Code (Sozialgesetzbuch Zweites Buch; ‘SGB II’), Paragraph 1, headed ‘Function and objective of basic provision for jobseekers’, provides in subparagraphs 1 to 3:

‘(1) Basic provision for jobseekers is intended to enable its beneficiaries to lead a life in keeping with human dignity.

…

(3) Basic provision for jobseekers encompasses benefits:

1. intended to bring to an end or reduce need, in particular by integration into the labour market, and

2. intended to cover subsistence costs.’

20 Paragraph 7 of SGB II, headed ‘Beneficiaries’, provides:

‘(1) Benefits under this Book shall be received by persons who:

1. have attained the age of 15 and have not yet reached the age limit referred to in Paragraph 7a,

2. are fit for work,

3. are in need of assistance and

4. whose ordinary place of residence is in the Federal Republic of Germany (beneficiaries fit for work). The following are excluded:

1. foreign nationals who are not workers or self-employed persons in the Federal Republic of Germany and do not enjoy the right of freedom of movement under Paragraph 2(3) of the Law on freedom of movement of Union

citizens [Freizügigkeitsgesetz/EU; "the FreizügG/EU"], and their family members, for the first three months of their residence,

2. foreign nationals whose right of residence arises solely out of the search for employment and their family members,

…

Point 1 of the second sentence shall not apply to foreign nationals residing in the Federal Republic of Germany who have been granted a residence permit under Chapter 2, Section 5, of the Law on residence. Provisions of law governing residence shall be unaffected.

…'

21 Paragraph 8 of SGB II, headed 'Fitness for work', states in subparagraph 1:

'All persons who are not incapable for the foreseeable future, because of an illness or handicap, of working for at least three hours per day under normal labour market conditions are fit for work.

…'

22 Paragraph 9(1) of SGB II provides:

'All persons who cannot, or cannot sufficiently, cover their subsistence costs on the basis of the income or assets to be taken into consideration and who do not receive the necessary assistance from other persons, in particular from family members or providers of other social security benefits, are in need of assistance.'

23 Paragraph 20 of SGB II sets out additional provisions on basic subsistence needs. Paragraph 21 of SGB II lays down rules on additional needs and Paragraph 22 lays down rules on accommodation and heating needs. Finally, Paragraphs 28 to 30 deal with education and participation benefits.

24 In Book XII of the Social Code (Sozialgesetzbuch Zwölftes Buch; 'SGB XII'), Paragraph 1, which relates to social assistance, provides:

'The function of social assistance is to enable the beneficiaries to lead a life in keeping with human dignity. …'

25 Paragraph 21 of SGB XII provides:

'Subsistence benefits shall not be paid to persons who are in principle entitled to benefits under Book II because they are fit for work or because of their family ties. …'

26 Paragraph 23 of SGB XII, headed 'Social assistance for foreign nationals', reads as follows:

'(1) Subsistence assistance, assistance for sick persons, assistance for pregnant women, maternity assistance and care assistance under this Book must be given to foreign nationals who are actually resident in national territory. The provisions of the fourth Chapter shall not be affected. Otherwise, social assistance may be granted in so far as it is justified in a particular case. The restrictions of the first sentence shall not apply to foreign nationals holding a permanent residence permit ("Niederlassungserlaubnis") or a residence permit of limited duration ("befristeter Aufenthaltstitel") who anticipate taking up permanent residence in federal territory. Legal provisions under which social assistance other than the benefits referred to in the first sentence must or should be granted shall not be affected.

…

(3) Foreign nationals who have entered national territory in order to obtain social assistance or whose right of residence arises solely out of the search for employment, and their family members, have no right to social

assistance. If they have entered national territory for the purpose of treatment or alleviation of illness, assistance for sick persons may be granted only to remedy a critical, life-threatening condition or for urgent and essential treatment of a serious or contagious disease.

(4) Foreign nationals in receipt of social assistance must be informed of the return and resettlement programmes applicable to them; in appropriate cases recourse to such programmes is to be promoted.'

Law on freedom of movement of Union citizens

27 The scope of the FreizügG/EU is specified in Paragraph 1 of that law:

'This Law shall govern the entry and residence of nationals of other Member States of the European Union (Union citizens) and their family members.'

28 Paragraph 2 of the FreizügG/EU provides, on the right of entry and residence:

'(1) Union citizens who are entitled to freedom of movement and their family members shall have the right to enter and reside in federal territory, subject to the provisions of this Law.

(2) The following are entitled to freedom of movement under Community law:

1. Union citizens who wish to reside in federal territory as workers or for the purpose of seeking employment or pursuing vocational training,

…

5. Union citizens who are not working, subject to the conditions laid down in Paragraph 4,

6. family members, subject to the conditions laid down in Paragraphs 3 and 4,

…

(4) Union citizens shall not require a visa in order to enter federal territory or a residence permit in order to reside there. …

(5) In order for Union citizens to reside in federal territory for a period of up to three months, it is sufficient that they hold a valid identity card or passport. Family members who are not Union citizens have the same right if they hold an approved or otherwise accepted passport (or document in lieu of a passport) and they are accompanying or joining the Union citizen.

…

(7) The right under subparagraph 1 may be found not to exist if it is established that the person concerned has pretended that a condition for that right is fulfilled by using counterfeit or falsified documents or by misrepresentation of the facts. In the case of a family member who is not a Union citizen, the right under subparagraph 1 may also be found not to exist if it is established that he is not joining the Union citizen in order to establish or preserve family life or is not accompanying the Union citizen for that purpose. In these cases a family member who is not a Union citizen may be refused issue of the residence card or visa or his residence card may be withdrawn. Decisions under sentences 1 to 3 shall be in writing.'

29 Paragraph 3 of the FreizügG/EU, relating to family members, states:

'(1) Family members of the Union citizens specified in Paragraph 2(2), points 1 to 5, shall enjoy the right under Paragraph 2(1) if they are accompanying or joining the Union citizen. For family members of the Union citizens specified in Paragraph 2(2), point 5, this shall apply subject to Paragraph 4.

(2) The following are family members:

1. the spouse, the partner and the descendants of the persons specified in Paragraph 2(2), points 1 to 5 and 7, or of their spouses or partners, who are not yet 21 years old,

2. the relatives in the ascending line and descendants of the persons specified in Paragraph 2(2), points 1 to 5 and 7, or of their spouses or partners, whom those persons or their spouses or partners maintain.

…'

30 Paragraph 4 of the FreizügG/EU provides, in relation to persons who are entitled to freedom of movement and are not working:

'Union citizens who are not working and the family members accompanying or joining them shall enjoy the right provided for in Paragraph 2(1) if they have sufficient sickness insurance cover and sufficient means of subsistence. If the Union citizen is resident in federal territory as a student, this right shall extend only to his spouse, partner and children who are maintained.'

31 Paragraph 5 of the FreizügG/EU, headed 'Residence cards and certificate concerning the right of permanent residence', provides:

'…

(2) The competent aliens office may require that the conditions for the right under Paragraph 2(1) be substantiated within three months following entry into federal territory. Information and evidence necessary for substantiation may be received by the competent registration authority at the time of registration with it. That authority shall forward the information and evidence to the competent aliens office. The registration authority shall not use or process that data for any other purpose.

(3) A check to establish whether the conditions for the right under Paragraph 2(1) are fulfilled or continue to be fulfilled may be carried out where this is justified by a particular reason.

…'

32 Paragraph 5a of the FreizügG/EU states:

'(1) The competent authority may request a Union citizen to produce to it a valid identity card or passport in the circumstances referred to in Paragraph 5(2) and, in the circumstances referred to in

…

3. Paragraph 2(2), point 5, proof of sufficient sickness insurance cover and sufficient means of subsistence.'

33 Paragraph 6 of the FreizügG/EU, relating to loss of the right of entry and residence, states:

'(1) Without prejudice to Paragraph 2(7) and Paragraph 5(4), loss of the right under Paragraph 2(1) may be determined, and the certificate concerning the right of permanent residence, the residence card or the permanent residence card may be withdrawn, only on grounds of public policy, public security or public health (Articles 45(3) and 52(1) of the Treaty on the Functioning of the European Union). Entry may also be refused on the grounds referred to in the first sentence. …

(2) The existence of a criminal conviction shall not in itself constitute a sufficient ground for the adoption of the decisions or measures referred to in subparagraph 1. Only criminal convictions which have not yet been deleted from the federal central register may be taken into account, and only in so far as the circumstances on which they are based disclose personal conduct that constitutes a present threat to the requirements of public policy. There must be a genuine and sufficiently serious threat affecting a fundamental interest of society.

(3) When a decision under subparagraph 1 is made, account must be taken in particular of how long the person concerned has resided in Germany, his age, his state of health, his family and economic situation, his social and cultural integration in Germany and the extent of his ties to his State of origin.

…

(6) Decisions or measures relating to loss of the right of residence or the right of permanent residence may not be adopted on economic grounds.

…'

34 As regards the obligation to leave the territory, Paragraph 7 of the FreizügG/EU states:

'(1) Union citizens and their family members shall be obliged to leave federal territory if the aliens office has established that there is no right of entry and residence. The decision shall contain a warning of removal from federal territory and set a time-limit for leaving it. Except in urgent cases the period set must be at least a month. …

Union citizens and their family members who have lost their right to freedom of movement pursuant to Paragraph 6(1) may not re-enter federal territory and reside there. The prohibition under the first sentence shall, upon application, be for a fixed term. That term shall begin to run when federal territory is left. An application to have the prohibition lifted that is made after a reasonable period or after three years shall be determined within six months.'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

35 Ms Dano, who was born in 1989, and her son Florin, who was born on 2 July 2009 in Saarbrücken (Germany), are both Romanian nationals. According to the findings of the referring court, Ms Dano last entered Germany on 10 November 2010.

36 On 19 July 2011, the city of Leipzig issued Ms Dano with a residence certificate of unlimited duration ('unbefristete Freizügigkeitsbescheinigung') for EU nationals, establishing 27 June 2011 as the date of entry into German territory. On 28 January 2013 it also issued her with a duplicate certificate.

37 Since their arrival in Leipzig, Ms Dano and her son have been living in the apartment of Ms Dano's sister, who provides for them materially.

38 Ms Dano receives child benefit ('Kindergeld') for her son Florin, which is paid by the Leipzig family benefits office on behalf of the Federal Employment Agency and amounts to EUR 184 per month. The Leipzig social assistance service for children and young people also pays an advance on maintenance payments of EUR 133 per month for that child, whose father's identity is not known.

39 Ms Dano attended school for three years in Romania, but did not obtain any leaving certificate. She understands German orally and can express herself simply in German. On the other hand, she cannot write in German and her ability to read texts in that language is only limited. She has not been trained in a profession and, to date, has not worked in Germany or Romania. Although her ability to work is not in dispute, there is nothing to indicate that she has looked for a job.

40 The first application that Ms Dano and her son submitted for the grant of benefits by way of basic provision under SGB II was refused by Jobcenter Leipzig by decision of 28 September 2011, on the basis of point 2 of the second sentence of Paragraph 7(1) of SGB II. Since that decision was not contested, it became final.

41 A fresh application for the same benefits, submitted on 25 January 2012, was also refused, by decision of Jobcenter Leipzig of 23 February 2012. Ms Dano and her son lodged an administrative objection against that refusal, relying on Articles 18 TFEU and 45 TFEU and on the judgment in *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344). That objection was dismissed by decision of 1 June 2012.

42 On 1 July 2012, Ms Dano and her son brought an action challenging that decision before the Sozialgericht Leipzig (Social Court, Leipzig), by which they again sought the grant of benefits by way of basic provision for jobseekers under SGB II in respect of the period commencing on 25 January 2012.

43 The Sozialgericht Leipzig considers that, by virtue of point 2 of the second sentence of Paragraph 7(1) of SGB II and Paragraph 23(3) of SGB XII, Ms Dano and her son are not entitled to benefits granted by way of basic provision. However, it expresses doubts as to whether provisions of EU law, in particular Article 4 of Regulation No 883/2004, the general principle of non-discrimination resulting from Article 18 TFEU and the general right of residence resulting from Article 20 TFEU, preclude those provisions of German law.

44 According to the findings of the referring court, the main proceedings concern persons who cannot claim a right of residence in the host State by virtue of Directive 2004/38.

45 In those circumstances, the Sozialgericht Leipzig decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do persons who do not wish to claim payment of any benefits of social security law or family benefits under Article 3(1) of Regulation No 883/2004 but rather special non-contributory benefits under Article 3(3) and Article 70 of the regulation fall within the scope *ratione personae* of Article 4 of the regulation?

(2) If Question 1 is answered in the affirmative: are the Member States precluded by Article 4 of Regulation No 883/2004, in order to prevent an unreasonable recourse to non-contributory social security benefits under Article 70 of the regulation which guarantee a level of subsistence, from excluding in full or in part Union citizens in need from accessing those benefits, which are provided to their own nationals who are in the same situation?

(3) If Question 1 or Question 2 is answered in the negative: are the Member States precluded by (a) Article 18 TFEU and/or (b) [point (a) of the first subparagraph of Article 20(2)] TFEU in conjunction with the [second subparagraph] of Article 20(2) TFEU and Article 24(2) of Directive 2004/38/EC, in order to prevent an unreasonable recourse to non-contributory social security benefits under Article 70 of Regulation No 883/2004 which guarantee a level of subsistence, from excluding in full or in part Union citizens in need from accessing those benefits, which are provided to their own nationals who are in the same situation?

(4) If, according to the answers to the abovementioned questions, the partial exclusion of benefits which guarantee a level of subsistence complies with EU law: may the provision of non-contributory benefits which guarantee a level of subsistence for Union citizens, outside acute emergencies, be limited to the provision of the necessary funds for return to the home State or do Articles 1, 20 and 51 of the Charter … require more extensive payments which enable permanent residence?'

**Consideration of the questions referred**

*Question 1*

46 By its first question, the referring court asks, in essence, whether Article 4 of Regulation No 883/2004 must be interpreted as meaning that 'special non-contributory benefits' for the purposes of Articles 3(3) and 70 of the regulation fall within its scope.

47 A preliminary point to note is that the referring court has classified the benefits at issue in the main proceedings as 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004.

48 It must be pointed out, first, that Article 3 of Regulation No 883/2004 defines the matters covered by the regulation, expressly stating in Article 3(3) that the regulation 'shall also apply to the special non-contributory cash benefits covered by Article 70 [of the regulation]'.

49 Accordingly, it is clear from the wording of Article 3 of Regulation No 883/2004 that the regulation applies to special non-contributory cash benefits.

50 Second, Article 70(3) of Regulation No 883/2004 provides that Article 7 of the regulation, which governs the waiving of residence rules, and the other chapters of Title III thereof, which is devoted to the various categories of benefits, are not to apply to special non-contributory cash benefits.

51 Whilst Article 70(3) of Regulation No 883/2004 therefore, by way of exception, renders certain of the regulation's provisions inapplicable to special non-contributory cash benefits, Article 4 is not among those provisions.

52 Finally, the interpretation that Article 4 of Regulation No 883/2004 applies to special non-contributory cash benefits corresponds to the intention of the EU legislature, as is apparent from the third recital in the preamble to Regulation No 1247/92 which amended Regulation No 1408/71, inserting provisions relating to benefits of this type in order to take account of the case-law in that regard.

53 In accordance with the seventh recital, such benefits should be granted solely in accordance with the legislation of the Member State of residence of the person concerned or of the members of his or her family, with such aggregation of periods of residence completed in any other Member State as is necessary and without discrimination on grounds of nationality.

54 The specific provision which the EU legislature thus inserted into Regulation No 1408/71 by means of Regulation No 1247/92 is thus characterised by non-exportability of special non-contributory cash benefits as the counterpart of equal treatment in the State of residence.

55 In the light of all the foregoing considerations, the answer to the first question is that Regulation No 883/2004 must be interpreted as meaning that 'special non-contributory cash benefits' as referred to in Articles 3(3) and 70 of the regulation fall within the scope of Article 4 of the regulation.

*Questions 2 and 3*

56 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 18 TFEU, Article 20(2) TFEU, Article 24(2) of Directive 2004/38 and Article 4 of Regulation No 883/2004 must be interpreted as precluding legislation of a Member State under which nationals of other Member States who are not economically active are excluded, in full or in part, from entitlement to certain 'special non-contributory cash benefits' within the meaning of Regulation No 883/2004 although those benefits are granted to nationals of the Member State concerned who are in the same situation.

57 It should be observed first of all that Article 20(1) TFEU confers on any person holding the nationality of a Member State the status of citizen of the Union (judgment in *N.*, C-46/12, EU:C:2013:9725, paragraph 25).

58 As the Court has held on numerous occasions, the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy within the scope *ratione materiae* of the FEU Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard (judgments in *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 31; *D'Hoop*, C-224/98, EU:C:2002:432, paragraph 28; and *N.*, EU:C:2013:9725, paragraph 27).

59 Every Union citizen may therefore rely on the prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU in all situations falling within the scope *ratione materiae* of EU law. These situations include those relating to the exercise of the right to move and reside within the territory of the Member States conferred by point (a) of the first subparagraph of Article 20(2) TFEU and Article 21 TFEU (see judgment in *N.*, EU:C:2013:97, paragraph 28 and the case-law cited).

60 In this connection, it is to be noted that Article 18(1) TFEU prohibits any discrimination on grounds of nationality '[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein'. The second subparagraph of Article 20(2) TFEU expressly states that the rights conferred on Union citizens by that article are to be exercised 'in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder'. Furthermore, under Article 21(1) TFEU too the right of Union citizens to move and reside freely within the territory of the Member States is subject to compliance with the

‘limitations and conditions laid down in the Treaties and by the measures adopted to give them effect’ (see judgment in *Brey*, C-140/12, EU:C:2013:565, paragraph 46 and the case-law cited).

61 Thus, the principle of non-discrimination, laid down generally in Article 18 TFEU, is given more specific expression in Article 24 of Directive 2004/38 in relation to Union citizens who, like the applicants in the main proceedings, exercise their right to move and reside within the territory of the Member States. That principle is also given more specific expression in Article 4 of Regulation No 883/2004 in relation to Union citizens, such as the applicants in the main proceedings, who invoke in the host Member State the benefits referred to in Article 70(2) of the regulation.

62 Accordingly, the Court should interpret Article 24 of Directive 2004/38 and Article 4 of Regulation No 883/2004.

63 It must be stated first of all that ‘special non-contributory cash benefits’ as referred to in Article 70(2) of Regulation No 883/2004 do fall within the concept of ‘social assistance’ within the meaning of Article 24(2) of Directive 2004/38. That concept refers to all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State (judgment in *Brey*, EU:C:2013:565, paragraph 61).

64 That having been said, it must be pointed out that, whilst Article 24(1) of Directive 2004/38 and Article 4 of Regulation No 883/2004 reiterate the prohibition of discrimination on grounds of nationality, Article 24(2) of that directive contains a derogation from the principle of non-discrimination.

65 Under Article 24(2) of Directive 2004/38, the host Member State is not obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the period of seeking employment, referred to in Article 14(4)(b) of the directive, that extends beyond that first period, nor is it obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies to persons other than workers, self-employed persons, persons who retain such status and members of their families.

66 It is apparent from the documents before the Court that Ms Dano has been residing in Germany for more than three months, that she is not seeking employment and that she did not enter Germany in order to work. She therefore does not fall within the scope *ratione personae* of Article 24(2) of Directive 2004/38.

67 In those circumstances, it must be established whether Article 24(1) of Directive 2004/38 and Article 4 of Regulation No 883/2004 preclude refusal to grant social benefits in a situation such as that at issue in the main proceedings.

68 Article 24(1) of Directive 2004/38 provides that all Union citizens residing on the basis of the directive in the territory of the host Member State are to enjoy equal treatment with the nationals of that Member State within the scope of the Treaty.

69 It follows that, so far as concerns access to social benefits, such as those at issue in the main proceedings, a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38.

70 First, in the case of periods of residence of up to three months, Article 6 of Directive 2004/38 limits the conditions and formalities for the right of residence to the requirement to hold a valid identity card or passport and, under Article 14(1) of the directive, that right is retained as long as the Union citizen and his family members do not become an unreasonable burden on the social assistance system of the host Member State (judgment in *Ziolkowski and Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraph 39). In accordance with Article 24(2) of Directive 2004/38, the host Member State is thus not obliged to confer entitlement to social benefits on a national of another Member State or his family members during that period.

71 Second, for periods of residence longer than three months, the right of residence is subject to the conditions set out in Article 7(1) of Directive 2004/38 and, under Article 14(2), that right is retained only if the Union citizen

and his family members satisfy those conditions. It is apparent from recital 10 in the preamble to the directive in particular that those conditions are intended, inter alia, to prevent such persons from becoming an unreasonable burden on the social assistance system of the host Member State (judgment in *Ziolkowski and Szeja*, EU:C:2011:866, paragraph 40).

72 Third, it is apparent from Article 16(1) of Directive 2004/38 that Union citizens acquire the right of permanent residence after residing legally for a continuous period of five years in the host Member State and that that right is not subject to the conditions referred to in the preceding paragraph. As stated in recital 18 in the preamble to the directive, once obtained, the right of permanent residence is not to be subject to any conditions, with the aim of it being a genuine vehicle for integration into the society of that State (judgment in *Ziolkowski and Szeja*, EU:C:2011:866, paragraph 41).

73 In order to determine whether economically inactive Union citizens, in the situation of the applicants in the main proceedings, whose period of residence in the host Member State has been longer than three months but shorter than five years, can claim equal treatment with nationals of that Member State so far as concerns entitlement to social benefits, it must therefore be examined whether the residence of those citizens complies with the conditions in Article 7(1)(b) of Directive 2004/38. Those conditions include the requirement that the economically inactive Union citizen must have sufficient resources for himself and his family members.

74 To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State.

75 It should be added that, as regards the condition requiring possession of sufficient resources, Directive 2004/38 distinguishes between (i) persons who are working and (ii) those who are not. Under Article 7(1)(a) of Directive 2004/38, the first group of Union citizens in the host Member State have the right of residence without having to fulfil any other condition. On the other hand, persons who are economically inactive are required by Article 7(1)(b) of the directive to meet the condition that they have sufficient resources of their own.

76 Therefore, Article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence.

77 As the Advocate General has observed in points 93 and 96 of his Opinion, any unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host Member State with regard to the grant of social benefits is an inevitable consequence of Directive 2004/38. Such potential unequal treatment is founded on the link established by the Union legislature in Article 7 of the directive between the requirement to have sufficient resources as a condition for residence and the concern not to create a burden on the social assistance systems of the Member States.

78 A Member State must therefore have the possibility, pursuant to Article 7 of Directive 2004/38, of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence.

79 To deny the Member State concerned that possibility would, as the Advocate General has stated in point 106 of his Opinion, thus have the consequence that persons who, upon arriving in the territory of another Member State, do not have sufficient resources to provide for themselves would have them automatically, through the grant of a special non-contributory cash benefit which is intended to cover the beneficiary's subsistence costs.

80 Therefore, the financial situation of each person concerned should be examined specifically, without taking account of the social benefits claimed, in order to determine whether he meets the condition of having sufficient resources to qualify for a right of residence under Article 7(1)(b) of Directive 2004/38.

81 In the main proceedings, according to the findings of the referring court the applicants do not have sufficient resources and thus cannot claim a right of residence in the host Member State under Directive 2004/38. Therefore,

as has been stated in paragraph 69 of the present judgment, they cannot invoke the principle of non-discrimination in Article 24(1) of the directive.

82 Accordingly, Article 24(1) of Directive 2004/38, read in conjunction with Article 7(1)(b) thereof, does not preclude national legislation such as that at issue in the main proceedings in so far as it excludes nationals of other Member States who do not have a right of residence under Directive 2004/38 in the host Member State from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004.

83 The same conclusion must be reached in respect of the interpretation of Article 4 of Regulation No 883/2004. The benefits at issue in the main proceedings, which constitute 'special non-contributory cash benefits' within the meaning of Article 70(2) of the regulation, are, under Article 70(4), to be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. It follows that there is nothing to prevent the grant of such benefits to Union citizens who are not economically active from being made subject to the requirement that those citizens fulfil the conditions for obtaining a right of residence under Directive 2004/38 in the host Member State (see, to this effect, judgment in *Brey*, EU:C:2013:965, paragraph 44).

84 In the light of the foregoing, the answer to the second and third questions is that Article 24(1) of Directive 2004/38, read in conjunction with Article 7(1)(b) thereof, and Article 4 of Regulation No 883/2004 must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have a right of residence under Directive 2004/38 in the host Member State.

*Question 4*

85 By its fourth question, the referring court asks, in essence, whether Articles 1, 20 and 51 of the Charter must be interpreted as requiring the Member States to grant Union citizens non-contributory cash benefits by way of basic provision such as to enable permanent residence or whether those States may limit their grant to the provision of funds necessary for return to the home State.

86 It should be recalled that, in the context of a reference for a preliminary ruling under Article 267 TFEU, the Court is called upon to interpret EU law only within the limits of the powers conferred on the European Union (see, inter alia, judgment in *Betriu Montull*, C-5/12, EU:C:2013:571, paragraph 68 and the case-law cited).

87 Article 51(1) of the Charter states that the provisions of the Charter are addressed 'to the Member States only when they are implementing Union law'.

88 According to Article 6(1) TEU, the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of EU law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties (see judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 17 and 23, and order in *Nagy and Others*, C-488/12 to C-491/12 and C-526/12, EU:C:2013:703, paragraph 15).

89 In paragraph 41 of the judgment in *Brey* (EU:C:2013:565), the Court confirmed that Article 70 of Regulation No 883/2004, which defines the term 'special non-contributory cash benefits', is not intended to lay down the conditions creating the right to those benefits. It is thus for the legislature of each Member State to lay down those conditions.

90 Accordingly, since those conditions result neither from Regulation No 883/2004 nor from Directive 2004/38 or other secondary EU legislation, and the Member States thus have competence to determine the conditions for the grant of such benefits, they also have competence, as the Advocate General has observed in point 146 of his Opinion, to define the extent of the social cover provided by that type of benefit.

91 Consequently, when the Member States lay down the conditions for the grant of special non-contributory cash benefits and the extent of such benefits, they are not implementing EU law.

92 It follows that the Court does not have jurisdiction to answer the fourth question.

**Costs**

93 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010, must be interpreted as meaning that 'special non-contributory cash benefits' as referred to in Articles 3(3) and 70 of the regulation fall within the scope of Article 4 of the regulation.**

2. **Article 24(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, read in conjunction with Article 7(1)(b) thereof, and Article 4 of Regulation No 883/2004, as amended by Regulation No 1244/2010, must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have a right of residence under Directive 2004/38 in the host Member State.**

3. **The Court of Justice of the European Union does not have jurisdiction to answer the fourth question.**

## Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*

In Case C-34/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal du travail de Bruxelles (Belgium), made by decision of 19 December 2008, received at the Court on 26 January 2009, in the proceedings

**Gerardo Ruiz Zambrano**,

v

**Office national de l'emploi (ONEm)**,

THE COURT (Grand Chamber),

[…]

gives the following

**Judgment**

1 The reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 17 EC and 18 EC, and also Articles 21, 24 and 34 of the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights').

2 That reference was made in the context of proceedings between Mr Ruiz Zambrano, a Columbian national, and the Office national de l'emploi (National Employment Office) ('ONEm') concerning the refusal by the latter to grant him unemployment benefits under Belgian legislation.

**Legal context**

*European Union law*

3 Article 3(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34), provides:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

*National law*

The Belgian Nationality Code

4 Under Article 10(1) of the Belgian Nationality Code (*Moniteur belge*, 12 July 1984, p. 10095), in the version applicable at the time of the facts in the main proceedings ('the Belgian Nationality Code'):

'Any child born in Belgium who, at any time before reaching the age of 18 or being declared of full age, would be stateless if he or she did not have Belgian nationality, shall be Belgian.'

The Royal Decree of 25 November 1991

5 Article 30 of the Royal Decree of 25 November 1991 (*Moniteur belge* of 31 December 1991, p. 29888) concerning rules on unemployment provides as follows:

'In order to be eligible for unemployment benefit, a full-time worker must have completed a qualifying period comprising the following number of working days:

…

2. 468 during the 27 months preceding the claim [for unemployment benefit], if the worker is more than 36 and less than 50 years of age,

…'

6 Article 43(1) of the Royal Decree states:

'Without prejudice to the previous provisions, a foreign or stateless worker is entitled to unemployment benefit if he or she complies with the legislation relating to aliens and to the employment of foreign workers.

Work undertaken in Belgium is not taken into account unless it complies with the legislation relating to the employment of foreign workers.

…'

7 Under Article 69(1) of the Royal Decree:

'In order to receive benefits, foreign and stateless unemployed persons must satisfy the legislation concerning aliens and that relating to the employment of foreign labour.'

The Decree-Law of 28 December 1944

8 Article 7(14) of the Decree-Law of 28 December 1944 on social security for workers (*Moniteur belge* of 30 December 1944), inserted by the Framework Law of 2 August 2002 (*Moniteur belge* of 29 August 2002, p. 38408), is worded as follows:

'Foreign and stateless workers shall be eligible to receive benefits only if, at the time of applying for benefits, they satisfy the legislation concerning residency and that relating to the employment of foreign labour.

Work done in Belgium by a foreign or stateless worker shall be taken into account for the purpose of the qualifying period only if it was carried out in accordance with the legislation on the employment of foreign labour.

…'

The Law of 30 April 1999

[…]

The Royal Decree of 9 June 1999

11 Article 2(2) of the Royal Decree of 9 June 1999 implementing the Law of 30 April 1999 on the employment of foreign workers (*Moniteur belge* of 26 June 1999, p. 24162) provides:

'The following shall not be required to obtain a work permit:

…

2. the spouse of a Belgian national, provided that s/he comes in order to settle, or does settle, with that national;

(a) descendants under 21 years of age or dependants of the Belgian national or his spouse;

(b) dependent ascendants of the Belgian national or his/her spouse;

(c) the spouse of the persons referred to in (a) or (b);

…'

The Law of 15 December 1980

12 Article 9 of the Law of 15 December 1980 on access to Belgian territory, residence, establishment and expulsion of foreign nationals (*Moniteur belge* du 31 December 1980, p. 14584), in the version thereof applicable to the main proceedings ('the Law of 15 December 1980'), provides:

'In order to be able to reside in the Kingdom beyond the term fixed in Article 6, a foreigner who is not covered by one of the cases provided for in Article 10 must be authorised by the Minister or his representative.

Save for exceptions provided for by international treaty, a law or royal decree, the foreigner must request that authorisation from the competent diplomatic mission or Belgian consul in his place of residence or stay abroad.

In exceptional circumstances, the foreigner may request that authorisation from the mayor of the municipality where he is residing, who will forward to the Minister or his representative. It will, in that case, be issued in Belgium.'

13 Article 40 of the same law provides:

'1. Without prejudice to the provisions in the regulations of the Council [of the European Union] and the Commission of the European Communities and more favourable ones on which an EC foreign national might rely, the following provisions shall apply to him.

2. For the purposes of this Law, "EC foreign national" shall mean any national of a Member State of the European Communities who resides in or travels to the Kingdom and who:

(i) pursues or intends to pursue there an activity as an employed or self-employed person;

(ii) receives or intends to receive services there:

(iii) enjoys or intends to enjoy there a right to remain;

(iv) enjoys or intends to enjoy there a right of residence after ceasing a professional activity or occupation pursued in the Community;

(v) undergoes or intends to undergo there, as a principal pursuit, vocational training in an approved educational establishment; or

(vi) belongs to none of the categories under (i) to (v) above.

3. Subject to any contrary provisions of this Law, the following persons shall, whatever their nationality, be treated in the same way as an EC foreign national covered by paragraph 2(i), (ii) and (iii) above, provided that they come in order to settle, or do settle, with him:

(i) the spouse of that national;

(ii) the national's descendants or those of his spouse who are under 21 years of age and dependent on them;

(iii) the national's ascendants or those of his spouse who are dependent on them;

(iv) the spouse of the persons referred to in (ii) or (iii).

4. Subject to any contrary provisions of this Law, the following persons shall, whatever their nationality, be treated in the same way as an EC foreign national covered by paragraph 2(iv) and (vi) above, provided that they come in order to settle, or do settle, with him:

(i) the spouse of that national;

(ii) the national's descendants or those of his spouse who are dependent on them;

(iii) the national's ascendants or those of his spouse who are dependent on them;

(iv) the spouse of the persons referred to in (ii) or (iii).

5. Subject to any contrary provisions of this Law, the spouse of an EC foreign national covered by paragraph 2(v) above and his children or those of his spouse who are dependent on them shall, whatever their nationality, be treated in the same way as the EC foreign national provided that they come in order to settle, or do settle, with him.

6. The spouse of a Belgian who comes in order to settle, or does settle, with him, and also their descendants who are under 21 years of age or dependent on them, their ascendants who are dependent on them and any spouse of those descendants or ascendants, who come to settle, or do settle, with them, shall also be treated in the same way as an EC foreign national.'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

14 On 14 April 1999, Mr Ruiz Zambrano, who was in possession of a visa issued by the Belgian embassy in Bogotá (Colombia), applied for asylum in Belgium. In February 2000, his wife, also a Columbian national, likewise applied for refugee status in Belgium.

15 By decision of 11 September 2000, the Belgian authorities refused their applications and ordered them to leave Belgium. However, the order notified to them included a *non-refoulement* clause stating that they should not be sent back to Colombia in view of the civil war in that country.

16 On 20 October 2000, Mr Ruiz Zambrano applied to have his situation regularised pursuant to the third paragraph of Article 9 of the Law of 15 December 1980. In his application, he referred to the absolute impossibility of returning to Colombia and the severe deterioration of the situation there, whilst emphasising his efforts to integrate into Belgian society, his learning of French and his child's attendance at pre-school, in addition to the risk, in the event of a return to Columbia, of a worsening of the significant post-traumatic syndrome he had suffered in 1999 as a result of his son, then aged 3, being abducted for a week.

17 By decision of 8 August 2001, that application was rejected. An action was brought for annulment and suspension of that decision before the Conseil d'État, which rejected the action for suspension by a judgment of 22 May 2003.

18 Since 18 April 2001, Mr Ruiz Zambrano and his wife have been registered in the municipality of Schaerbeek (Belgium). On 2 October 2001, although he did not hold a work permit, Mr Ruiz Zambrano signed an employment contract for an unlimited period to work full-time with the Plastoria company, with effect from 1 October 2001.

19 On 1 September 2003, Mr Ruiz Zambrano's wife gave birth to a second child, Diego, who acquired Belgian nationality pursuant to Article 10(1) of the Belgian Nationality Code, since Columbian law does not recognise Colombian nationality for children born outside the territory of Colombia where the parents do not take specific steps to have them so recognised.

20 The order for reference further indicates that, at the time of his second child's birth, Mr Ruiz Zambrano had sufficient resources from his working activities to provide for his family. His work was paid according to the various applicable scales, with statutory deductions made for social security and the payment of employer contributions.

21 On 9 April 2004, Mr and Mrs Ruiz Zambrano again applied to have their situation regularised pursuant to the third paragraph of Article 9 of the Law of 15 December 1980, putting forward as a new factor the birth of their second child and relying on Article 3 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('ECHR'), which prevents that child from being required to leave the territory of the State of which he is a national.

22 Following the birth of their third child, Jessica, on 26 August 2005, who, like her brother Diego, acquired Belgian nationality, on 2 September 2005 Mr and Mrs Ruiz Zambrano lodged an application to take up residence pursuant to Article 40 of the Law of 15 December 1980, in their capacity as ascendants of a Belgian national. On 13 September 2005, a registration certificate was issued to them provisionally covering their residence until 13 February 2006.

23 Mr Ruiz Zambrano's application to take up residence was rejected on 8 November 2005, on the ground that he '[could] not rely on Article 40 of the Law of 15 December 1980 because he had disregarded the laws of his country by not registering his child with the diplomatic or consular authorities, but had correctly followed the procedures available to him for acquiring Belgian nationality [for his child] and then trying on that basis to legalise his own residence'. On 26 January 2006, his wife's application to take up residence was rejected on the same ground.

24 Since the introduction of his action for review of the decision rejecting his application for residence in March 2006, Mr Ruiz Zambrano has held a special residence permit valid for the entire duration of that action.

25 In the meantime, on 10 October 2005, Mr Ruiz Zambrano's employment contract was temporarily suspended on economic grounds, which led him to lodge a first application for unemployment benefit, which was rejected by a decision notified to him on 20 February 2006. That decision was challenged before the referring court by application of 12 April 2006.

26 In the course of the inquiries in the action brought against that decision, the Office des Étrangers (Aliens' Office) confirmed that 'the applicant and his wife cannot pursue any employment, but no expulsion measure can be taken against them because their application for legalising their situation is still under consideration'.

27 In the course of an inspection carried out on 11 October 2006 by the Direction générale du contrôle des lois sociales (Directorate General, Supervision of Social Legislation) at the registered office of Mr Ruiz Zambrano's employer, he was found to be at work. He had to stop working immediately. The next day, Mr Ruiz Zambrano's employer terminated his contract of employment with immediate effect and without compensation.

28 The application lodged by Mr Ruiz Zambrano for full-time unemployment benefits as from 12 October 2006 was rejected by a decision of the ONEm (National Employment Office), which was notified on 20 November 2006. On 20 December 2006 an action was also brought against that decision before the referring court.

29 On 23 July 2007, Mr Ruiz Zambrano was notified of the decision of the Office des Étrangers rejecting his application of 9 April 2004 to regularise his situation. The action brought against that decision before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) was declared to be devoid of purpose by a judgment of 8 January 2008, as the Office des Étrangers had withdrawn that decision.

30 By letter of 25 October 2007, the Office des Étrangers informed Mr Ruiz Zambrano that the action for review he had brought in March 2006 against the decision rejecting his application to take up residence of 2 September 2005 had to be reintroduced within 30 days of the notification of that letter, in the form of an action for annulment before the Conseil du contentieux des étrangers.

31 On 19 November 2007, Mr Ruiz Zambrano brought such an action for annulment, based, first, on the inexistence of the 'legal engineering' of which he had been charged in that decision, since the acquisition of Belgian nationality by his minor children was not the result of any steps taken by him, but rather of the application

of the relevant Belgian legislation. Mr Ruiz Zambrano also alleges infringement of Articles 2 and 7 of Directive 2004/38, as well as infringement of Article 8 of the ECHR, and of Article 3(1) of Protocol No 4 thereto.

32 In its written observations lodged before the Court, the Belgian Government states that, since 30 April 2009, Mr Ruiz Zambrano has had a provisional and renewable residence permit, and should have a type C work permit, pursuant to the instructions of 26 March 2009 of the Minister for immigration and asylum policy relating to the application of the former third paragraph of Article 9 and Article 9a of the Law of 15 December 1980.

33 It is apparent from the order for reference that the two decisions which are the subject-matter of the main proceedings, by which the ONEm refused to recognise Mr Ruiz Zambrano's entitlement to unemployment benefit, first, during the periods of temporary unemployment from 10 October 2005 and then 12 October 2006, following the loss of his job, are based solely on the finding that the working days on which he relies for the purpose of completing the qualifying period for his age category, that is, 468 working days during the 27 months preceding his claim for unemployment benefit, were not completed as required by the legislation governing foreigners' residence and employment of foreign workers.

34 Mr Ruiz Zambrano challenges that argument before the referring court, stating inter alia that he enjoys a right of residence directly by virtue of the EC Treaty or, at the very least, that he enjoys the derived right of residence, recognised in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925 for the ascendants of a minor child who is a national of a Member State and that, therefore, he is exempt from the obligation to hold a work permit.

35 In those circumstances, the Tribunal du travail de Bruxelles (Employment Tribunal, Brussels) (Belgium) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Do Articles 12 [EC], 17 [EC] and 18 [EC], or one or more of them when read separately or in conjunction, confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States?

2. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right which they recognise, without discrimination on the grounds of nationality, in favour of any citizen of the Union to move and reside freely in the territory of the Member States means that, where that citizen is an infant dependent on a relative in the ascending line who is a national of a non-member State, the infant's enjoyment of the right of residence in the Member State in which he resides and of which he is a national must be safeguarded, irrespective of whether the right to move freely has been previously exercised by the child or through his legal representative, by coupling that right of residence with the useful effect whose necessity is recognised by Community case-law [*Zhu and Chen*], and granting the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who has sufficient resources and sickness insurance, the secondary right of residence which that same national of a non-member State would have if the child who is dependent upon him were a Union citizen who is not a national of the Member State in which he resides?

3. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right of a minor child who is a national of a Member State to reside in the territory of the State in which he resides must entail the grant of an exemption from the requirement to hold a work permit to the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who, were it not for the requirement to hold a work permit under the national law of the Member State in which he resides, fulfils the condition of sufficient resources and the possession of sickness insurance by virtue of paid employment making him subject to the social security system of that State, so that the child's right of residence is coupled with the useful effect recognised by Community case-law [*Zhu and Chen*] in favour of a minor child who is a European citizen with a nationality other than that of the Member State in which he resides and is dependent upon a relative in the ascending line who is a national of a non-member State?'

**The questions referred for a preliminary ruling**

36 By its questions, which it is appropriate to consider together, the referring court asks, essentially, whether the provisions of the TFEU on European Union citizenship are to be interpreted as meaning that they confer on a

relative in the ascending line who is a third country national, upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit in that Member State.

37 All governments which submitted observations to the Court and the European Commission argue that a situation such as that of Mr Ruiz Zambrano's second and third children, where those children reside in the Member State of which they are nationals and have never left the territory of that Member State, does not come within the situations envisaged by the freedoms of movement and residence guaranteed under European Union law. Therefore, the provisions of European Union law referred to by the national court are not applicable to the dispute in the main proceedings.

38 Mr Ruiz Zambrano argues in response that the reliance by his children Diego and Jessica on the provisions relating to European Union citizenship does not presuppose that they must move outside the Member State in question and that he, in his capacity as a family member, is entitled to a right of residence and is exempt from having to obtain a work permit in that Member State.

39 It should be observed at the outset that, under Article 3(1) of Directive 2004/38, entitled '[b]eneficiaries', that directive applies to 'all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members …'. Therefore, that directive does not apply to a situation such as that at issue in the main proceedings.

40 Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State (see, inter alia, Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 27, and Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 21). Since Mr Ruiz Zambrano's second and third children possess Belgian nationality, the conditions for the acquisition of which it is for the Member State in question to lay down (see, to that effect, inter alia, Case C-135/08 *Rottmann* [2010] ECR I-0000, paragraph 39), they undeniably enjoy that status (see, to that effect, *Garcia Avello*, paragraph 21, and *Zhu and Chen*, paragraph 20).

41 As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, inter alia, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 82; *Garcia Avello*, paragraph 22; *Zhu and Chen*, paragraph 25; and *Rottmann*, paragraph 43).

42 In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, *Rottmann*, paragraph 42).

43 A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.

44 It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

45 Accordingly, the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

**Costs**

[…]

## Case C-165/16, *Toufik Lounes v Secretary of State for the Home Department*

In Case C-165/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) (United Kingdom), made by decision of 8 March 2016, received at the Court on 21 March 2016, in the proceedings

**Toufik Lounes**

v

**Secretary of State for the Home Department**

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano (Rapporteur), Vice-President, R. Silva de Lapuerta, M. Ilešič, J.L. da Cruz Vilaça, J. Malenovský, E. Levits, C.G. Fernlund and C. Vajda, Presidents of Chambers, J.-C. Bonichot, A. Arabadjiev, S. Rodin, F. Biltgen, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: Y. Bot,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 15 May 2017,

after considering the observations submitted on behalf of:

– Mr Lounes, by P. Saini, Barrister, and by R. Matharu, Solicitor,

– the United Kingdom Government, by M. Holt, C. Crane and C. Brodie, acting as Agents, and by D. Blundell, Barrister,

– the Spanish Government, by V. Ester Casas, acting as Agent,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by E. Montaguti and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 May 2017,

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34).

2 This request has been made in proceedings between Mr Toufik Lounes and the Secretary of State for the Home Department (United Kingdom) concerning the refusal to issue Mr Lounes with a residence card.

**Legal context**

*European Union law*

3 Recitals 5 and 18 of Directive 2004/38 state:

'(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. ...

...

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

4 Article 1 of Directive 2004/38 provides:

'This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

...'

5 Under Article 2 of the directive:

'For the purposes of this Directive:

1. "Union citizen" means any person having the nationality of a Member State;

2. "family member" means:

(a) the spouse;

...

3. "host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.'

6 Article 3 of Directive 2004/38, which is entitled 'Beneficiaries', provides in paragraph 1:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

7 Article 6 of that directive, which is entitled 'Right of residence for up to three months', provides:

'1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.'

8 Under the title 'Right of residence for more than three months', Article 7(1) and (2) of the directive provides:

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

...

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).'

9 Chapter IV of Directive 2004/38, entitled 'Right of Permanent Residence', contains Article 16, which is worded as follows:

'1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

...

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.'

*United Kingdom law*

10 Directive 2004/38 was transposed into United Kingdom law by the Immigration (European Economic Area) Regulations 2006 ('the EEA Regulations 2006'). The EEA Regulations 2006 use the term 'EEA national' in place of 'Union citizen'.

11 In its original version, Regulation 2 of the EEA Regulations 2006 defined 'EEA national' as 'a national of an EEA State', it being specified that the United Kingdom was excluded from the definition of 'EEA State'.

12 Following two successive amendments to those regulations by (i) the Immigration (European Economic Area) (Amendment) Regulations 2012 (2012/1547) ('the EEA Regulations 2012/1547') and (ii) the Immigration

(European Economic Area) (Amendment) (No. 2) Regulations 2012 (2012/2560) ('the EEA Regulations 2012/2560'), Regulation 2 of the EEA Regulations 2006 provides:

'In these Regulations: "EEA national" means a national of an EEA State who is not also a British citizen.'

13 Regulations 6, 7, 14 and 15 of the EEA Regulations 2006 transpose into United Kingdom law Articles 2, 7 and 16 of Directive 2004/38.

**The dispute in the main proceedings and the question referred for a preliminary ruling**

14 In September 1996, Ms Ormazabal, a Spanish national, moved to the United Kingdom to study. She has resided there since then and has been employed full-time since September 2004.

15 On 12 August 2009, she became a naturalised British citizen and was issued with a British passport, while also retaining her Spanish nationality.

16 In 2013 she began a relationship with Mr Lounes, an Algerian national, who had entered the United Kingdom on a six-month visitor visa on 20 January 2010 and overstayed illegally. Ms Ormazabal and Mr Lounes married in a religious ceremony on 1 January 2014, and then in a civil ceremony in London (United Kingdom) on 16 May 2014. Since then they have resided in the United Kingdom.

17 On 15 April 2014, Mr Lounes applied to the Secretary of State for the Home Department for the issue of a residence card as a family member of an EEA national pursuant to the EEA Regulations 2006.

18 On 14 May 2014, he was served with a 'notice to a person liable to removal', together with notice of a decision to remove him from the United Kingdom, on the ground that he had overstayed in that State in breach of immigration controls.

19 By letter of 22 May 2014, the Secretary of State for the Home Department informed Mr Lounes of her decision to refuse his application for a residence card and of the reasons for that refusal. The letter stated, in essence, that, following the amendment of Regulation 2 of the EEA Regulations 2006 by EEA Regulations 2012/1547 and 2012/2560, Ms Ormazabal was no longer regarded as an 'EEA national' for the purposes of the former regulations because she had become a British citizen on 12 August 2009, even though she had also retained her Spanish nationality. She was therefore no longer entitled to the rights conferred by the EEA Regulations 2006 and by Directive 2004/38 in the United Kingdom. Consequently, Mr Lounes could not claim a residence card as a family member of an EEA national under those regulations.

20 The order for reference indicates that, prior to that amendment, British citizens who, like Ms Ormazabal, were also nationals of another EEA Member State were — unlike British citizens without such dual nationality – – regarded as EEA nationals for the purposes of Regulation 2 of the EEA Regulations 2006 and could therefore rely on the rights conferred by those regulations. However, since that amendment, such citizens have no longer been regarded as such and can therefore no longer benefit from those rights, with the consequence that their family members who are third-country nationals can likewise no longer rely on a right of residence in the United Kingdom in that capacity.

21 Mr Lounes brought a claim before the referring court against the decision of 22 May 2014 mentioned in paragraph 19 of this judgment.

22 That court has expressed doubts as to the compatibility of that decision and of Regulation 2 of the EEA Regulations 2006, as amended by the EEA Regulations 2012/1547 and 2012/2560, with Article 21 TFEU and Directive 2004/38.

23 The referring court states in this regard that, according to the explanatory note relating to the EEA Regulations 2012/1547 and also to the explanatory memoranda to those regulations and to the EEA Regulations 2012/2560, the amendment of Regulation 2 reflected the judgment of 5 May 2011, *McCarthy* (C-434/09, EU:C:2011:277), in which the Court of Justice ruled that Directive 2004/38 was not applicable to a Union citizen

who has never exercised his right of free movement, has always resided in a Member State of which he is a national and is, in addition, a national of another Member State.

24 In the present case, however, it is undisputed that, before acquiring British citizenship, Ms Ormazabal had exercised her freedom of movement and had acquired a right of residence in the United Kingdom as a Spanish national under Directive 2004/38.

25 Against that background, the referring court in essence questions whether, as the Secretary of State for the Home Department maintains, Ms Ormazabal ceased to be covered by Directive 2004/38 in the United Kingdom from the date of her naturalisation in that Member State or whether, as Mr Lounes asserts, even though Ms Ormazabal has acquired British citizenship, she must still be considered a 'beneficiary' of Directive 2004/38 within the meaning of Article 3(1) thereof and can still rely in the United Kingdom upon the rights guaranteed by the directive, given that she continues to hold Spanish nationality. In the first case, Mr Lounes would not qualify for a derived right of residence in the United Kingdom as a family member of a Union citizen under Directive 2004/38, whereas, in the second case, he would be in a position to be granted such a right.

26 In that connection, the referring court is also uncertain whether the answer to that question would be different depending on whether (i) Ms Ormazabal had acquired a right of permanent residence in the United Kingdom under Article 16 of Directive 2004/38 before she acquired British citizenship or (ii) had, at that time, only a right of residence for more than three months under Article 7 of the directive. The referring court indicates that the type of right of residence enjoyed by Ms Ormazabal before her naturalisation is the subject of debate between the parties to the main proceedings and is a question that is still to be determined.

27 In those circumstances, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) (United Kingdom), decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Where a Spanish national and Union citizen:

– moves to the United Kingdom, in the exercise of her right to free movement under Directive [2004/38]; and

– resides in the United Kingdom in the exercise of her right under Article 7 or Article 16 of Directive [2004/38]; and

– subsequently acquires British citizenship, which she holds in addition to her Spanish nationality, as a dual national; and

– several years after acquiring British citizenship, marries a third country national with whom she resides in the United Kingdom;

are she and her spouse both beneficiaries of Directive [2004/38], within the meaning of Article 3(1), whilst she is residing in the United Kingdom, and holding both Spanish nationality and British citizenship?'

**Consideration of the question referred**

28 As a preliminary point, it should be noted that, in accordance with settled case-law of the Court, even though, formally, the referring court has limited its question to the interpretation of Article 3(1) of Directive 2004/38, that does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in its question (see, by analogy, judgment of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277, paragraph 24 and the case-law cited).

29 In the present case, the information given in the order for reference indicates that the referring court's uncertainties in the case before it concern not only Directive 2004/38 but also Article 21(1) TFEU.

30 By its question, the referring court must therefore be understood to be asking, in essence, whether Directive 2004/38 and Article 21(1) TFEU are to be interpreted as meaning that, in a situation in which a Union citizen (i)

has exercised his right of free movement by moving to and residing in a Member State other than that of which he is a national, under Article 7(1) or Article 16(1) of that directive, (ii) has then acquired the nationality of that Member State, while also retaining his nationality of origin, and (iii) several years later, has married a third-country national with whom he continues to reside in that Member State, that third-country national has a right of residence in the Member State concerned, on the basis of either Directive 2004/38 or Article 21(1) TFEU.

*Interpretation of Directive 2004/38*

31 According to settled case-law of the Court, the purpose of Directive 2004/38 is to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States which is conferred directly on citizens of the Union by Article 21(1) TFEU. Recital 5 of the directive states that that right should, if it is to be exercised under objective conditions of dignity, be also granted to the family members of those citizens, irrespective of nationality (judgment of 18 December 2014, *McCarthyand Others*, C-202/13, EU:C:2014:2450, paragraphs 31 and 33 and the case-law cited).

32 Directive 2004/38 does not however confer any autonomous right on family members of a Union citizen who are third-country nationals. Thus, any rights that may be conferred on those nationals by the directive are derived from the rights which the Union citizen concerned enjoys as a result of having exercised his freedom of movement (see, to that effect, judgment of 18 December 2014, *McCarthyand Others*, C-202/13, EU:C:2014:2450, paragraph 34 and the case-law cited).

33 As the Court has held on several occasions, it follows from a literal, contextual and teleological interpretation of Directive 2004/38 that the directive governs only the conditions determining whether a Union citizen can enter and reside in Member States other than that of which he is a national and does not confer a derived right of residence on third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national (see, to that effect, judgments of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 37, and of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 53).

34 First, it is clear from the wording of Article 3(1) of Directive 2004/38 that Union citizens who move to or reside in a 'Member State other than that of which they are a national', and their family members as defined in Article 2(2) who accompany or join them, fall within the scope of the directive and are beneficiaries of the rights conferred by it (judgment of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 38).

35 Secondly, other provisions of Directive 2004/38, in particular Article 6, Article 7(1) and (2) and Article 16(1) and (2), refer to the right of residence of a Union citizen and to the derived right of residence conferred on the family members of that citizen either in 'another Member State' or in 'the host Member State' (judgment of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 40 and the case-law cited).

36 Thirdly, although, as has been stated in paragraph 31 of this judgment, Directive 2004/38 aims to facilitate and strengthen the exercise of the right of Union citizens to move and reside freely within the territory of the Member States, the fact remains that the subject matter of the directive concerns, as is apparent from Article 1(a), the conditions governing the exercise of that right (judgments of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277, paragraph 33, and of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 41).

37 The Court has accordingly held that, since, under a principle of international law, a Member State cannot refuse its own nationals the right to enter its territory and remain there and since those nationals thus enjoy an unconditional right of residence there, Directive 2004/38 is not intended to govern the residence of a Union citizen in the Member State of which he is a national. Consequently, in view of the case-law referred to in paragraph 32 of this judgment, nor is the directive intended to confer, in the territory of that Member State, a derived right of residence on family members of that citizen who are third-country nationals (see, to that effect, judgments of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277, paragraphs 29, 34 and 42, and of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraphs 42 and 43).

38 In the present case, it is common ground that Ms Ormazabal, who is a Spanish national, exercised her freedom of movement by moving to and residing in a Member State other than that of which she was a national when she left Spain for the United Kingdom in 1996. It is also common ground that she had the status of a 'beneficiary' of Directive 2004/38 within the meaning of Article 3(1) thereof and that she was resident in the

United Kingdom under Article 7(1) or — as the United Kingdom Government appears to accept — Article 16(1) of the directive, at least until she acquired British citizenship by naturalisation.

39 However, as the Advocate General has noted in points 48 and 63 of his Opinion, Ms Ormazabal's acquisition of British citizenship gave rise to a change in the legal rules applicable to her, under both national law and the directive.

40 Since then, Ms Ormazabal has in fact been living in one of the Member States of which she is a national and consequently enjoys an unconditional right of residence there in accordance with the principle of international law mentioned in paragraph 37 of this judgment.

41 It follows that, since she acquired British citizenship, first, Ms Ormazabal has ceased to fall within the definition, recalled in paragraph 34 of this judgment, of a 'beneficiary' within the meaning of Article 3(1) of Directive 2004/38. Secondly, in view of the reasoning set out in paragraphs 36 and 37 of this judgment, the directive no longer governs her residence in the United Kingdom, as that residence is inherently unconditional.

42 That being so, it must be held that Directive 2004/38 has not applied to Ms Ormazabal's situation since she was naturalised as a British citizen.

43 That conclusion is not called in question by the fact that Ms Ormazabal has exercised her freedom of movement by going to the United Kingdom and residing there or by the fact that she has continued to hold Spanish nationality in addition to British citizenship. Despite that combination of circumstances, the fact remains that, since she acquired British citizenship, Ms Ormazabal has not been residing in a 'Member State other than that of which [she is] a national', as referred to in Article 3(1) of Directive 2004/38, and therefore no longer falls within the definition of a 'beneficiary' of that directive within the meaning of that provision.

44 In the light of the case-law referred to in paragraphs 32 and 37 of this judgment, her spouse, Mr Lounes, who is a third-country national, likewise does not fall within that definition and thus cannot benefit from a derived right of residence in the United Kingdom on the basis of Directive 2004/38.

*Interpretation of Article 21(1) TFEU*

45 As Directive 2004/38 does not confer a derived right of residence on third-country nationals in a situation such as that of Mr Lounes, it is necessary to determine whether such a right of residence may arise under the provisions of the FEU Treaty concerning Union citizenship, in particular Article 21(1) TFEU, which confers on every citizen of the Union the right to move and reside freely within the territory of the Member States, subject to, inter alia, the limitations and conditions laid down in the Treaties.

46 It should be recalled that the Court has already acknowledged, in certain cases, that third-country nationals, family members of a Union citizen, who were not eligible, on the basis of Directive 2004/38, for a derived right of residence in the Member State of which that citizen is a national could, however, be accorded such a right on the basis of Article 21(1) TFEU (see, to that effect, judgments of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraphs 44 to 50, and of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 54).

47 However, like Directive 2004/38, Article 21(1) TFEU does not confer any autonomous right of residence on a third-country national; rather it confers only a right derived from the rights enjoyed by the Union citizen concerned (judgments of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraphs 66 and 67, and of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 36).

48 Thus, a derived right of residence of a third-country national who is a family member of a Union citizen exists, in principle, only when it is necessary in order to ensure that the Union citizen can exercise his freedom of movement effectively. The purpose and justification of a derived right of residence are therefore based on the fact that a refusal to allow such a right would be such as to interfere, in particular, with that freedom and with the exercise and the effectiveness of the rights which Article 21(1) TFEU affords the Union citizen concerned (see, to that effect, judgments of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 68; of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 45; and of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraphs 36 and 73).

49 In the circumstances of the present case, it must be noted that, contrary to what the United Kingdom Government in essence maintains, the situation of a national of one Member State, such as Ms Ormazabal, who has exercised her freedom of movement by going to and residing legally in another Member State, cannot be treated in the same way as a purely domestic situation merely because the person concerned has, while resident in the host Member State, acquired the nationality of that State in addition to her nationality of origin.

50 The Court has already held that there is a link with EU law with regard to nationals of one Member State who are lawfully resident in the territory of another Member State of which they are also nationals (see, to that effect, judgment of 8 June 2017, *Freitag*, C-541/15, EU:C:2017:432, paragraph 34).

51 Accordingly, Ms Ormazabal, who is a national of two Member States and has, in her capacity as a Union citizen, exercised her freedom to move and reside in a Member State other than her Member State of origin, may rely on the rights pertaining to Union citizenship, in particular the rights provided for in Article 21(1) TFEU, also against one of those two Member States.

52 The rights which nationals of Member States enjoy under that provision include the right to lead a normal family life, together with their family members, in the host Member State (see, by analogy, judgment of 25 July 2008, *Metock and Others*, C-127/08, EU:C:2008:449, paragraph 62).

53 A national of one Member State who has moved to and resides in another Member State cannot be denied that right merely because he subsequently acquires the nationality of the second Member State in addition to his nationality of origin, otherwise the effectiveness of Article 21(1) TFEU would be undermined.

54 In the first place, denying him that right would amount to treating him in the same way as a citizen of the host Member State who has never left that State, disregarding the fact that the national concerned has exercised his freedom of movement by settling in the host Member State and that he has retained his nationality of origin.

55 A Member State cannot restrict the effects that follow from holding the nationality of another Member State, in particular the rights which are attendant thereon under EU law and which are triggered by a citizen exercising his freedom of movement.

56 In the second place, the rights conferred on a Union citizen by Article 21(1) TFEU, including the derived rights enjoyed by his family members, are intended, amongst other things, to promote the gradual integration of the Union citizen concerned in the society of the host Member State.

57 Union citizens, such as Ms Ormazabal, who, after moving, in the exercise of their freedom of movement, to the host Member State and residing there for a number of years pursuant to and in accordance with Article 7(1) or Article 16(1) of Directive 2004/38, acquire the nationality of that Member State, intend to become permanently integrated in that State.

58 As is stated, in essence, by the Advocate General in point 86 of his Opinion, it would be contrary to the underlying logic of gradual integration that informs Article 21(1) TFEU to hold that such citizens, who have acquired rights under that provision as a result of having exercised their freedom of movement, must forego those rights — in particular the right to family life in the host Member State — because they have sought, by becoming naturalised in that Member State, to become more deeply integrated in the society of that State.

59 It would also follow that Union citizens who have exercised their freedom of movement and acquired the nationality of the host Member State in addition to their nationality of origin would, so far as their family life is concerned, be treated less favourably than Union citizens who have also exercised that freedom but who hold only their nationality of origin. The rights conferred on Union citizens in the host Member State, particularly the right to a family life with a third-country national, would thus be reduced in line with their increasing degree of integration in the society of that Member State and according to the number of nationalities that they hold.

60 It follows from the foregoing that, if the rights conferred on Union citizens by Article 21(1) TFEU are to be effective, citizens in a situation such as Ms Ormazabal's must be able to continue to enjoy, in the host Member State, the rights arising under that provision, after they have acquired the nationality of that Member State in addition to their nationality of origin and, in particular, must be able to build a family life with their third-country-national spouse, by means of the grant of a derived right of residence to that spouse.

61 The conditions for granting that derived right of residence must not be stricter than those provided for by Directive 2004/38 for the grant of a derived right of residence to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than that of which he is a national. Even though Directive 2004/38 does not cover a situation such as that mentioned in the preceding paragraph of this judgment, it must be applied, by analogy, to that situation (see, by analogy, judgments of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraphs 50 and 61, and of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraphs 54 and 55).

62 In view of all the foregoing, the answer to the question is that Directive 2004/38 must be interpreted as meaning that, in a situation in which a Union citizen (i) has exercised his freedom of movement by moving to and residing in a Member State other than that of which he is a national, under Article 7(1) or Article 16(1) of that directive, (ii) has then acquired the nationality of that Member State, while also retaining his nationality of origin, and (iii) several years later, has married a third-country national with whom he continues to reside in that Member State, that third-country national does not have a derived right of residence in the Member State in question on the basis of Directive 2004/38. The third-country national is however eligible for a derived right of residence under Article 21(1) TFEU, on conditions which must not be stricter than those provided for by Directive 2004/38 for the grant of such a right to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than the Member State of which he is a national.

**Costs**

63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

**Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC must be interpreted as meaning that, in a situation in which a citizen of the European Union (i) has exercised his freedom of movement by moving to and residing in a Member State other than that of which he is a national, under Article 7(1) or Article 16(1) of that directive, (ii) has then acquired the nationality of that Member State, while also retaining his nationality of origin, and (iii) several years later, has married a third-country national with whom he continues to reside in that Member State, that third-country national does not have a derived right of residence in the Member State in question on the basis of Directive 2004/38.**

**The third-country national is however eligible for a derived right of residence under Article 21(1) TFEU, on conditions which must not be stricter than those provided for by Directive 2004/38 for the grant of such a right to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than the Member State of which he is a national.**

LECTURE 6: EU-SPECIFIC FUNDAMENTAL RIGHTS: OPENNESS AND TRANSPARENCY (I)

The European Union consistently has been reproached rather consistently by Member States' parliaments and citizens' groups for being opaque and non-transparent. In an attempt to increase the visibility of its activities and to increase its legitimacy with those actors, the EU adopted a transparency-oriented decision-making approach. Transparency comprises two features in this respect. Firstly, it implies openness concerning decision-making processes, procedures and criteria employed in legislative or regulatory decision-making itself. Openness as such implies that the balances struck by the institutions should be open for anyone willing to understand and retrace. Secondly and complementarily, such openness also presupposes a right for individuals to obtain access to documents relevant for the general public in understanding how a specific decision has come to being. General openness and specific access to documents entitlements have been enshrined in Article 15 TFEU. In addition, Article 42 of the Charter also acknowledges a fundamental right of access to documents. In relation to access, the Council and European Parliament adopted Regulation 1049/2001, which rendered that fundamental right operational in relation to both institutions and the European Commission. The same right has later on been extended to other institutions, offices and bodies of the European Union. The Court of Justice has subsequently been called upon to interpret and apply that Regulation, which is premised on the "widest possible access" to EU-held or –authored documents. In practice, it soon turned out that the "widest possible access" does not necessarily imply full and unrestricted access to all documents; indeed, some categories of documents appear to be *prima facie* per se excluded from access. The judicial recognition of such categories in itself raises interesting and new questions regarding the scope of the widest possible access. In this lecture, we will study the general access regime against the background of the post-Lisbon openness approach to EU decision-making. We will particularly outline how the Court struck a balance between openness, access and confidentiality in that regard and how that balance impacts on citizens' legitimate expectations vis-à-vis a transparent European Union.

*Materials to read:*

- Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] O.J. L145/43.
- Court of Justice, 17 October 2013, Case C-280/11 P, *Council v Access Info Europe*, ECLI:EU:C:2013:671.
- Court of Justice, 3 July 2014, Case C-350/12 P, *Council v in 't Veld*, ECLI:EU:C:2014:2039.
- General Court, 22 March 2018, Case T-540/15, *Emilio De Capitani v European Parliament*, ECLI:EU:T:2018:167.

# Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 255(2) thereof,

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

Acting in accordance with the procedure referred to in Article 251 of the Treaty(2),

Whereas:

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

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

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

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

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

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

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

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

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

(10) In order to bring about greater openness in the work of the institutions, access to documents should be granted by the European Parliament, the Council and the Commission not only to documents drawn up by the institutions, but also to documents received by them. In this context, it is recalled that Declaration No 35 attached to the Final

Act of the Treaty of Amsterdam provides that a Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement.

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

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

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

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

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

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

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

HAVE ADOPTED THIS REGULATION:

Article 1

Purpose

The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents,

(b) to establish rules ensuring the easiest possible exercise of this right, and

(c) to promote good administrative practice on access to documents.

Article 2

Beneficiaries and scope

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

2. The institutions may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

4. Without prejudice to Articles 4 and 9, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register. In particular, documents drawn up or received in the course of a legislative procedure shall be made directly accessible in accordance with Article 12.

5. Sensitive documents as defined in Article 9(1) shall be subject to special treatment in accordance with that Article.

6. This Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them.

Article 3

Definitions

For the purpose of this Regulation:

(a) "document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;

(b) "third party" shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.

Article 4

Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

- public security,

- defence and military matters,

- international relations,

- the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,

- court proceedings and legal advice,

- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

Article 5

Documents in the Member States

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

The Member State may instead refer the request to the institution.

Article 6

Applications

1. Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 of the EC Treaty and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.

2. If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.

3. In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

4. The institutions shall provide information and assistance to citizens on how and where applications for access to documents can be made.

Article 7

Processing of initial applications

1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.

3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application.

Article 8

Processing of confirmatory applications

1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

3. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.

Article 9

Treatment of sensitive documents

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

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

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

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

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

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

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

Article 10

Access following an application

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

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

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

Article 11

Registers

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

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

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

Article 12

Direct access in electronic form or through a register

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

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

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

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

Article 13

Publication in the Official Journal

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

(a) Commission proposals;

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

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

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

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

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

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

(a) initiatives presented to the Council by a Member State pursuant to Article 67(1) of the EC Treaty or pursuant to Article 34(2) of the EU Treaty;

(b) common positions referred to in Article 34(2) of the EU Treaty;

(c) directives other than those referred to in Article 254(1) and (2) of the EC Treaty, decisions other than those referred to in Article 254(1) of the EC Treaty, recommendations and opinions.

3. Each institution may in its rules of procedure establish which further documents shall be published in the Official Journal.

Article 14

Information

1. Each institution shall take the requisite measures to inform the public of the rights they enjoy under this Regulation.

2. The Member States shall cooperate with the institutions in providing information to the citizens.

Article 15

Administrative practice in the institutions

1. The institutions shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by this Regulation.

2. The institutions shall establish an interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents.

Article 16

Reproduction of documents

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

Article 17

Reports

1. Each institution shall publish annually a report for the preceding year including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register.

2. At the latest by 31 January 2004, the Commission shall publish a report on the implementation of the principles of this Regulation and shall make recommendations, including, if appropriate, proposals for the revision of this Regulation and an action programme of measures to be taken by the institutions.

Article 18

Application measures

1. Each institution shall adapt its rules of procedure to the provisions of this Regulation. The adaptations shall take effect from 3 December 2001.

2. Within six months of the entry into force of this Regulation, the Commission shall examine the conformity of Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community(6) with this Regulation in order to ensure the preservation and archiving of documents to the fullest extent possible.

3. Within six months of the entry into force of this Regulation, the Commission shall examine the conformity of the existing rules on access to documents with this Regulation.

Article 19

Entry into force

This Regulation shall enter into force on the third day following that of its publication in the Official Journal of the European Communities.

It shall be applicable from 3 December 2001.

## Case C-280/11 P, *Council v Access Info Europe*

In Case C-280/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 31 May 2011,

**Council of the European Union,** represented by B. Driessen and C. Fekete, acting as Agents,

appellant,

supported by

**Czech Republic,** represented by M. Smolek and D. Hadroušek, acting as Agents,

**Kingdom of Spain,** represented by S. Centeno Huerta, acting as Agent,

**French Republic,** represented by G. de Bergues and N. Rouam, acting as Agents,

interveners in the appeal,

the other parties to the proceedings being:

**Access Info Europe,** established in Madrid (Spain), represented by O. Brouwer and J. Blockx, advocaten,

applicant at first instance,

supported by:

**European Parliament,** represented by A. Caiola and M. Dean, acting as Agents, with an address for service in Luxembourg,

intervener in the appeal,

**Hellenic Republic,** represented by E.-M. Mamouna and K. Boskovits, acting as Agents,

**United Kingdom of Great Britain and Northern Ireland,**

interveners at first instance,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the First Chamber, A. Borg Barthet, E. Levits and M. Berger, Judges,

Advocate General: P. Cruz Villalón,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 21 February 2013,

after hearing the Opinion of the Advocate General at the sitting on 16 May 2013

gives the following

**Judgment**

1 By its appeal, the Council of the European Union seeks to have set aside the judgment of 22 March 2011 in Case T-233/09 *Access Info Europe* v *Council* [2011] ECR II-1073 ('the judgment under appeal') by which the General Court of the European Union annulled the Council's decision of 26 February 2009 ('the decision at issue') refusing to let Access Info Europe ('Access Info') have access to certain information contained in a note of 26 November 2008 from the Secretariat General of the Council to the Working Party on Information, set up by the Council, concerning the proposal for a new regulation regarding public access to European Parliament, Council and Commission documents ('the requested document').

**Legal context**

2 Recital 6 in the preamble to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) is worded as follows:

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

3 Under Article 1 of that regulation:

'The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission … documents … in such a way as to ensure the widest possible access to documents.

…'

4 The first subparagraph of Article 4(3) of Regulation No 1049/2001 provides:

'Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'.

**Background to the dispute**

5 By e-mail of 3 December 2008, Access Info applied to the Council for access to the requested document. That document contained the proposals for amendments, or for re-drafting, tabled by a number of Member States at the meeting of the Working Party on Information, referred to in paragraph 1 above, on 25 November 2008.

6 By the decision at issue, the Council granted partial access to the requested document. In particular, the Council sent Access Info a version of that document which did not make it possible to identify the Member States which had put those proposals forward.

7 The Council justified its refusal to disclose the identities of those Member States on the basis of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001, on the ground that disclosure of those identities would have seriously undermined its decision-making process and there was no overriding public interest in such disclosure. Indeed, bearing in mind the preliminary nature of the discussions under way at that time, disclosure of the identities of the Member States concerned would have reduced the delegations' room for manœuvre during the negotiations, which are a feature of the legislative procedure in the Council, and would therefore have impaired its ability to reach an agreement.

8 On 26 November 2008 – that is to say, the very day on which the requested document was created – an unedited version of the requested document was made available to the public on the internet site of the organisation Statewatch, without authorisation ('the unauthorised disclosure').

**The judgment under appeal**

9 By application lodged at the Registry of the General Court on 12 June 2009, Access Info brought an action for annulment of the decision at issue, which was upheld by the judgment under appeal.

10 The General Court first set out the basic principles relating to access to documents. In particular, in paragraphs 55 to 58 of that judgment, it stated that the right of access to documents of the institutions is connected with the democratic nature of those institutions and that, since the purpose of Regulation No 1049/2001 is, in accordance with Article 1 thereof, to ensure the widest possible right of access, the exceptions to disclosure must be interpreted and applied strictly. The General Court observed that those principles are clearly of particular relevance where the Council is acting in its legislative capacity, as in that case.

11 Next, in paragraphs 59 and 60 of the judgment under appeal, the General Court stated that the mere fact that a document concerns an interest protected by an exception to disclosure is not sufficient to justify the application of that exception: such application may be justified only if access to that document could specifically and effectively undermine the protected interest. Moreover, the risk of the protected interest being undermined must not be purely hypothetical and must be reasonably foreseeable. It is up to the institution concerned to weigh the specific interest which must be protected through non-disclosure of part of the requested document – in the circumstances, the identity of the Member States which put forward the proposals – against the general interest in the entire document being made accessible.

12 Applying those principles, the General Court went on in paragraphs 68 to 80 of the judgment under appeal to examine the main reason put forward by the Council as justification for only partly disclosing the requested document, that is to say, the alleged reduction in the delegations' room for manœuvre within the Council as a result of the fact that disclosure of the identities of the Member States which put forward proposals would give rise to so much public pressure on those States that it would no longer be possible for a delegation from those States to submit a proposal tending towards the restriction of openness.

13 First, in paragraphs 69 to 74 of the judgment under appeal, the General Court found that it is specifically the principle of democratic legitimacy which requires those responsible for the proposals contained in the requested document to be publicly accountable for their actions, especially where that document is part of the legislative procedure. The General Court also found that the disclosure of the identities of those who put forward a proposal would not prevent the delegations from subsequently departing from that proposal. It explained that a proposal is designed to be discussed, whether it be anonymous or not, not to remain unchanged following that discussion if the identity of its author is known. Public opinion is perfectly capable of understanding that aspect of proposals made in the legislative process. Moreover, according to the General Court, it cannot be presumed that all sections of public opinion are opposed to limiting the principle of transparency. Lastly, the General Court found that even the unauthorised disclosure had not had adverse effects on the Council's decision-making process.

14 Secondly, in paragraphs 75 and 76 of the judgment under appeal, the General Court rejected the Council's argument that it was necessary to take into consideration the preliminary nature of the discussions in order to assess the risk, in terms of undermining the decision-making process, associated with the reduction of the Member States' room for manœuvre. According to the General Court, the preliminary nature of the discussions does not, in itself, justify application of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001, as that provision does not make a distinction according to the state of progress of the discussions.

15 Thirdly, in paragraphs 77 and 78 of the judgment, the General Court rejected the argument that it was necessary to take into consideration the particularly sensitive nature of the proposals made by the Member State delegations. In that regard, the General Court stated that proposals for amendments are part of the normal legislative process. As a result, they are not 'particularly sensitive' to the point that a fundamental interest of the European Union or of the Member States would be jeopardised if the identity of those who made the proposals were to be disclosed, especially since it was not the content of the proposals made by the Member States that was at issue, but solely the identification of the delegations who had tabled them. Furthermore, the General Court

found that it is in the very nature of democratic debate that a proposal for amendment of a draft regulation can be subject to both positive and negative comments on the part of the public and the media.

16 Fourthly, in paragraph 79 of the judgment under appeal, the General Court rejected the argument that the unusual lengthiness of the procedure for approving the new regulation on access to documents was attributable to the difficulties which the unauthorised disclosure had created for the negotiations. According to the General Court, the true position was that there were other political and legal reasons which could account for the length of the legislative process.

17 Lastly, in paragraphs 82 and 83 of the judgment under appeal, the General Court rejected the Council's argument blaming the unauthorised disclosure for the subsequent loss of detail, in particular as regards the identification of delegations, from the reports of the meetings of the Council's working parties. In that connection, the General Court stated that this change could also be explained by the fact that Access Info had brought an action contesting the decision at issue. In any event, the absence of any causal link between disclosure to the public of the names of the delegations and the serious undermining of the decision-making process was confirmed, according to the General Court, by a document which post-dated the unauthorised disclosure and which did not simply refer, without mentioning names, to the proposals to amend the legislative text, but specified the identity of the delegations, at least in the original version of that document.

18 On the basis of the above considerations, inter alia, the General Court upheld the action and annulled the decision at issue.

**The procedure before the Court of Justice and the forms of order sought by the parties**

19 By order of 17 October 2011, the Czech Republic and the Kingdom of Spain were granted leave to intervene in support of the form of order sought by the Council, and the European Parliament was granted leave to intervene in support of the form of order sought by Access Info. By order of 2 February 2012, the French Republic was granted leave to intervene in support of the form of order sought by the Council.

20 The Council, the Czech Republic, the Hellenic Republic, the Kingdom of Spain and the French Republic claim that the Court should:

– set aside the judgment under appeal;

– give final judgment in the matters that are the subject of this appeal; and

– order Access Info to pay the costs both of the appeal proceedings and of the proceedings at first instance.

21 Access Info and the European Parliament contend that the Court should dismiss the appeal and order the Council to pay the costs.

**The appeal**

22 The Council relies, essentially, on three grounds of appeal.

*The first ground of appeal*

Arguments of the parties

23 By its first ground of appeal, the Council, supported in this regard by the Kingdom of Spain, submits that the General Court disregarded the balanced approach laid down both in primary law (Article 207(3) EC and Article 255 EC, applicable *ratione temporis*) and secondary law (recital 6 to Regulation No 1049/2001 and the first subparagraph of Article 4(3) thereof) between, on the one hand, the wider right of access to documents relating to the legislative activity of the institutions and, on the other, the need to preserve the effectiveness of the decision-making process. In particular, the General Court – inter alia in paragraph 69 of the judgment under appeal – construed the first subparagraph of Article 4(3) in such a way as to attribute undue and excessive weight to the

transparency of the decision-making process, without taking any account of the needs associated with the effectiveness of that process.

24 More specifically, the Council – supported by the Czech Republic, the Hellenic Republic and the Kingdom of Spain – argues that its legislative process is very fluid and requires a high level of flexibility on the part of Member States so that they can modify their initial position, thus maximising the chances of reaching an agreement. In order to ensure a 'negotiating space' and thereby preserve the effectiveness of the legislative process, it is necessary to ensure that Member States have maximum room for manœuvre in the discussions and that they do so from the earliest stages of the procedure. That room for manœuvre would be reduced if the identity of the delegations were disclosed too early in the procedure, in that it would have the effect of triggering pressure from public opinion, which would deprive the delegations themselves of the flexibility needed to ensure the effectiveness of the Council's decision-making process.

25 In that connection, the Czech Republic and the Kingdom of Spain add that, in the present case, it was not necessary to name the delegations in order to attain the objective pursued by Regulation No 1049/2001. Full access to the content of the requested document would be sufficient to ensure a democratic debate on the issues which that document concerns. Moreover, the only consequence of disclosing the identity of the delegations would have been to enable pressure to be exerted, not on the Council, but on the Member States.

26 Access Info contends that, by its first ground of appeal, the Council criticises only three paragraphs of the judgment under appeal, namely, paragraphs 57 and 58, in which the General Court merely set out the relevant case-law, and paragraph 69, in which – according to Access Info, supported in that regard by the European Parliament – the General Court specifically weighed the requirements of transparency against the need to protect the decision-making process, and concluded that disclosure of the identities of the Member States concerned did not appear liable, in the case before it, to undermine the Council's decision-making process.

Findings of the Court

27 In order to rule on this ground of appeal, it should be noted that, in accordance with recital 1 to Regulation No 1049/2001, that regulation reflects the intention expressed in the second paragraph of Article 1 TEU of marking a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. As is stated in recital 2 to that regulation, the public right of access to documents of the institutions is related to the democratic nature of those institutions (Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 34; Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others* v *API and Commission* [2010] ECR I-8533, paragraph 68; and Case C-506/08 P *Sweden* v *MyTravel and Commission* [2011] ECR I-6237, paragraph 72).

28 To that end, Regulation No 1049/2001 is designed – as is stated in recital 4 and reflected in Article 1 – to confer on the public as wide a right of access as possible to documents of the institutions (*Sweden and Turco* v *Council*, paragraph 33; *Sweden and Others* v *API and Commission*, paragraph 69; and *Sweden* v *MyTravel and Commission*, paragraph 73).

29 However, that right is none the less subject to certain limitations based on grounds of public or private interest. More specifically, and in reflection of recital 11, Article 4 of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (see Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 62; *Sweden and Others* v *API and Commission*, paragraphs 70 and 71; and *Sweden* v *MyTravel and Commission*, paragraph 74).

30 Nevertheless, as such exceptions derogate from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (*Sison* v *Council*, paragraph 63; *Sweden and Turco* v *Council*, paragraph 36; *Sweden and Others* v *API and Commission*, paragraph 73; and *Sweden* v *MyTravel and Commission*, paragraph 75).

31 Thus, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, first explain how disclosure of that document could specifically and actually undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon

which it is relying. Moreover, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical (*Sweden* v *MyTravel and Commission*, paragraph 76 and the case-law cited).

32 Moreover, if the institution applies one of the exceptions provided for in Article 4 of Regulation 1049/2001, it is for that institution to weigh the particular interest to be protected through non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible, having regard to the advantages of increased openness, as described in recital 2 to Regulation No 1049/2001, in that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (*Sweden and Turco* v *Council*, paragraph 45).

33 Moreover, the Court has also held that those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, a fact reflected in recital 6 to Regulation No 1049/2001, which states that wider access must be granted to documents in precisely such cases. Openness in that respect contributes to strengthening democracy by enabling citizens to scrutinise all the information which has formed the basis for a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights (*Sweden and Turco* v *Council*, paragraph 46).

34 It is on the basis of those principles that the Court of Justice must examine the first ground of appeal, by which the Council claims, in essence, that the General Court did not take any account of the needs associated with the protection of its decision-making process.

35 It should be noted that, in paragraph 69 of the judgment under appeal, the General Court specifically stated that, in accordance with the case-law referred to in paragraph 30 above, public access to the entire content of Council documents constitutes the principle, or general rule, and that that principle is subject to exceptions which must be interpreted and applied strictly.

36 Contrary to the assertions made by the Council, the General Court did take account of the needs associated with the effectiveness of the decision-making process: in paragraphs 69 to 83 of the judgment under appeal, it carried out a detailed examination of the arguments adduced by the Council to justify the application, in the circumstances, of the exception concerning the protection of the Council's decision-making process.

37 Thus, far from disregarding the balance between the principle of transparency and the preservation of the effectiveness of the Council's decision-making process, the General Court, in accordance with the principles set out in paragraphs 31 to 33 above, examined the substance of all the arguments put forward by the Council to justify the application, in the circumstances, of the exception referred to in the first subparagraph of Article 4(3) of Regulation 1049/2001.

38 It was not until after it had examined those arguments and found that none of them could prove that disclosure of the information relating to the identity of the Member States in question would have given rise to a genuine risk of seriously undermining the interest protected by the exception in question that the General Court concluded, in paragraph 84 of the judgment under appeal, that the Council had infringed the first subparagraph of Article 4(3) of Regulation 1049/2001 by precluding, through the decision at issue, the disclosure of that information.

39 Moreover, to the extent that the Council's criticism could be seen as an attempt to put in question the General Court's assessment of those arguments, it must be stated that the Council does not, in support of this ground of appeal, put forward anything to refute the General Court's conclusion that the Council's arguments at first instance were not sufficiently substantiated to establish that disclosure of the information concerning the identity of the Member States in question would have given rise to a genuine risk of seriously undermining the Council's decision-making process.

40 Lastly, as regards the argument of the Czech Republic and the Kingdom of Spain that disclosure of the identity of the delegations was not necessary to attain the objective of Regulation No 1049/2001, suffice it to state that, as was pointed out in paragraph 28 above, the aim of Regulation No 1049/2001, as stated in Article 1 thereof, is to confer on the public as wide a right of access as possible to documents of the institutions. It is in the light of that principle that the General Court rightly stated in paragraph 69 of the judgment under appeal that Regulation No 1049/2001 aims to ensure public access to the entire content of Council documents, including, in this case, the

identity of those who put forward the proposals, and full access to those documents may be limited only on the basis of the exceptions to that right laid down in that regulation, which must, for their part, be based on a genuine risk that the interest which they protect might be undermined. As the General Court ruled out the existence of such a risk in the circumstances of the case, partial access to the requested document cannot be regarded as sufficient for the purposes of attaining the objective pursued by Regulation No 1049/2001.

41 In those circumstances, the first ground of appeal must be rejected as unfounded.

*The third ground of appeal*

Arguments of the parties

42 By its third ground of appeal, which it is appropriate to examine in second place and which comprises three parts, the Council alleges that the General Court committed several errors in law, which led it to conclude that the Council had not established 'to the requisite legal and factual standard' the risk that its decision-making process might be seriously undermined.

43 By the first part of its third ground of appeal, the Council, supported by the Hellenic Republic and the Kingdom of Spain, criticises the General Court for having required, in paragraphs 73 and 74 of the judgment under appeal, proof that the interest protected by the exception had actually been seriously undermined. According to the Council, for it to be possible to rely on the exception under the first subparagraph of Article 4(3) of Regulation 1049/2001, there need only be a risk of harm and, accordingly, an institution which receives a request for access to documents need only establish the likelihood of harm to its decision-making process as a result of the disclosure of that document.

44 For their part, Access Info and the European Parliament contend that, far from requiring the Council to provide proof of an actual adverse effect on the decision-making process, the General Court merely examined, in paragraphs 73 and 74, the argument raised by the Council itself that the Council's decision-making process had been genuinely and specifically undermined as a result of the unauthorised disclosure.

45 By the second part of its third ground of appeal, the Council, with the backing of the Hellenic Republic, argues that, in paragraph 76 of the judgment under appeal, the General Court did not take due account of the importance of the state of progress of discussions when assessing the risk posed to the decision-making process by disclosure of the identities of the delegations. According to the Council, if the public were recognised as having the right to scrutinise all the preparatory documents throughout the entire decision-making process, delegations would be dissuaded from expressing their points of view during the initial stages of the procedure. Indeed, given the 'peculiarities' of the Council's *modus operandi*, those opinions – especially when they relate to technical matters – are often exploratory in nature and do not necessarily reflect the precise and definitive position of the Member State from which those delegations come, which means that they are liable to evolve during the procedure. The effect of recognising a public right of scrutiny at that preliminary stage of the procedure would be that delegations would refrain from expressing their points of view until they had been assigned a negotiation position by their respective governments, and this would make the legislative process more rigid.

46 In response to those arguments, Access Info contends, first of all, that the Council did not explain the precise nature of the 'peculiarities' that purportedly distinguish its decision-making process. Secondly, it was not until the appeal that the Council raised the argument based on the allegation that the ability of the Member States' delegations to modify their point of view during the procedure would be undermined. In any event, as the General Court found in paragraph 76 of the judgment under appeal, there is no reference in the first subparagraph of Article 4(3) of Regulation No 1049/2001 to the stage of the negotiations as a criterion to be taken into account in order to justify application of the exception to the right of access. Admittedly, that factor could be a relevant consideration when assessing the risk that the interest protected by that provision might be adversely affected. However, identifying the delegations which put forward proposals at an early stage in the discussions would not prevent those delegations from being able to change their position at a later stage. Lastly, Access Info states that it is precisely at the point when the procedure is initiated that maximum transparency is vital: by the time that discussions have already been held and compromise positions reached, transparency and public debate are no longer of any use at all.

47 By the third part of its third ground of appeal, the Council submits in essence that, contrary to the requirements laid down in paragraph 69 of *Sweden and Turco* v *Council*, the General Court did not take due account, in paragraphs 72 and 79 to 83 of the judgment under appeal, of the sensitive nature of the requested document when assessing the risk that full disclosure of that document would cause serious harm to the decision-making process. According to the Council, the sensitive nature of that document stems from the fact that the proposals in question concerned the provision to be made in the new regulation on access to documents regarding exceptions from the principle of transparency. Moreover, the sensitivity of those issues is confirmed by the fact that the European Union Courts have recently ruled on the interpretation of the exceptions and by the level of debate, and the pressure from public opinion, generated by those issues.

48 In support of that part of the ground of appeal, the Council puts forward a number of arguments. First of all, it claims that *Sweden and Turco* v *Council* allows it to rely on the exception under the first subparagraph of Article 4(3) of Regulation No 1049/2001 where the requested document is of a particularly sensitive nature. In paragraph 78 of the judgment under appeal, however, the General Court construed that provision as being applicable only where a fundamental interest of the European Union or of the Members States is involved. There is nothing in the wording of that provision or in other parts of the regulation to support that interpretation; nor is it borne out by *Sweden and Turco* v *Council*. Moreover, that interpretation, together with the high standard of proof required by the General Court to establish that level of harm, makes it almost impossible to rely on that provision.

49 Next, in order to emphasise once more the sensitive nature of the issues in question, the Council claims that the General Court erred in finding, in paragraph 79 of the judgment under appeal, that the unusual lengthiness of the legislative procedure in question could be accounted for by political and legal factors connected with the entry into force of the Lisbon Treaty, the European Parliament elections and the renewal of the Commission. Referring to certain changes in the drafting rules for documents from its working parties with effect from the second half of 2008 – that is to say, after the unauthorised disclosure – the Council states that in actual fact that delay was attributable, at least in part, to the decline in the candour and completeness of the discussions that followed the unauthorised disclosure, which diminished the effectiveness of the decision-making process within the Council.

50 Lastly, according to the Council, the impasse over the legislative dossier was also attributable, at least in part, to the fact that, precisely because of the unauthorised disclosure, Member States found it very difficult to move out of their initial negotiation positions. In particular, the delegations from those States which wanted to propose amendments that could be perceived by the public as restricting the right of public access were unwilling to do so. The Council claims that the General Court was wrong not to acknowledge the adverse effects on the Council's decision-making process produced by the unauthorised disclosure. First, the General Court erred in finding, in paragraph 72 of the judgment under appeal, that such an argument was unfounded because one of the proposals in question, made after the unauthorised disclosure, restricted the right of public access, whereas, contrary to the statements made by the General Court, that proposal had not been tabled by a delegation from a Member State, but originated with the Commission itself. Secondly, in paragraphs 82 and 83 of the judgment under appeal, the General Court was wrong to reject evidence provided by the Council to explain the decline in the level of detail in the reports for the legislative file, and in relation to the identification of the delegations in the working parties by name. Whereas the General Court found an explanation for this in the fact that proceedings had been brought before it, the Council maintains that, given the sensitive nature of the issues in question, that change was attributable precisely to the unauthorised disclosure. The Council illustrates the reduction in the level of detail with a reference to a report established in July 2009 from the working party in question, in which the identity of the delegations was no longer mentioned but, instead, use was made of expressions like 'a certain number of delegations' and 'other delegations'.

51 Access Info contends first of all that the General Court referred to a situation in which 'a fundamental interest of the European Union or of the Members States' is involved only as an example of a situation in which an issue might be regarded as 'particularly sensitive'. It did not state, however, that only such situations may be regarded as sensitive. Secondly, in contrast with the document at issue in *Sweden and Turco* v *Council*, the requested document contained, not legal opinions, but merely proposals for amendments to draft legislation. Lastly, Access Info adds that the Council failed to provide a detailed statement of reasons for its refusal, even though this is required by *Sweden and Turco* v *Council*.

52 As to the remainder, Access Info contends that the third part of the Council's third ground of appeal must be ruled inadmissible in that it calls into question the General Court's findings as to the sensitive nature of the requested document, as well as those relating to the reasons for the unusual lengthiness of the legislative procedure

in question. In any event, Access Info – supported in substance by the European Parliament – argues, first, that the Council's position regarding the sensitive nature of the issues covered by the requested document is based on the fact that those issues give rise to public debate and that they are covered by the case-law of the European Union Courts. Access Info maintains, however, that the Council has failed to substantiate those assertions. Moreover, according to Access Info, the vast majority of legislative procedures concern issues that could give rise to lobbying from interest groups or to debate in the media. Yet that is precisely what transparency and democracy involve, and it does not demonstrate the sensitive nature of an issue, justifying the confidential treatment of a document such as the document requested. Furthermore, if the issues examined were so very sensitive, it would have warranted the redaction, not just of the names of the Member States, but also of the content of the proposals. Secondly, Access Info disputes the Council's submission that the unusual delay in the legislative process in question was caused by the unauthorised disclosure. In fact, that delay could also be explained by the lack of any political agreement between the Council and the European Parliament over the revision of the regulation. Thirdly, Access Info contests the assertion that the unauthorised disclosure led to changes in the detail provided in the working party's reports.

Findings of the Court

53 As regards the first part of the Council's third ground of appeal, it must be stated that this is based on a misreading of the judgment under appeal.

54 In paragraph 59 of the judgment, the General Court rightly stated that application of the exceptions to the right of access is justified only if there is a risk that one of the protected interests might be undermined; and that risk must be reasonably foreseeable and must not be purely hypothetical.

55 In order to determine whether such a risk existed in the circumstances of the case, the General Court first of all found, in paragraphs 70 to 72 of the judgment under appeal, that the Council had not demonstrated the accuracy of the premiss on which it based its arguments, that is to say, the assumption that the public pressure generated by disclosure of the identity of the delegations would be so great that it would no longer be possible for those delegations to submit a proposal tending towards the restriction of openness. Since that was not demonstrated, the General Court rightly found that disclosure of the identity of the delegations which wished to put forward such proposals was not likely to undermine the Council's decision-making process.

56 The General Court then examined, in paragraphs 73 and 74 of the judgment under appeal, the argument – summarised in paragraph 50 of that judgment, which is not criticised by the Council – that the unauthorised disclosure 'had a negative effect on the sincerity and exhaustiveness of the discussions within the Council Working Party, preventing the delegations from contemplating different solutions and amendments so as to reach agreement on the most controversial questions'.

57 In paragraphs 73 and 74, the General Court confined itself to responding to that plea and concluded that, contrary to the submissions made by the Council, the unauthorised disclosure was not, in the circumstances of the case, such as to undermine the Council's decision-making process.

58 In those circumstances, the first part of the third ground of appeal must be rejected as unfounded.

59 As regards the second part of the third ground of appeal, according to which the General Court did not take due account of the importance of the state of progress of discussions when assessing the risk posed by full disclosure of the positions of the delegations, in terms of seriously undermining the Council's decision-making process, it must be stated that that part is also based on a misreading of the judgment under appeal.

60 In paragraph 76 of the judgment under appeal, the General Court stated that the preliminary nature of the discussions does not, in itself, justify application of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001. Accordingly, having ruled out the possibility that the Council's other arguments could establish a risk of its decision-making process being undermined, the General Court rightly found that the mere fact that the request for disclosure was made at a very early stage in the legislative process was not sufficient to allow the application of that exception.

61 Consequently, the second part is unfounded.

62 Lastly, as regards the third part of the Council's third ground of appeal, it must be stated first that, when the General Court found, in paragraph 78 of the judgment under appeal, that the matters covered by the requested document were not particularly sensitive, it did not refer to *Sweden and Turco* v *Council*; and rightly so, given that paragraph 69 of that judgment, on which this part of the ground of appeal is based, concerns only specific documents, namely, legal opinions. In the present case, not only was the requested document created as part of the legislative process, but it does not belong to any category of documents in respect of which Regulation No 1049/2001 recognises an interest that specifically merits being protected, such as the category for legal opinions.

63 In any event, even if the General Court were wrong in finding that the criterion for establishing the particularly sensitive nature of a document is that of the risk that disclosure of the document would jeopardise a fundamental interest of the European Union or of the Member States, it must be noted that, in paragraph 77 of the judgment under appeal, it was not by reference to that criterion that, in the circumstances of the case, the General Court ruled out the possibility that the requested document was particularly sensitive. Its conclusion was based, rather, on the finding that the various proposals for amendment or re-drafting made by the four Member State delegations which are described in the requested document are part of the normal legislative process, from which it follows that the requested documents could not be regarded as sensitive – not solely by reference to the criterion concerning the involvement of a fundamental interest of the European Union or of the Member States, but by reference to any criterion whatsoever.

64 Consequently, the Council was wrong to allege that the General Court disregarded the particularly sensitive nature of the requested document.

65 Secondly, as concerns the other arguments relied on by the Council in support of the third part of its third ground of appeal, it should be recalled that, according to settled case-law of the Court of Justice, it is clear from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that the General Court has exclusive jurisdiction to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and to assess those facts. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them. The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Save where the clear sense of the evidence has been distorted, that assessment does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see, inter alia, Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraph 105, and the Order of 10 November 2011 in Case C-626/10 P *Agapiou Joséphidès* v *Commission and EACEA* [2011] ECR I-169, paragraph 107).

66 By its argument that the General Court was wrong to hold that the unusual lengthiness of the legislative procedure in question could be accounted for by political and legal factors connected with the entry into force of the Lisbon Treaty, the European Parliament elections and the renewal of the Commission, the Council, without pleading any distortion of the evidence, seeks to challenge the General Court's finding that the unusual lengthiness of the legislative procedure was attributable, not to the difficulties brought about by disclosure of the information relating to the identity of those who had made the proposals, but to those factors of a legal and political nature – as the Council itself also maintains, as can be seen from paragraph 46 of the judgment under appeal.

67 Similarly, as regards the alleged effects of the unauthorised disclosure on the Council's decision-making process, the Council, without clearly pleading any distortion of the evidence, is simply attempting to challenge assessments made at first instance. First, it challenges the assessment made by the General Court, in paragraph 72 of the judgment under appeal, of an item of evidence – that is to say, the public version of a document containing written proposals relating to the legislative procedure in question, drawn up by the delegations, namely, Document No 9716/09 of 11 May 2009 – in concluding that, contrary to the assertions made by the Council at first instance, that disclosure had not forced the delegations to avoid submitting proposals tending towards the restriction of openness. Secondly, the Council challenges the General Court's assessment, in paragraphs 82 and 83 of the judgment under appeal, of another item of evidence – namely, Document 10859/1/09 REV 1 – from which the General Court inferred that there had been a change in Council practice after the unauthorised disclosure, in that the information relating to the identity of the Member States which made comments or suggestions about the Commission's proposal was no longer included, and that that change could be explained by the fact that Access Info had brought an action contesting the lawfulness of the decision at issue.

68 Consequently, since those arguments are inadmissible, the third ground of appeal must be rejected as being in part inadmissible and in part unfounded.

*The second ground of appeal*

Arguments of the parties

69 By its second ground of appeal, the Council submits essentially that the General Court's reasoning is inconsistent with the case-law of the Court of Justice which allows the institutions to rely on general considerations in order to refuse to disclose certain categories of document. The Council maintains, as does the Hellenic Republic, that the decision at issue set out the general considerations explaining the reasons why the requested document could not be disclosed and the reasons why those considerations were in fact applicable to the requested document. Thus, the Council did not confine its examination to the nature of the document, but based its refusal on detailed explanations relating to the sensitive nature of the issues covered and on the fact that those issues formed part of preliminary discussions engaged in before the legislative procedure proper.

70 Access Info contends first that, as the second ground of appeal does not expressly refer to any particular paragraph in the judgment under appeal, it is inadmissible and ineffective. In any event, according to Access Info, supported on this point by the European Parliament, the Council did not make explicit, either in its appeal or in the decision at issue, which general presumption formed the basis for its refusal of access in the circumstances. Moreover, contrary to the requirements of the relevant case-law, there is no basis in any provision of European Union law or any general principle of law for a general presumption of confidentiality for documents such as the requested document, all the more so since that document originated from a procedure of a legislative nature.

Findings of the Court

71 It should be noted at the outset that, contrary to the assertions made by Access Info, this ground of appeal is admissible, given that, although the Council admittedly does not identify any specific paragraph in the judgment under appeal as containing an error of law, it is clear from the arguments in support of this ground of appeal that the Council takes issue with the General Court for not finding that it was open to the Council to rely on a presumption of confidentiality based on general considerations as justification for refusing access to the requested document.

72 As regards the substance, it should be noted that, according to settled case-law, although, in order to justify refusing access to a document, it is not sufficient, in principle, for the document to fall within an activity or an interest referred to in Article 4 of Regulation No 1049/2001, as the institution concerned must also explain how access to that document could specifically and actually undermine the interest protected by an exception laid down in that provision, it is nevertheless open to that institution to base its decisions in that regard on general presumptions which apply to certain categories of document, as similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature (*Sweden and Turco* v *Council*, paragraph 50; Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraph 54; and Case C-477/10 P *Commission* v *Agrofert Holding* [2012] ECR, paragraph 57).

73 While, in such a case, the institution concerned would not be under an obligation to carry out a specific assessment of the content of each of those documents, it must nevertheless specify on which general considerations it bases the presumption that disclosure of the documents would undermine one of the interests protected by the exceptions under Article 4 of Regulation No 1049/2001 (see, to that effect, *Sweden and Others* v *API and Commission*, paragraph 76).

74 In the present case, even if it were to be taken as established that the Council had argued at first instance that it was entitled to refuse access to a document, such as the requested document, by relying on a presumption based on the considerations summarised in paragraph 43 of the judgment under appeal concerning the need to protect the delegations' room for manœuvre during preliminary discussions on the Commission's legislative proposal, it is clear, first, that, in paragraphs 70 to 79 of the judgment under appeal, the General Court examined those considerations and that, in paragraph 80, it concluded that they were not a sufficient basis for application of the exception under the first subparagraph of Article 4(3) of Regulation No 1049/2001. Secondly, the Council's attempt to challenge that assessment by the third ground of appeal was unsuccessful, that ground having been rejected.

75 Consequently, the Council cannot reasonably argue that it was entitled to refuse access to the requested document by relying on a presumption based on such considerations.

76 In view of the above, the arguments seeking to show that the General Court did not take into account the reasons why the Council had considered that those general considerations were applicable to the requested document are ineffective.

77 It follows that the second ground of appeal must be rejected as unfounded.

78 It follows from all the foregoing considerations that the appeal must be dismissed.

**Costs**

79 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those Rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 140(1) of those Rules provides that the Member States and institutions which have intervened in the proceedings are to bear their own costs.

80 Since the Council's appeal has been dismissed, it is appropriate, in accordance with the forms of order sought by Access Info, for the Council to be ordered to pay, in addition to its own costs, the costs incurred by Access Info.

81 The Czech Republic, the Hellenic Republic, the Kingdom of Spain, the French Republic and the European Parliament must bear their own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders the Council of the European Union to pay the costs incurred by Access Info Europe;**

3. **Orders the Czech Republic, the Hellenic Republic, the Kingdom of Spain, the French Republic and the European Parliament to bear their own costs.**

## Case C-350/12 P, *Council v in 't Veld*

In Case C-350/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 17 July 2012,

**Council of the European Union,** represented by P. Berman, B. Driessen and C. Fekete, acting as Agents,

applicant,

the other parties to the proceedings being:

**Sophie in 't Veld,** represented by O. Brouwer, E. Raedts and J. Blockx, advocaten,

applicant at first instance,

supported by:

**European Parliament,** represented by N. Lorenz and N. Görlitz, acting as Agents,

intervener in the appeal,

**European Commission,** represented by B. Smulders and P. Costa de Oliveira, acting as Agents, with an address for service in Luxembourg,

intervener at first instance,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, A. Borg Barthet, E. Levits, M. Berger and S. Rodin, Judges,

Advocate General: E. Sharpston,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 17 October 2013,

after hearing the Opinion of the Advocate General at the sitting on 13 February 2014,

gives the following

**Judgment**

1 By its appeal, the Council of the European Union seeks to have set aside the judgment of the General Court of the European Union in *In 't Veld* v *Council*, T-529/09, EU:T:2012:215 ('the judgment under appeal'), by which the General Court annulled in part the decision of the Council of 29 October 2009 refusing Ms in 't Veld full access to a document containing the opinion of the Council's Legal Service concerning a recommendation from the European Commission to the Council to authorise the opening of negotiations between the European Union and the United States of America for the conclusion of an international agreement to make available to the United States Treasury Department financial messaging data ('the decision at issue').

**Legal context**

2 Recitals 2, 4 and 11 in the preamble to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) read as follows:

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

...

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

...

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

3 Article 1 of Regulation No 1049/2001 provides:

‘The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as “the institutions”) documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents,

...’

4 Article 2(3) of that regulation is worded as follows:

‘This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.’

5 Article 4(1), (2) and (6) of that same regulation provides:

‘1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

...

– international relations,

...

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

...

– ... legal advice,

...

unless there is an overriding public interest in disclosure.

…

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.'

**Background to the dispute**

6 On 28 July 2009, Ms in 't Veld, a Member of the European Parliament, requested access, under Regulation No 1049/2001, to document 11897/09 of 9 July 2009, containing an opinion of the Council's Legal Service on the 'recommendation from the Commission to the Council to authorise the opening of negotiations between the European Union and the United States of America for an international agreement to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing' ('the proposed agreement').

7 By the decision at issue, the Council authorised only partial access to the document, full access being refused on the basis of the exceptions laid down in the third indent of Article 4(1)(a) and the second indent of Article 4(2) of Regulation No 1049/2001, relating to the protection, respectively, of the public interest as regards international relations and of legal advice.

8 In that decision, the Council stated, first, that 'disclosure of [document 11897/09] would reveal to the public information relating to certain provisions in the [proposed agreement] … and consequently, would negatively impact on the [European Union]'s negotiating position and would also damage the climate of confidence in the ongoing negotiations'. The Council added that 'disclosure of the document would also reveal to the … counterpart elements pertaining to the position to be taken by the [European Union] in the negotiations which — in the case [where] the legal advice was critical — could be exploited so as to weaken the [European Union]'s negotiating position'.

9 Secondly, the Council stated that document 11897/09 contained 'legal advice, where the Legal Service analyses the legal basis and the respective competences of the [European Union] and the European Community to conclude the [proposed agreement]', and that this 'sensitive issue, which has an impact on the powers of the European Parliament in the conclusion of the [proposed agreement], has been [the] subject of divergent positions between the institutions'. In those circumstances, according to the Council, '[d]ivulgation of the contents of [document 11897/09] would undermine the protection of legal advice, since it would make known to the public an internal opinion of the Legal Service, intended only for the members of the Council within the context of the Council's preliminary discussions on the [proposed agreement]'. In addition, the Council considered 'that the protection of its internal legal advice relating to a draft international agreement ... outweighs the public interest in disclosure'.

**The judgment under appeal and the forms of order sought**

10 On 31 December 2009, Ms in 't Veld brought an action for annulment of the decision at issue, relying on four pleas in law in support of the action.

11 The first two pleas in that action alleged infringement of the third indent of Article 4(1)(a) and the second indent of Article 4(2) of Regulation No 1049/2001. The third plea in support of that action was based on the infringement of Article 4(6) of that regulation, relating to partial access to documents of the institutions. The fourth plea alleged breach of the obligation to state reasons.

12 By the judgment under appeal, the General Court upheld, in part, the first plea of Ms in 't Veld, and the second plea in its entirety. Since those first two pleas were considered well founded, the General Court also upheld

the third plea. The fourth plea was rejected. On that basis, the General Court partially annulled the decision at issue.

13 On 24 July 2012, the Council brought the present appeal, by which, supported by the Commission, it asks the Court to set aside the judgment under appeal, give final judgment on the matters raised in the appeal and order Ms in 't Veld to pay the costs of both sets of proceedings.

14 Ms in 't Veld, supported by the European Parliament, asks the Court of Justice to dismiss the appeal and to order the Council to pay the costs.

**The appeal**

15 By its appeal, the Council claims that the General Court infringed two provisions of Regulation No 1049/2001 restricting the right of access to documents of the institutions. The first plea is thus based on an infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001, relating to the protection of the public interest as regards international relations, and the second alleges infringement of the second indent of Article 4(2) of the regulation, which provides for an exception in respect of legal advice.

*The first plea, alleging infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001*

The judgment under appeal

16 In order to respond to the first plea in law put forward by Ms in 't Veld in support of her action for annulment, alleging infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001, the General Court noted, in paragraphs 24 and 25 of the judgment under appeal, that the decision to be adopted by an institution pursuant to that provision is of a complex and delicate nature and calls for the exercise of particular care, having regard in particular to the singularly sensitive and essential nature of the protected interest, and that, therefore, the adoption of such a decision calls for the institution concerned to have a wide margin of discretion for that purpose; the General Court's review of the legality of that decision must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers.

17 In paragraph 26 of the judgment under appeal, the General Court found that the opinion to which access had been requested in the present case was, in essence, concerned with the legal basis of the Council decision authorising the opening of negotiations, on behalf of the European Union, for the conclusion of the proposed agreement. The General Court therefore considered, in paragraph 30 of the judgment under appeal, that it had to be ascertained whether the Council had shown that access to the undisclosed elements of document 11897/09 could have specifically and actually undermined the public interest concerned.

18 To that end, the General Court examined the two grounds on which the Council relied in order to establish that there was a risk of such a threat. As regards the ground that disclosure would have revealed to the public information relating to certain provisions in the proposed agreement, which would have damaged the climate of confidence in the ongoing negotiations, the General Court held, in paragraphs 35 to 39 of the judgment under appeal, that the Council had, on the basis of that ground, lawfully refused access to those passages in document 11897/09 containing the analysis of the specific content of that agreement which could have revealed the strategic objectives pursued by the European Union in the negotiations on the conclusion of that agreement.

19 As regards the ground that disclosure of document 11897/09 would have revealed to the counterpart elements pertaining to the position to be taken by the European Union in the negotiations (in particular as regards the choice of legal basis for the proposed agreement), elements which, where the legal advice had been critical, could have been exploited so as to weaken the European Union's negotiating position, the General Court noted in paragraph 46 of the judgment under appeal that the risk involved in the disclosure of positions taken within the institutions regarding the legal basis for concluding a future international agreement was not liable in itself to establish the existence of a threat to the European Union's interest in the field of international relations.

20 In that regard, in paragraphs 47 to 50 of the judgment under appeal, the General Court noted, first of all, that the choice of the appropriate legal basis, both for internal and international European Union activity, has constitutional significance and that such a choice does not follow merely from the conviction of its author, but

must rest on objective factors which are amenable to judicial review, such as, in particular, the aim and the content of the measure. As a consequence, since that choice does not fall within the discretion of the institution, any divergence of opinions on that subject cannot be equated with a difference of opinion between the institutions as to matters which relate to the substance of the agreement. Accordingly, the mere fear of disclosing a disagreement within the institutions regarding the legal basis of a decision authorising the opening of negotiations on behalf of the European Union is not a sufficient basis for concluding that the protected public interest in the field of international relations may be undermined.

21 Furthermore, in response to the argument put forward by the Commission in that respect, the General Court, in paragraphs 52 and 53 of the judgment under appeal, held that the disclosure of a document establishing the existence of doubts regarding the choice of the legal basis in relation to the conclusion of the proposed agreement was not liable to give rise, in itself, to a threat to the European Union's credibility as a negotiating partner in respect of that agreement. Indeed, any confusion as to the nature of the powers of the European Union could only be made worse in the absence of a prior objective debate between the institutions concerned regarding the legal basis of the action envisaged.

22 Next, in paragraph 54 of the judgment under appeal, the General Court noted that, at the material time, there was a procedure under EU law, in Article 300(6) EC, that was specifically designed to prevent complications, both at EU level and in international law, resulting from an incorrect choice of legal basis in relation to the conclusion of an international agreement binding the European Union.

23 In that regard, the General Court, in paragraphs 55 and 56 of the judgment under appeal, underlined the fact that, at the time of the adoption of the decision at issue, the existence of different views concerning the legal basis of the proposed agreement was within the public domain, owing, inter alia, to the fact that a Parliament resolution of 17 September 2009 relating to the proposed agreement established the existence of such different views.

24 Lastly, in paragraph 57 of the judgment under appeal, the General Court noted that, in invoking the exception based on the protection of the public interest as regards international relations, the Council also made reference to the fact that the opinion of its Legal Service touched on certain points of the draft negotiating directives, knowledge of which could have been exploited by the other party to those negotiations. The General Court held that that consideration did indeed establish a risk that the European Union's interest in the field of international relations might be undermined, but that it justified the exception in question only with respect to those elements of document 11897/09 that related to the content of the negotiating directives.

25 In paragraphs 58 to 60 of the judgment under appeal, the General Court concluded from the foregoing considerations that, with the exception of those elements of document 11897/09 concerning the specific content of the proposed agreement or the negotiating directives which could reveal the strategic objectives pursued by the European Union in the negotiations on that agreement, the Council had not shown that the disclosure of other aspects of that document would specifically and actually have undermined the public interest in the field of international relations.

26 Consequently, the General Court upheld in part the first plea in law put forward by Ms in 't Veld in support of her action for annulment.

Arguments of the parties

27 The first ground of appeal raised by the Council alleges infringement, by the judgment under appeal, of the third indent of Article 4(1)(a) of Regulation No 1049/2001, and is in two parts.

28 By the first part of this plea, the Council, supported by the Commission, submits that the General Court misinterpreted that provision by considering that a disagreement as to the choice of the legal basis of the EU act regarding the conclusion of an international agreement is not capable of undermining the European Union's interest in the field of international relations.

29 According to the Council, since the legal basis of an EU act determines the decision-making procedure that applies, it necessarily affects the balance of powers between the institutions as well. Disputes concerning the applicable legal basis therefore remain, by their very nature, of very great political significance and are potentially highly contentious.

30 Referring to *Commission* v *Council*, 22/70 (EU:C:1971:32) and to Opinion 1/75 (EU:C:1975:145) and Opinion 2/00 (EU:C:2001:664), the Council maintains that the issue of the legal basis of an EU act concerning the conclusion of an international agreement is vitally important for the European Union's position in the negotiations on such an agreement, since uncertainty as to the determination of the legal basis of such an agreement has a negative impact on those negotiations.

31 The European Union's negotiating partners could exploit the differences of opinion between the institutions to the European Union's disadvantage. Moreover, any doubts as to the legal capacity of an institution to conduct negotiations would also have an impact on the European Union's credibility and effectiveness in international negotiations, and would adversely affect its ability to bring them to a successful conclusion.

32 As regards the reference to Article 300(6) EC, in the Council's submission this is wholly irrelevant. First, no institution had availed itself of this possibility in the present case. Secondly, the availability of that procedure does not in any way mitigate the harm caused by disclosing legal advice relating to a dispute about a legal basis.

33 In addition, the Parliament resolution of 17 September 2009 referred to by the General Court, which was adopted a few months after document 11897/09 was drawn up, had revealed the substance of divergent opinions unlawfully, since that information had never been disclosed by the Council under Regulation No 1049/2001. In those circumstances, the General Court was wrong to justify its decision on the basis, in particular, that the information had been made public by the European Parliament; to conclude otherwise would condone the disclosure of information in contravention of Articles 6 to 8 of that regulation. In any event, that resolution merely noted the existence of a difference of views between the institutions, which did not imply that the full content of the opinion in question had been put in the public domain.

34 By contrast, Ms in 't Veld, supported by the European Parliament, submits that the Council's arguments are based on a misreading of the judgment under appeal, in so far as the General Court did not consider that disagreement as to the legal basis of an international agreement could never undermine the public interest in the field of international relations. In fact the General Court merely stated that such a disagreement is not, in itself, a sufficient basis for concluding that there is a threat to that interest.

35 That error in the premiss of the Council's reasoning rendered its arguments in support of the first part of the first plea ineffective.

36 In any event, according to Ms in 't Veld, those arguments are unfounded. Whilst the decision of an institution to proceed on an incorrect basis could actually undermine the European Union's international relations, the fact remains that the disclosure of an opinion of that institution as to the legal basis of negotiations does not affect this.

37 Ms in 't Veld adds that the choice of legal basis is a purely internal issue, so that it is doubtful that the European Union's negotiating partners could use uncertainties as to its choice in order to obtain a better deal. On the contrary, the negotiating partners of the European Union in principle have an interest in ensuring that the proposed international agreement is concluded on a lawful basis, so as to reduce to a minimum the risk of any future challenge to that agreement, including on the grounds of lack of competence of the institutions to represent the parties to it. Likewise, the European Union's credibility in negotiations can be undermined only by the choice of a wrong legal basis and not by the debate on that choice.

38 Lastly, as regards the Parliament resolution of 17 September 2009, the General Court had referred to it only in so far as it confirmed not the content but the existence of differences of opinion between the Council and the European Parliament on the choice of an adequate legal basis for the purpose of conducting such negotiations, which was public knowledge and which also appeared in the decision at issue itself.

39 By the second part of its first ground of appeal, the Council, supported by the Commission, submits that where the institutions rely on one of the exceptions laid down in Article 4(1) of Regulation No 1049/2001 in order to justify a decision relating to access to a document, they have a wide margin of discretion; therefore the Court's review of the legality of such a decision should be limited.

40 However, in the present case, the General Court had undertaken a full review of the decision at issue. In particular, in paragraph 58 of the judgment under appeal, it had explicitly concluded that 'the Council has not shown how, specifically and actually, wider access to [document 11897/09] would have undermined the public

interest in the field of international relations'. According to the Council, that phrase, and in particular the words 'specifically and actually', demonstrate that the General Court did not just check whether the facts had been accurately stated and whether there had been a manifest error of assessment of the facts, but rather required the Council to prove that the disclosure of that document would lead to harm.

41 Ms in 't Veld, supported by the European Parliament, contends, in opposition to that argument, that it is the case-law of the Court of Justice that requires the institution concerned to provide proof that the disclosure of a document to which access has been refused would specifically and actually undermine one of the interests protected by Article 4 of Regulation No 1049/2001. The General Court had confined itself to examining the two arguments raised by the Council and by the Commission to justify the non-disclosure of document 11897/09 without infringing the Council's discretion, given that the arguments of those institutions referred to manifest errors of assessment which the General Court is empowered to review in the context of a limited review. The General Court had not, therefore, assessed the specific content of the proposed agreement or the negotiating directives, and therefore did not replace the Council's assessment with its own.

Findings of the Court

42 As regards the first part of the first plea put forward by the Council in support of its appeal, it must be held that that part of the plea is based on a misreading of the judgment under appeal.

43 Contrary to what may be inferred from the Council's and the Commission's reasoning, the General Court did not in any way rule out the possibility that the disclosure of a disagreement between institutions as to the choice of legal basis empowering an institution to conclude an international agreement on behalf of the European Union might undermine the protection of the interest protected by the third indent of Article 4(1)(a) of Regulation No 1049/2001.

44 On the contrary, the General Court merely stated, in paragraph 46 of the judgment under appeal, first of all, that the risk involved in disclosing positions taken within the institutions with regard to that choice does not in itself establish the existence of a threat to the European Union's interest in the field of international relations. It went on to point out, in paragraph 50 of that judgment, that the mere fear of disclosure of the existence of divergent opinions within the institutions regarding the appropriate legal basis on which to adopt a decision authorising the opening of negotiations on behalf of the European Union is not a sufficient basis for concluding that the public interest in the field of international relations may be undermined. Lastly, in paragraph 52 of that judgment, it ruled out the possibility that the existence of a legal debate as to the extent of the powers of the institutions with regard to the international activity of the European Union might give rise to a presumption of the existence of a threat to the credibility of the European Union in the negotiations for an international agreement.

45 Such an interpretation of the third indent of Article 4(1)(a) of Regulation No 1049/2001 is not incorrect in law.

46 It must be noted in that regard that Regulation No 1049/2001 is designed — as is stated in recital 4 and reflected in Article 1 — to confer on the public as wide a right of access as possible to documents of the institutions (*Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 28 and the case-law cited).

47 However, that right is none the less subject to certain limitations based on grounds of public or private interest. More specifically, and in reflection of recital 11, Article 4 of Regulation No 1049/2001 provides for a number of exceptions enabling the institutions to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (*Council* v *Access Info Europe*, EU:C:2013:671, paragraph 29 and the case-law cited).

48 Nevertheless, as such exceptions derogate from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (*Council* v *Access Info Europe*, EU:C:2013:671, paragraph 30 and the case-law cited).

49 As is apparent from the judgment under appeal, document 11897/09 contains an opinion of the Council's Legal Service, issued in the context of the adoption of the Council's decision authorising the opening of negotiations, on behalf of the European Union, in respect of the proposed agreement.

50 Ms in 't Veld does not dispute, moreover, that the exception to the right of access linked to the protection of the public interest as regards the European Union's international relations is capable of applying to such a document.

51 However, the mere fact that a document concerns an interest protected by an exception to the right of access laid down in Article 4 of Regulation No 1049/2001 is not sufficient to justify the application of that provision (see, to that effect, *Commission* v *Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 116).

52 Indeed, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, first explain how disclosure of that document could specifically and actually undermine the interest protected by the exception — among those provided for in Article 4 of Regulation No 1049/2001 — upon which it is relying. In addition, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical (*Council* v *Access Info Europe*, EU:C:2013:671, paragraph 31 and the case-law cited).

53 Moreover, if the institution applies one of the exceptions provided for in Article 4(2) and (3) of Regulation No 1049/2001, it is for that institution to weigh the particular interest to be protected through non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible, having regard to the advantages of increased openness, as described in recital 2 to Regulation No 1049/2001, in that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (*Council* v *Access Info Europe*, EU:C:2013:671, paragraph 32 and the case-law cited).

54 However, as is evident from paragraph 7 of the judgment under appeal, the Council did not provide anything in the decision at issue to demonstrate how disclosure of document 11897/09 would risk specifically and actually undermining the interest protected by the third indent of Article 4(1)(a) of Regulation No 1049/2001.

55 Furthermore, the arguments put forward by the Council do not establish that the General Court's reasoning in relation to the interpretation of that provision is incorrect in law.

56 In the first place, the case-law invoked by the Council does not reveal any general rule under which disclosure of the existence of a divergence of views among the institutions as to the legal basis on which one of them is empowered to open negotiations to conclude an international agreement and, therefore, the determination of the appropriate EU act for that purpose, would in itself undermine the public interest as regards the European Union's international relations.

57 First of all, in *Commission* v *Council* (EU:C:1971:32, paragraph 86), the Court held that to have suggested to third countries, at an advanced stage of the negotiations in respect of an international agreement, that there was now a new distribution of powers within the European Union could jeopardise the successful outcome of those negotiations. That does not correspond at all to the situation in which there is disclosure, at most, of a divergence of opinion between institutions as to the legal basis of a decision authorising the negotiation of an international agreement. Nor does it mean that the decision in question could, on that basis, be invalidated.

58 Next, in Opinion 1/75 (EU:C:1975:145), the Court referred to the negative international repercussions that might flow from a possible decision of the Court to the effect that an agreement is, either by reason of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaty. Lastly, in Opinion 2/00 (EU:C:2001:664, paragraphs 5 and 6), the Court emphasised that to proceed on an incorrect legal basis is liable to invalidate the act concluding the agreement, and that that is liable to create complications both at EU level and in international law. The Court's considerations in the context of those Opinions are set in the context of an examination of the objective of the procedure laid down in Article 300(6) EC (now Article 218(11) TFEU). In the present case, not only did the parties not avail themselves of that procedure for prior referral to the Court of Justice before the conclusion of the proposed agreement, but in any case the risk that the Council's decision on the opening of negotiations might be the subject of a judicial decision declaring it to be incompatible with the Treaties was not contemplated.

59 In the second place, the General Court's reference in paragraph 54 of the judgment under appeal to the procedure laid down under Article 300(6) EC is merely descriptive. Such a reference must clearly be understood as an indication that it is the Treaty itself which lays down a judicial procedure concerning the legal issues that

may be linked to the legal basis of a decision concerning the conclusion of an international agreement, a procedure which precedes the signing of the agreement and which is public, thereby ruling out any presumption that a discussion that is made public, concerning the correct legal basis for such a decision, can automatically specifically and actually undermine the public interest as regards international relations.

60 Lastly, in third place, in its assessment of the existence of a risk of a threat to that interest, the General Court was fully entitled, in paragraph 55 of the judgment under appeal, to take into consideration the fact that the main content of document 11897/09 had been made public in a Parliament resolution. In the context of that assessment, which concerns the risk that disclosure of a document would lead to harm to the interest protected under Article 4 of Regulation No 1049/2001, the fact that the earlier disclosure was not in accordance with that regulation is not relevant; the inferences to be drawn from such unlawfulness may have to be drawn in the context of other legal remedies provided for by the Treaties.

61 Having regard to the foregoing, it must be concluded that the first part of the first plea put forward by the Council in support of its appeal is unfounded.

62 By the second part of that plea, the Council submits that the General Court wrongly carried out a full review of the legality of the decision at issue, when it should have confined itself to a limited review, as is clear from the case-law of the Court of Justice.

63 It must be noted in that regard that while it is true that, as regards the scope of the judicial review of the legality of a decision of an institution refusing public access to a document on the basis of one of the exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation No 1049/2001, that institution must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest. The review by the Courts of the European Union of the legality of such a decision must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers (*Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 34).

64 However, where the institution concerned refuses access to a document the disclosure of which would undermine one of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, that institution remains obliged, as noted in paragraph 52 of the present judgment, to explain how disclosure of that document could specifically and actually undermine the interest protected by an exception provided for in that provision, and the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical.

65 In paragraph 58 of the judgment under appeal, the General Court found that, with the exception of those elements of document 11897/09 which concern the specific content of the proposed agreement or the negotiating directives, which could reveal the strategic objectives pursued by the European Union in the negotiations concerning that agreement, the Council had not shown how, specifically and actually, wider access to that document would have undermined the public interest in the field of international relations.

66 To that end, the General Court confined itself to verifying the statement of reasons for the decision at issue in that regard. After having pointed out, in paragraph 41 of the judgment under appeal, that the Council was maintaining that that decision referred to the risk associated with the disclosure of those elements of the analysis relating to the legal basis of the proposed agreement, even if that was not explicitly apparent from that decision, the General Court, on the basis of that consideration, then confined itself to declaring, in paragraphs 46 to 50 of that judgment, that that statement of reasons for the decision at issue was insufficient in law, since merely noting the existence of that risk did not in itself satisfy the requirement whereby the institution concerned must establish, specifically and actually, the existence of a threat to the European Union's interest in the field of international relations. The General Court ruled in that regard that, since the choice of the legal basis rests on objective factors and does not fall within the discretion of the institution, any divergence of opinion on that subject cannot be equated with a difference of opinion between the institutions as to matters which relate to the substance of the agreement, and which might have been liable to damage the interests of the European Union in the field of international relations.

67 By contrast, in paragraphs 57 and 58 of the judgment under appeal, the General Court considered that the statement of reasons put forward by the Council in support of the decision at issue was sufficient in itself as

regards the elements of document 11897/09 concerning the specific content of the proposed agreement or the negotiating directives, and concluded in paragraph 59 of that judgment that the Council had established the risk of a threat to the public interest in the field of international relations with regard to those elements only.

68 It follows from the foregoing that the General Court confined itself to reviewing the statement of reasons underpinning the decision at issue and did not, therefore, infringe the Council's discretion.

69 In the light of those considerations, the second part of the first plea put forward by the Council in support of its appeal is also unfounded; accordingly this plea must be rejected in its entirety.

*The second plea, alleging infringement of the second indent of Article 4(2) of Regulation No 1049/2001*

The judgment under appeal

70 In the light of its finding following examination of the first plea in law put forward by Ms in 't Veld in support of her action for annulment, the General Court limited its examination of the second plea, alleging infringement of the second indent of Article 4(2) of Regulation No 1049/2001, to the undisclosed parts of document 11897/09 only, and excluded those dealing with the specific content of the proposed agreement or the negotiating directives.

71 In paragraphs 69 and 70 of the judgment under appeal, first of all, the General Court held that the grounds of the decision at issue, according to which the Council and its Legal Service could be deterred from asking for and providing written opinions relating to sensitive issues if those opinions subsequently had to be disclosed, were not substantiated by any specific, detailed evidence which could establish in the present case the existence of a reasonably foreseeable and not purely hypothetical threat to the Council's interest in receiving frank, objective and comprehensive legal advice.

72 In paragraph 71 of the judgment under appeal, the General Court also held that, since the possibility that the public interest in the field of international relations could be undermined was provided for by a separate exception, covered by the third indent of Article 4(1)(a) of Regulation No 1049/2001, the mere fact that the legal advice contained in document 11897/09 concerned the field of the international relations of the European Union was not in itself sufficient for the application of the exception laid down in the second indent of Article 4(2) of that regulation.

73 In paragraphs 72 to 74 of the judgment under appeal, the General Court went on to note that, although it may be conceded that where international negotiations are still ongoing, enhanced protection is necessary in respect of the documents of the institution involved in those negotiations, in order to rule out any threat to the interests of the European Union during the process of those negotiations, that consideration has already been taken into account by the recognition of the wide discretion given to the institutions in applying the exception under the third indent of Article 4(1)(a) of Regulation No 1049/2001. In the context of the exception provided for in the second indent of Article 4(2) of that regulation, the Council cannot legitimately rely on the general consideration that a threat to a protected public interest may be presumed in a sensitive area, in particular concerning legal advice given during the negotiation process for an international agreement. Nor may a specific and foreseeable threat to the interest in question be established by a mere fear of disclosing to EU citizens differences of opinion between the institutions regarding the legal basis for the international activity of the European Union and, thus, of creating doubts as to the lawfulness of that activity.

74 Regarding the Council's argument concerning the risk of a threat to the ability of its Legal Service to defend, in court proceedings, a position on which it had issued a negative opinion, the General Court considered, in paragraph 78 of the judgment under appeal, that an argument of such a general nature could not justify an exception to the transparency required by Regulation No 1049/2001.

75 Lastly, according to the General Court, it was for the Council to balance the particular interest to be protected by non-disclosure of document 11897/09 against any overriding public interest justifying disclosure.

76 In that regard, the General Court, in paragraphs 81 to 95 of the judgment under appeal, noted that the requirements for transparency are greater where the Council is acting in its legislative capacity. Yet, initiating and conducting negotiations in order to conclude an international agreement fall, in principle, within the domain of

the executive. However, the General Court also added that application of the principle of the transparency of the decision-making process of the European Union could not be ruled out in international affairs, especially where a decision authorising the opening of negotiations involves an international agreement which may have an impact on an area of the European Union's legislative activity, such as the proposed agreement which concerns, in essence, the processing and exchange of information in the context of police cooperation, which may also affect the protection of personal data. In that regard, the fact that document 11897/09 concerns an area potentially covered by the exception referred to in the third indent of Article 4(1)(a) of Regulation No 1049/2001, relating to the protection of the public interest in the field of international relations, is irrelevant for the purposes of an assessment of the application of the separate exception, relating to the protection of legal advice, provided for in the second indent of Article 4(2) of that regulation. Moreover, the fact that the procedure for concluding the proposed agreement was still ongoing at the time of the adoption of the decision at issue is not conclusive in ascertaining whether, despite that risk, there exists any overriding public interest justifying disclosure. Indeed, the public interest in the transparency of the decision-making process would become meaningless if, as the Commission proposes, it were to be taken into account only in those cases where the decision-making process has come to an end.

77 On the basis of those considerations, the General Court upheld the second plea in law put forward by Ms in 't Veld in support of her action for annulment.

Arguments of the parties

78 The second ground of appeal raised by the Council alleges infringement of the second indent of Article 4(2) of Regulation No 1049/2001, and is in two parts.

79 By the first part of this plea, the Council, supported by the Commission, claims that the General Court failed to consider the specific nature of the subject-matter dealt with in the legal opinion contained in document 11897/09 and erroneously applied the 'specific and actual harm' standard.

80 In particular, the General Court had overlooked the specific circumstances of the present case, in particular the fact that the international negotiations on a sensitive matter relating to cooperation in the fight against terrorism were ongoing at the material time, and that the institutions were in disagreement regarding the choice of the legal basis of the proposed agreement. The fact that the General Court failed to take into consideration, for the purposes of the exception in the second indent of Article 4(2) of Regulation No 1049/2001, the subject-matter dealt with in the legal opinion was inconsistent with the case-law of the Court of Justice, according to which the area of activity to which a document relates and its sensitive nature are relevant for the purposes of applying the relative exceptions provided for in Article 4(2) and (3) of that regulation.

81 According to the Council, the General Court's insistence, in paragraph 73 of the judgment under appeal, on the fact that the interests related to the negotiation of the international agreement had already been taken into account 'by the recognition of the wide discretion given to the institutions in applying the exception under the third indent of Article 4(1)(a) of Regulation No 1049/2001' is based on the false premiss that an institution cannot rely on the same factual elements in order to justify the application of different exceptions under Article 4 of that regulation, since that premiss is supported neither by the wording of the regulation itself nor by the relevant case-law, the Council citing in support of its view *Commission* v *Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 55, and *Commission* v *Éditions Odile Jacob* EU:C:2012:393, paragraphs 113 to 115.

82 The Council adds in that regard that the General Court committed an error of law by requiring it to establish the existence of specific and actual harm to the protection of legal advice and to submit specific, detailed evidence proving the existence of that harm.

83 In any event, the Council had explained, in the decision at issue, how, in the present case, public access to document 11897/09 was likely to undermine the interest protected by the exception in the second indent of Article 4(2) of Regulation No 1049/2001. In particular, there was a real risk that the European Parliament might seek to use elements in the legal opinion in the political exchanges between the institutions in order to influence the pending negotiations. Moreover, the negotiations had still been pending at the material time, while the Court of Justice had never ruled in favour of disclosure of a legal opinion in such circumstances.

84 Lastly, the Council submits that the General Court's view, in paragraph 101 of the judgment under appeal, that 'the public interest in the transparency of the decision-making process would become meaningless if, as the Commission proposes, it were to be taken into account only in those cases where the decision-making process has come to an end', is inconsistent with the case-law of the Court of Justice, which admits that internal documents including legal opinions benefit from a higher level of protection while the relevant procedure is pending. It is also contrary to the wording of the second subparagraph of Article 4(3) of Regulation No 1049/2001, which provides for a specific exception regarding the protection of internal documents relating to a matter where the decision has not been taken by the institution.

85 According to Ms in 't Veld, supported by the European Parliament, the General Court in fact confined itself to considering whether the fact that the legal advice related to the European Union's international relations should have changed its analysis, and concluded in paragraph 71 of the judgment under appeal that this circumstance was not 'in itself' sufficient to justify a refusal based on the protection of legal advice.

86 In addition, the General Court's statement in paragraph 88 of the judgment under appeal that 'public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations' did not mean that legal advice in relation to the legal basis of those negotiations is 'particularly sensitive'. In fact, the judgment under appeal already allowed the Council to redact information from the opinion containing 'strategic elements of the negotiations' because it allowed the Council to redact 'those passages in the requested document containing the analysis of the specific content of the [proposed] agreement which could have revealed the strategic objectives pursued by the European Union in the negotiations'. The part of the judgment which concerns the exception relating to legal advice therefore discussed only the remainder of document 11897/09. The Council's arguments are therefore unfounded.

87 As to the General Court's alleged error in the application of the 'specific and actual harm' standard, Ms in 't Veld refers back to her arguments in that regard which were set out in the second part of the first plea.

88 Lastly, with regard to the alleged existence of exceptional circumstances in the present case, Ms in 't Veld maintains, in response to the Council's arguments, that, first, as regards the fact that disclosure should be refused on the ground that the legal advice related to an internal discussion in the Council on the commencement of the negotiations, that is not relevant, since all legal advice constitutes internal discussions on the topic on which they are prepared. Secondly, as regards the fact that the advice relates to the 'sensitive matter' of terrorism and terrorist-financing, the Council had not explained why this would be relevant for the purposes of justifying the restriction of access to an opinion concerning the legal basis for concluding an international agreement such as the proposed agreement. To the extent that the opinion describes the content of that agreement and the strategic objectives of the European Union, the General Court had decided that the Council was not obliged to disclose them. As to the other parts of the opinion — that is those concerning the legal basis on which to conclude the proposed agreement — their possibly sensitive nature would not depend on the subject-matter of the agreement itself. Thirdly, as regards the fact that the negotiations on that agreement were still ongoing, the General Court had rightly explained that if citizens were precluded from gaining access to internal documents of the institutions on the ground that the decision-making process had not been concluded, they would never be able to participate in that process. Furthermore, the Council's reference in that context to Article 4(3) of Regulation No 1049/2001 was irrelevant, since that exception had not been invoked in the decision at issue. Fourthly, in the light of the argument that disclosure of the document would increase the chances that the European Parliament 'might seek to use elements in the legal opinion in the political exchanges between the institutions in order to influence the pending negotiations', Ms in 't Veld notes that, as a Member of that Parliament, she had already been able to take cognisance of the content of document 11897/09 even before the decision at issue was adopted, and therefore, if she had wanted to use those elements in the negotiations with the Council, she could already have done so.

89 By the second part of its second plea, the Council, supported by the Commission, claims that the General Court made an error of law in applying, in the context of the present case, case-law of the Court of Justice according to which it is necessary, in the balancing exercise required by the last phrase of Article 4(2) of Regulation No 1049/2001, to take account of the fact that a legal opinion has been issued in the context of a legislative procedure (*Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374). The General Court's reasoning was based on the premiss that the same level of transparency should apply to the European Union's decision-making process during the negotiation of an international agreement affecting the European Union's legislative activity as applies to the legislative process of the European Union itself, which would amount

to an unwarranted extension of the judgment in *Sweden and Turco* v *Council* (EU:C:2008:374) beyond the legislative sphere.

90 In fact, there is an important distinction between cases where the European Union is acting in its legislative capacity and those where it is acting in its executive capacity in conducting international relations. Regulation No 1049/2001 itself recognised the special protection to be accorded to international relations, the confidentiality of which is protected by an exception set out in the third indent of Article 4(1)(a), a provision in respect of which the legislator had not, however, foreseen a balancing of the competing interests.

91 Although issues of democratic accountability and EU citizens' participation do arise in relation to the conclusion of an international agreement and its subsequent implementation by means of EU legislative acts, the Council maintains that that cannot be the case during the preceding negotiation phase, in so far as it is impossible to inform EU citizens at large without simultaneously informing the international partners with whom the European Union is negotiating.

92 Against that argument, Ms in 't Veld notes that the General Court allowed the Council to redact the passages in document 11897/09 discussing the specific content of the proposed agreement which could have revealed the strategic objectives of the European Union; therefore those arguments could not be relevant for the discussion of the legal basis of the agreement, as no 'strategic elements' derived from that.

93 In addition, the fact that the legal advice related to international relations and that Article 4(1) of Regulation No 1049/2001 contains a special 'mandatory' exception protecting the European Union's international relations does not remove the need to take into account the possibility of an overriding public interest in the context of Article 4(2) of that regulation. It is precisely because of the impact of the proposed agreement on the legislative activity of the European Union — that is the impact it has on rules that are binding on all EU citizens — that the need to confer greater legitimacy on the institutions and the increased confidence of citizens in them constitute an overriding interest.

94 Lastly, as regards the point raised by the Council that, in the context of ongoing negotiations, it is impossible to inform citizens at large without simultaneously informing the international partners with whom the European Union is negotiating, Ms in 't Veld states that, while that may be a relevant consideration for the refusal of public access to that part of document 11897/09 concerning the strategic objectives and negotiating tactics, that would not be the case as regards the remainder of that document, which concerns only the question of the legal basis.

Findings of the Court

95 As a preliminary point, it should be borne in mind that, according to the case-law of the Court, as regards the exception relating to legal advice laid down in the second indent of Article 4(2) of Regulation No 1049/2001, the examination to be undertaken by the Council when it is asked to disclose a document must necessarily be carried out in three stages, corresponding to the three criteria in that provision (*Sweden and Turco* v *Council*, EU:C:2008:374, paragraph 37).

96 Accordingly, the Council must first satisfy itself that the document which it is asked to disclose does indeed relate to legal advice. Secondly, it must examine whether disclosure of the parts of the document in question which have been identified as relating to legal advice would undermine the protection which must be afforded to that advice, in the sense that it would be harmful to an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice. The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical. Thirdly and lastly, if the Council takes the view that disclosure of a document would undermine the protection of legal advice as defined above, it is incumbent on the Council to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be undermined (see, to that effect, *Sweden and Turco* v *Council*, EU:C:2008:374, paragraphs 38 to 44).

97 By the first part of its second ground of appeal, the Council, in the first place, claims that the General Court failed to take account, when assessing the risk that the disclosure of document 11897/09 would undermine the interest protected by the second indent of Article 4(2) of Regulation No 1049/2001, of the fact that the content of that document was particularly sensitive, since it concerned ongoing international negotiations on a matter relating to cooperation in the fight against terrorism.

98 It is sufficient to note in that regard that the General Court did in fact take that point into consideration in paragraph 71 of the judgment under appeal, but ruled that that fact, in itself, was not sufficient for the application of the relevant exception to the right of access, since the possibility that the public interest in the field of international relations could be undermined is provided for by a separate exception.

99 That interpretation is not wrong in law.

100 First, it is true that an EU institution, when assessing a request for access to documents which it holds, may take into account more than one of the grounds for refusal set out in Article 4 of Regulation No 1049/2001 (see, to that effect, *Commission* v *Éditions Odile Jacob* EU:C:2012:393, paragraph 113, and *Commission* v *Agrofert Holding* EU:C:2012:394, paragraph 55).

101 However, by its arguments, the Council is really seeking to justify the application of a single ground for refusal — the protection of the public interest as regards international relations — by invoking to that end two different exceptions set out in Article 4 of Regulation No 1049/2001. Yet even on the assumption that identical facts could justify the application of two different exceptions, where — as in the present case — an applicant has unsuccessfully relied on the exception expressly laid down for the protection of international relations, that applicant cannot then be justified in referring to the same facts in order to establish a presumption that an exception protecting another interest — such as legal advice — should apply, without explaining how the disclosure of those documents could specifically and actually undermine that other interest.

102 Secondly, the General Court itself acknowledged in paragraph 88 of the judgment under appeal that public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations. In that regard, the Council's complaint that the General Court failed to draw the appropriate conclusions from that consideration has no basis in fact, since it is precisely on the basis of that consideration that the General Court, in paragraphs 35 to 39 of the judgment under appeal, considered that access to that part of document 11897/09 which contained the strategic elements of the negotiations could legitimately be refused on the basis of the exception set out in the third indent of Article 4(1)(a) of Regulation No 1049/2001.

103 In the second place, the Council claims that the General Court erroneously applied the 'specific and actual harm' standard.

104 In that regard, it is sufficient to note that, in the light of the case-law mentioned in paragraph 52 of the present judgment, the General Court correctly observed in paragraph 69 of the judgment under appeal that the risk that the disclosure of document 11897/09 could specifically and actually undermine an institution's interest in seeking and receiving frank, objective and comprehensive advice must be reasonably foreseeable and not purely hypothetical.

105 In order to provide the necessary explanations to establish the existence of such a risk, it is necessary, contrary to the Council's and Commission's assertions, to carry out the examination described in paragraph 96 of the present judgment, even if the document to which access is sought does not concern a legislative procedure.

106 Admittedly the Court emphasised, in paragraph 46 of the judgment in *Sweden and Turco* v *Council* (EU:C:2008:374), that the considerations, whereby it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 in the preamble to Regulation No 1049/2001, from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system, are of particular relevance where the Council is acting in its legislative capacity.

107 However, the Court of Justice has also stated that the non-legislative activity of the institutions does not fall outside the scope of Regulation No 1049/2001. Suffice it to note in that respect that Article 2(3) of that regulation states that the latter applies to all documents held by an institution, that is to say, drawn up or received by it and in its possession, in all areas of EU activity (see, to that effect, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraphs 87, 88 and 109).

108 In the third place, the Council claims that, contrary to the criticism levelled at it by the General Court, as set out in the judgment under appeal, it had explained why, in the light of the circumstances of the case, public access to document 11897/09 was likely to undermine the interest protected by the exception in Article 4 of Regulation No 1049/2001.

109 As regards, on the one hand, the Council's arguments as to the existence of a real risk of harm to the international negotiations, in that the European Parliament would seek to use the information contained in the legal opinion in order to influence the ongoing negotiations and to challenge the legality of the Council's decision on the conclusion of the proposed agreement, suffice it to note that that criticism overlooks the fact that the General Court decided that the Council was justified in refusing access to those parts of document 11897/09 that related to the specific content of the proposed agreement and the strategic objectives which the European Union pursued in the negotiations. However the Council did not provide any evidence to establish how the disclosure of the remainder of that document would have given rise to such risks.

110 On the other hand, as regards the Council's argument that the General Court failed to take account of the fact that the negotiations were ongoing at the time of the request for access to document 11897/09, it must be noted that the General Court did in fact explicitly examine that consideration in paragraphs 72 and 73 of the judgment under appeal, and concluded that it had already been taken into account by the recognition of the wide discretion given to the institutions in applying the exception under the third indent of Article 4(1)(a) of Regulation No 1049/2001.

111 In the light of the foregoing considerations, the first part of the second plea raised by the Council in support of its appeal must be rejected.

112 Given that the Council has, in the context of the first part of its second ground of appeal, unsuccessfully challenged the General Court's reasoning in the judgment under appeal — on the basis of which the General Court held, in paragraph 102 of that judgment, that the matters invoked in the decision at issue did not prove that the disclosure of document 11897/09 would have undermined the protection of legal advice —, there is no need to examine the second part of that plea, since the arguments set out are ineffective. That part of the plea relates to the General Court's alternative grounds, according to which the Council had in any event failed to ascertain whether there was an overriding public interest justifying fuller disclosure of document 11897/09 in accordance with the second indent of Article 4(2) of Regulation No 1049/2001.

113 It follows from all of the foregoing considerations that the second plea must also be rejected; accordingly the appeal must be dismissed in its entirety.

**Costs**

114 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs.

115 Under Article 138(1) of the Rules of Procedure, which applies to the procedure on an appeal by virtue of Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 140(1) of the Rules of Procedure provides that the institutions which have intervened in the proceedings are to bear their own costs.

116 Since the Council has been unsuccessful and Ms in 't Veld has applied for costs, the Council must be ordered to pay the costs. The European Parliament and the Commission shall bear their own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders the Council of the European Union to pay the costs;**

3. **Orders the European Parliament and the European Commission to bear their own costs.**

# Case T-540/15, *Emilio de Capitani v European Parliament*

In Case T-540/15,

**Emilio De Capitani,** residing in Brussels (Belgium), represented by O. Brouwer, J. Wolfhagen and E. Raedts, lawyers,

applicant,

v

**European Parliament,** represented initially by N. Görlitz, A. Troupiotis and C. Burgos, and subsequently by Görlitz, Burgos and I. Anagnostopoulou, acting as Agents,

defendant,

supported by

**Council of the European Union,** represented by E. Rebasti, B. Driessen and J.-B. Laignelot, acting as Agents,

and by

**European Commission,** represented by J. Baquero Cruz and F. Clotuche-Duvieusart, acting as Agents,

interveners,

APPLICATION pursuant to Article 263 TFEU seeking annulment of Decision A(2015) 4931 of the European Parliament of 8 July 2015, refusing to grant the applicant full access to the documents LIBE-2013-0091-02 and LIBE-2013-0091-03,

THE GENERAL COURT (Seventh Chamber, Extended Composition),

composed of M. Van der Woude, acting as President, V. Tomljenović, E. Bieliūnas, A. Marcoulli and A. Kornezov (Rapporteur), Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 20 September 2017,

gives the following

**Judgment**

**Background to the dispute**

1 By letter of 15 April 2015, the applicant, Mr Emilio De Capitani, submitted to the European Parliament, on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), an application for access to documents drawn up by, or made available to, the Parliament and containing the following information: 'justifications for seeking early agreements on the current co-decision procedures put forward in all committees; multi-column tables (describing the Commission proposal, the Parliamentary Committee orientation, the Council internal bodies suggested amendments and, if existing, suggested draft compromises) submitted to trilogues for ongoing co-decision procedures' ('the initial application').

2 On 3 June 2015, the Parliament replied to the applicant that, because of the very large number of documents covered by the initial application, its processing would create an excessive administrative burden, and therefore the application had to be rejected.

3 By letter of 19 June 2015, the applicant submitted to the Parliament an application under Article 7(2) of Regulation No 1049/2001, in which he limited the documents referred to in paragraph 1 above to the multi-column tables drawn up in connection with ongoing trilogues at the time of the initial request, relating to ordinary legislative procedures which have as their legal basis Title V of the TFEU ('Area of freedom, security and justice') and Article 16 TFEU relating to the protection of personal data ('the confirmatory application').

4 In Decision A(2015) 4931 of 8 July 2015, the Parliament informed the applicant that it had identified seven multi-column tables relating to the confirmatory application. Parliament granted full access to five of them. However, as regards the other two tables, namely those contained in documents LIBE-2013-0091-02 and LIBE-2013-0091-03 ('the documents at issue'), the Parliament granted access only to the first three columns of those tables, thereby refusing to disclose the fourth column. The applicant challenges the refusal to grant full access to the documents at issue ('the contested decision').

5 The tables in the documents at issue contain four columns, the first containing the text of the Commission's legislative proposal, the second the position of the Parliament as well as the amendments that it proposes, the third the position of the Council and the fourth the provisional compromise text (document LIBE-2013-0091-02) or the preliminary positions of the Presidency of Council in relation to the amendments proposed by the Parliament (document LIBE-2013-0091-03).

6 The Parliament based the contested decision on the first subparagraph of Article 4(3) of Regulation No 1049/2001 in so far as, first, the fourth column of the documents at issue contains provisional compromise texts and preliminary positions of the Presidency of Council, the disclosure of which would actually, specifically and seriously undermine the decision-making process of the institution as well as the inter-institutional decision-making process in the context of the ongoing legislative procedure and, second, no overriding public interest which outweighs the public interest in the effectiveness of the legislative procedure had been identified in the present case.

7 The Parliament based the alleged serious undermining of the decision-making process on the following reasons:

– the decision-making process would be actually, specifically and seriously affected by the disclosure of the fourth column of the documents at issue;

– the area to which the documents at issue relate — police cooperation — is a very sensitive area and disclosure of the fourth column of those documents would harm the trust between the Member States and the EU institutions and, therefore, their good cooperation and the Parliament's internal decision-making process;

– disclosure at a time when the negotiations are still ongoing would likely lead to public pressure being exerted on the rapporteur, shadow rapporteurs and political groups, since the negotiations concern the very sensitive issues of data protection and the management board of the European Union Agency for Law Enforcement Cooperation and Training (Europol);

– granting access to the fourth column of the documents at issue would make the Presidency of Council more wary of sharing information and cooperating with the Parliament negotiating team and, in particular, the rapporteur; moreover, the Parliament negotiating team would be forced, on account of the increased pressure from national authorities and interest groups, to make premature strategic choices of determining where to give in to the Council and where to demand more from the Presidency, which would 'complicate dramatically the finding of an agreement on a common position';

– the principle that 'nothing is agreed until everything is agreed' is very important for the proper functioning of the legislative procedure and, therefore, disclosure before the end of the negotiations of one element, even if it is itself not sensitive, may have negative consequences on all other parts of a dossier; furthermore, disclosure of positions that have not yet become final risks giving an inaccurate idea of what the positions of the institutions actually are;

– therefore, access to the whole of the fourth column should be refused until the text agreed has been approved by the co-legislators.

8 As regards the existence of a possible overriding public interest, the Parliament maintains that the principle of transparency and the higher requirements of democracy do not and cannot constitute in themselves an overriding public interest.

**Procedure and forms of order sought**

9 The applicant brought the present action by application lodged at the Court Registry on 18 September 2015.

10 By documents lodged at the Court Registry on 21 January 2016, the Council and the Commission sought leave to intervene in the present proceedings in support of the form of order sought by the Parliament. In their observations, neither the applicant nor the Parliament raised any objections to those interventions.

11 On 9 February 2016, the Parliament lodged its defence at the Court Registry.

12 By decision of the President of the Fourth Chamber of the Court of 22 March 2016, the Council and the Commission were granted leave to intervene in the present case.

13 The reply was lodged at the Court Registry on 4 April 2016.

14 On 13 and 17 May 2016, the Commission and the Council submitted their respective statements in intervention to the Court Registry.

15 On 17 May 2016, the rejoinder was also lodged at the Court Registry.

16 On 6 July 2016, the applicant sent the Court Registry his observations on the statements in intervention.

17 As the composition of the Chambers of the General Court had been altered, the present case was assigned to the Seventh Chamber of the Court and to a new Judge-Rapporteur.

18 On 5 April 2017, the Court decided to refer the case to the Seventh Chamber, Extended Composition.

19 As a Member of the Chamber was unable to sit in the present case, the President of the Court designated the Vice-President of the Court to complete the Chamber pursuant to Article 17(2) of the Rules of Procedure of the Court.

20 By order of 18 May 2017, the Seventh Chamber, Extended Composition, of the Court ordered the Parliament, by way of measures of inquiry, to provide it with a copy of the documents at issue, which was, pursuant to Article 104 of the Rules of Procedure, not communicated to the applicant.

21 On 23 May 2017, the Seventh Chamber, Extended Composition, of the Court put questions to the parties for written answer by way of measures of organisation of procedure.

22 On 14 June 2017, the Parliament complied with the measures of inquiry.

23 On the same day, the applicant, the Parliament, the Council and the Commission lodged at the Court Registry the replies to the measures of organisation of procedure.

24 The applicant claims that the Court should:

– annul the contested decision;

– order the Parliament to pay the costs.

25 The Parliament, supported by the Council and the Commission, contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

**Law**

**Interest in bringing proceedings**

26 In its reply of 14 June 2017 to the questions put by the Court by way of measures of organisation of procedure, the Parliament stated that it had received, on 23 October 2016, a request for access concerning, inter alia, the documents at issue and responded by making them available to the public through the register of parliamentary documents, given that the legislative procedure to which they related had been closed. The Parliament has cited the internet link providing access to those documents in footnote 3 of that reply.

27 At the hearing, the Council and the Commission claimed, in essence, that the applicant had thereby obtained satisfaction and thus lost his interest in bringing proceedings, and that there was therefore no need to adjudicate.

28 The applicant contends that he has not lost any interest in bringing proceedings.

29 It is settled case-law that an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested measure (judgment of 10 December 2010, *Ryanair* v *Commission*, T-494/08 to T-500/08 and T-509/08, EU:T:2010:511, paragraph 41; orders of 9 November 2011, *ClientEarth and Others* v *Commission*, T-120/10, not published, EU:T:2011:646, paragraph 46, and of 30 April 2015, *EEB* v *Commission*, T-250/14, not published, EU:T:2015:274, paragraph 14).

30 An applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible and must continue until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be likely, if successful, to procure an advantage for the party bringing it (judgment of 10 December 2010, *Ryanair* v *Commission*, T-494/08 to T-500/08 and T-509/08, EU:T:2010:511, paragraphs 42 and 43; orders of 9 November 2011, *ClientEarth and Others* v *Commission*, T-120/10, not published, EU:T:2011:646, paragraphs 47 and 49, and of 30 April 2015, *EEB* v *Commission*, T-250/14, not published, EU:T:2015:274, paragraphs 15 and 17).

31 It is therefore necessary to examine whether the making available to the public of the documents at issue on the electronic register of parliamentary documents, after the legislative procedure to which they belonged has come to an end, deprives of purpose the application for annulment of the contested decision.

32 In that regard, it follows from the case-law that the applicant retains an interest in seeking annulment of the act of an EU institution to prevent its alleged unlawfulness recurring in the future. That interest in bringing proceedings follows from the first paragraph of Article 266 TFEU, under which the institution whose act has been declared void is required to take the necessary measures to comply with the judgment of the Court. However, that interest in bringing proceedings can exist only if the alleged unlawfulness is liable to recur in the future independently of the circumstances which have given rise to the action brought by the applicant (see judgment of 7 June 2007, *Wunenburger* v *Commission*, C-362/05 P, EU:C:2007:322, paragraphs 50 to 52 and the case-law cited). That is the situation in the present case, since the applicant's allegation of unlawfulness is based on an interpretation of one of the exceptions provided for in Regulation No 1049/2001 that the Parliament is very likely to rely on again at the time of a new request, particularly since part of the grounds for the refusal to grant access set out in the contested decision are universally applicable to any application for access to the work of ongoing trilogues (see, to that effect, judgment of 22 March 2011, *Access Info Europe* v *Council*, T-233/09, EU:T:2011:105, paragraph 35).

33 Moreover, both the applicant's initial application and confirmatory application explicitly sought for a certain number of documents to be disclosed to him relating to on-going legislative procedures. Accordingly, the making available to the public of the documents at issue after the legislative procedure to which they relate has come to an end does not give full satisfaction to the applicant on account of the purpose of his applications, so that he retains an interest in seeking the annulment of the contested decision.

**Substance**

34 In support of his application, the applicant raises two pleas in law: the first alleges a misapplication of the first subparagraph of Article 4(3) of Regulation No 1049/2001; the second alleges a failure to state reasons in the contested decision. It is necessary to start by examining the first plea.

35 There are three parts to that plea. The first part alleges that the Parliament did not demonstrate to the requisite legal standard, in order to refuse to grant full access to the documents at issue, that access to those documents would specifically, effectively and in a non-hypothetical manner seriously undermine the legislative process. The content of the second part relates to disregard for the principle of the widest possible access to EU legislative documents. According to the third part, the Parliament wrongly refused to recognise the existence of an overriding public interest in the present case justifying full access to the documents at issue. It is appropriate to examine first and together, the first two parts of the first plea.

*Arguments of the parties*

36 In the first place, the applicant submits that access to the fourth column of the documents at issue could be refused to him only if the Parliament had shown that there was a reasonably foreseeable — and not purely hypothetical — likelihood of the decision-making process being seriously undermined, and how full access to both documents at issue could specifically and actually undermine the protected interest. He highlights the importance of access to the fourth column of those documents in a representative democracy so that citizens can ask their representatives to account for the choices they have made and, where appropriate, to express their views, by the means they consider appropriate, on agreements reached in the relevant trilogues.

37 First, he states that the Parliament did not specify why the legislative proposal at issue, solely because it falls within the area of police cooperation, was to be regarded as being very sensitive and did not justify how it would have harmed the trust between the Member States or between the institutions if the compromise text in the fourth column of the two documents at issue had been disclosed. He states that the fact that intense discussions may result or do result from a legislative proposal does not in any way mean that an issue is sensitive to the point of justifying its being kept secret.

38 Second, the applicant disputes the ground for refusal given by the Parliament in the contested decision that disclosure of the fourth column of the documents at issue would give rise to increased public pressure, since the positions of the different institutions, with the exception of the compromise text, are already known and the legislative process must, in principle, take place publicly and in a transparent manner. The temporary nature of the information contained in the fourth column of tables such as those contained in the documents at issue ('the trilogue tables'), which the public is perfectly capable of grasping, does in fact demonstrate the importance of access to the tables, in order to give the public an idea of how the legislative negotiations are conducted and an overview of the various proposals that have been or are being discussed.

39 Third, the applicant submits that the Parliament failed to provide reasons why it considered that the principle that 'nothing is agreed until everything is agreed' justifies not disclosing the fourth column of the trilogue tables and how that principle is related to a serious undermining of the decision-making process. The applicant adds that the efficiency of the legislative process as such is not an objective that is cited or contained in Article 294 TFEU.

40 In the second place, the applicant claims that Parliament failed to take into consideration, in the contested decision, the fact that, in the present case, it acted in its capacity as co-legislator and that, in such a case, in principle, access should have been as wide as possible, in the light of the specific nature of the legislative process recognised in recital 6 and Article 12(2) of Regulation No 1049/2001. He submits, moreover, that, in accordance with the case-law, the discretion left to the institutions not to disclose documents that are part of the normal legislative process is extremely limited or non-existent (judgment of 17 October 2013, *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 63). To hold otherwise would mean that, by using trilogues during the first reading, the legislative procedure provided for in the Treaty be circumvented and EU citizens prevented from accessing documents to which they would otherwise have access.

41 More generally, he notes that the democratic model adopted by the European Union has two dimensions, the first relating to the presence of a representative democracy, as set out in Article 10(1) and (2) TEU, which means that representatives may be held accountable to citizens for the legislative decisions they take, and the

second relating to the existence of a participatory democracy, which is enshrined in both Article 10(3) TEU and recital 2 of Regulation No 1049/2001, entitling EU citizens to participate in the decision-making process. The concept of transparency is relevant to both of those dimensions, although the Parliament has taken account of only the first of them.

42 In the third place, as regards the existence of a general presumption of non-disclosure of documents relating to the work of trilogues, as maintained by the Commission and the Council, the applicant, in his observations on the statements in intervention, contended that the presumption was contrary to the judgment of 16 July 2015, *ClientEarth* v *Commission* (C-612/13 P, EU:C:2015:486, paragraphs 77 and 78). In response to the measures of organisation of procedure set out in paragraph 21 above, concerning whether the trilogue tables satisfied the conditions required by the case-law in order to be covered by such a presumption, it replied in the negative, stating that the Court of Justice has allowed such general presumptions of non-disclosure only in relation to ongoing administrative or judicial proceedings. The trilogues do not qualify as such proceedings, but belong to the legislative process. Even if such a presumption could apply in the legislative field, it could not extend to trilogue tables, since they are currently the most crucial part in the EU legislative process.

43 First, the Parliament, supported by the Council and by the Commission, contends, in particular, that the organisation of a police force touches upon one of the core competences of the Member States and that some Member States may consider that cooperation in that area encroaches on their sovereignty. The sensitivity of the area concerned and of the legislative proposal in question is also illustrated by the extensive discussions that took place during negotiations on some of the aspects of that same proposal, such as the organisation of the management board of Europol or data protection. In that context, it becomes essential to ensure a time-limited non-disclosure of the fourth column of the trilogue tables.

44 The Parliament adds that the composition and powers of the management board of a newly created agency always give rise to intense discussions between the institutions. Similarly, there were considerable differences between the respective initial positions of the institutions concerning the protection and processing of data held by Europol. Given that those subjects have been a central feature throughout the trilogue procedure, which are merely examples of the parts of the legislative procedure at issue that were, according to the Parliament, objectively delicate, the contested decision, which seeks to maintain the confidentiality of the fourth column of the trilogue tables for a very brief period of time, was justified in the light of the effort made by the institutions in order to reach a satisfactory compromise.

45 The principle of 'nothing is agreed until everything is agreed' is thus merely a means of ensuring the internal and external consistency of the final compromise text. Early disclosure of the initial proposals of the institutions would significantly compromise the credibility of the legislative process and of the co-legislators themselves, who would have to be held accountable for a text that did not necessarily reflect their official position at that point in time.

46 Since the fourth column of the trilogue tables contains only provisional drafts of wording proposed during those trilogues and is not binding on the institutions, it cannot even be regarded as a preparatory document. Having full transparency during the legislative process and, in particular, during the trilogues would not only render the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001 devoid of purpose, it could also undermine the 'objectives of good governance and participation of civil society provided for in Article 15(1) TFEU'.

47 Furthermore, the Parliament notes that the proper functioning of the legislative procedure provided for in Article 294 TFEU enjoys Treaty protection and could, following a case-by-case examination, 'justify the application of the exception laid down in Article 4(3)' of Regulation No 1049/2001, which 'also refers to the well-functioning and thus the efficiency of the decision-making process'.

48 The Council and the Commission submit, in particular, that the applicant's claim, that the efficiency of the legislative process as such is not an objective that is cited or contained in Article 294 TFEU, is manifestly incorrect.

49 Second, the Parliament, supported by the Council and the Commission, relying on an interpretation of the same legal framework and case-law that differs from that of the applicant, submits that the concepts of 'wider access' and, more specifically, the 'widest possible access', as provided for in Article 1 of Regulation

No 1049/2001 cannot be regarded as equivalent to 'absolute access'. It submits that, with regard to the trilogue tables, it has a certain degree of discretion, the limit of which is defined by the proper functioning of the legislative process, as laid down in Article 294 TFEU and specified by the institutions, being jeopardised.

50 Moreover, the Parliament takes the view that the facts in the present case may be distinguished from those in the case giving rise to the judgment of 17 October 2013, *Council* v *Access Info Europe* (C-280/11 P, EU:C:2013:671), in that, inter alia, the negotiating mandates and the composition of the negotiating teams were voted on in public so that the institution's position was adopted in full transparency. It is only at a later stage of the procedure, when the legislative negotiations take place and a sensitive political balance is developing, that the Parliament considers that the fourth column of the trilogue table must be temporarily protected from any disclosure for a very limited period of time.

51 Third, in their statements in intervention, the Council and Commission proposed that the Court find there to be a general presumption of non-disclosure of the fourth column of trilogue tables while the trilogue procedure is ongoing. That presumption is dictated by the need to ensure that the integrity of the procedure be preserved by limiting intervention by third parties and to put the institutions in a position to perform effectively one of the powers entrusted to them by the Treaties. In response to the measures of organisation of procedure set out in paragraph 21 above, the Council added that, regardless of the subject matter and form of those tables, a general presumption of non-disclosure of the fourth column of the tables should be applied so as to ensure the viability of a potential compromise between institutions as well as the climate of trust in which the institutions are willing to make reciprocal concessions. In its view, the Court has already recognised the existence of a presumption despite the fact that it was not mentioned in the contested decision, as is clear from the judgment of 1 July 2008, *Sweden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 50).

52 In response to the measures of organisation of procedure set out in paragraph 21 above, the Parliament stated that it shared the view of the Commission and the Council that a general presumption of non-access to the fourth column of tables from ongoing trilogues should be recognised in order to preserve its efficiency at this very sensitive stage in interinstitutional negotiations.

*Findings of the Court*

53 In the contested decision, the Parliament refused to grant access to the fourth column of the documents at issue on the basis of the first subparagraph of Article 4(3) of Regulation No 1049/2001, claiming that disclosure of that column would actually, specifically and seriously undermine the decision-making process in question.

54 The applicant challenges the correctness of the contested decision on the ground that, in essence, the reasons underlying that decision are general and hypothetical, and are not such as to establish that there is a likelihood that the decision-making processes in question would be seriously undermined.

55 The Council and the Commission, on the other hand, ask the Court to find that there is a general presumption of non-disclosure according to which the institution concerned can refuse to grant access to the fourth column of ongoing trilogue tables. The Parliament, which did not rely on there being such a presumption in the contested decision, nevertheless endorsed that position.

56 In those circumstances, the Court considers it necessary to set out, as a preliminary matter, the case-law on the interpretation of Regulation No 1049/2001, followed by the principle characteristics of trilogues, before ascertaining, next, whether or not there is a general presumption that the institution concerned may refuse to grant access to the fourth column of ongoing trilogue tables. Lastly, in the event that the Court finds that there is no such presumption, it will consider whether the full disclosure of the documents at issue would seriously undermine the decision-making process in question within the meaning of the first paragraph of Article 4(3) of Regulation No 1049/2001.

– *Preliminary observations*

57 In accordance with recital 1 of Regulation No 1049/2001, that regulation reflects the wish to create a union in which decisions are taken as openly as possible and as closely as possible to the citizen. As is stated in recital 2 of Regulation No 1049/2001, the right of public access to documents of the institutions is related to the democratic nature of those institutions (judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and

C-52/05 P, EU:C:2008:374, paragraph 34, and of 17 October 2013, *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 27).

58 To that end, the purpose of Regulation No 1049/2001, as indicated in recital 4 and Article 1 thereof, is to give the public a right of access that is as wide as possible (judgments of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 61; of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 69, and of 17 October 2013, *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 28).

59 That right is nonetheless subject to certain limitations based on grounds of public or private interest (judgment of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 62). More specifically, and in accordance with recital 11 of Regulation No 1049/2001, Article 4 of the regulation lays down a series of exceptions authorising the institutions to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (judgments of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 70 and 71; 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 74; and 17 October 2013, *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 29).

60 One of the exceptions to such access is set out in the first subparagraph of Article 4(3) of Regulation No 1049/2001, which provides that 'access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution is to be refused where its disclosure would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'.

61 Since such exceptions derogate from the principle that the public should have the widest possible access to the documents, they must be interpreted and applied strictly (judgments of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 63; of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 36, and of 17 October 2013, *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 30).

62 In accordance with the principle that derogations are to be interpreted strictly, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by the exception — among those laid down in Article 4 of Regulation No 1049/2001 — upon which it is relying. Moreover, the risk of that undermining must be reasonably foreseeable and not purely hypothetical (judgments of 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 76; of 17 October 2013, *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 31, and of 15 September 2016, *Herbert Smith Freehills* v *Council*, T-710/14, EU:T:2016:494, paragraph 33). The mere fact that a document concerns an interest protected by an exception is not of itself sufficient to justify application of that exception (judgments of 13 April 2005, *Verein fürKonsumenteninformation* v *Commission*, T-2/03, EU:T:2005:125, paragraph 69; of 7 June 2011, *Toland* v *Parliament*, T-471/08, EU:T:2011:252, paragraph 29, and of 15 September 2016, *Herbert Smith Freehills* v *Council*, T-710/14, EU:T:2016:494, paragraph 32).

63 Therefore, the application of the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001 requires it to be established that access to the documents requested was likely to undermine specifically and actually the protection of the institution's decision-making process, and that the likelihood of that interest being undermined was reasonably foreseeable and not purely hypothetical (see, to that effect, judgment of 7 June 2011, *Toland* v *Parliament*, T-471/08, EU:T:2011:252, paragraph 70 and the case-law cited).

64 According to the case-law, the decision-making process is 'seriously' undermined, within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001 where, inter alia, the disclosure of the documents in question has a substantial impact on the decision-making process. The assessment of that serious nature depends on all of the circumstances of the case including, inter alia, the negative effects on the decision-making process relied on by the institution as regards disclosure of the documents in question (judgments of 18 December 2008, *Muñiz* v *Commission*, T-144/05, not published, EU:T:2008:596, paragraph 75; of 7 June 2011, *Toland* v *Parliament*, T-471/08, EU:T:2011:252, paragraph 71, and of 9 September 2014, *MasterCardand Others* v *Commission*, T-516/11, not published, EU:T:2014:759, paragraph 62).

65 That case-law cannot be interpreted as requiring the institutions to submit evidence to establish the existence of such a risk. It is sufficient in that regard if the contested decision contains tangible elements from which it can be inferred that the risk of the decision-making process being undermined was, on the date on which that decision was adopted, reasonably foreseeable and not purely hypothetical, showing, in particular, the existence, on that date, of objective reasons on the basis of which it could reasonably be foreseen that the decision-making process would be undermined if the documents were disclosed (see, to that effect, judgment of 7 June 2011, *Toland* v *Parliament*, T-471/08, EU:T:2011:252, paragraphs 78 and 79).

66 However, according to the case-law, it is open to the institution concerned to base its decisions on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature (judgments of 1 July 2008, *Swedenand Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 50; of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 54, and of 17 October 2013, *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 72).

67 While, in such a case, the institution concerned would not be under an obligation to carry out a specific assessment of the content of each of those documents, it must nevertheless specify on which general considerations it bases the presumption that disclosure of the documents would undermine one of the interests protected by the exception at issue, in the present case the exception laid down in the first paragraph of Article 4(3) of Regulation No 1049/2001 (see, to that effect, judgments of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 76, and of 17 October 2013, *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 73).

– *The nature of trilogues*

68 Given that the present dispute concerns access to the fourth column of tables drawn up for the purposes of ongoing trilogues, the Court considers it expedient to describe their essential characteristics. A trilogue is an informal tripartite meeting in which the representatives of the Parliament, the Council and the Commission take part. The aim of such exchanges is to reach a prompt agreement on a set of amendments acceptable to the Parliament and the Council, which must subsequently be approved by those institutions in accordance with their respective internal procedures. The legislative discussions conducted during a trilogue may concern both political and technical legal issues (see, to that effect, judgment of 15 September 2016, *Herbert Smith Freehills* v *Council*, T-710/14, EU:T:2016:494, paragraph 56).

69 Thus, the ordinary legislative procedure set out in Article 294 TFEU comprises three stages (first reading, second reading and third reading with conciliation), but it may be concluded after any one of those stages if the Parliament and the Council reach an agreement. Although the procedure may require up to three readings, the increased use of trilogues shows that an agreement is often reached during the first reading (judgment of 15 September 2016, *Herbert Smith Freehills* v *Council*, T-710/14, EU:T:2016:494, paragraph 57).

70 Trilogue meetings thus form an ‘established practice by which most EU legislation is adopted’ and are therefore regarded, by the Parliament itself, as ‘decisive phases of the legislative process’ (see Parliament resolution of 28 April 2016 on public access to documents, paragraphs 22 and 26). At the hearing, the Parliament stated that currently between 70 and 80% of the European Union’s legislative acts are adopted following a trilogue.

71 It is therefore important to recognise that the use of trilogues has over the years proved effective and flexible in that it has contributed significantly to increasing the possibilities for agreement at the various stages in the legislative process.

72 Furthermore, it is common ground that trilogue meetings are held in camera and that the agreements reached in those meetings, usually reflected in the fourth column of trilogue tables, are subsequently adopted, mostly without substantial amendment, by the co-legislators, as confirmed by the Parliament in its defence and at the hearing.

73 The Rules of Procedure of the Parliament, in the version applicable at the date on which the contested decision was adopted, provide in that regard certain rules governing the Parliament’s participation in trilogues. Those rules are laid down in Rules 73 and 74 of Chapter 6, headed ‘Conclusion of the legislative procedure’, of

the Rules of Procedure and Annexes XIX and XX thereof, which clearly shows that, according to the Rules of Procedure of the Parliament, trilogues are, indeed, part of the legislative process.

74 Moreover, it is clear from paragraph 27 of Parliament resolution of 28 April 2016 (see paragraph 70 above) that trilogue documents 'are related to legislative procedures and cannot, in principle, be treated differently from other legislative documents'.

75 Accordingly, and contrary to what the Council maintains in paragraph 43 of its statement in intervention, the Court finds that the trilogue tables form part of the legislative process.

– *The existence of a general presumption of non-disclosure of the fourth column of tables from ongoing trilogues*

76 It is now appropriate to determine, notwithstanding the fact that the documents at issue must be regarded as part of the legislative process, whether there is a general presumption of non-disclosure of the fourth column of tables from ongoing trilogues.

77 In that regard, first, it must be pointed out that primary EU law establishes a close relationship that, in principle, exists between legislative procedures and the principles of openness and transparency (see, to that effect, Opinion of the Advocate General Cruz Villalón in the case *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:325, points 39 and 40). In particular, Article 15(2) TFEU lays down that 'the Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act'.

78 In addition, it is precisely openness in the legislative process that contributes to conferring greater legitimacy on the institutions in the eyes of EU citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole (see, to that effect, judgment of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 59).

79 The Court of Justice has already had occasion to point out that, in the context of the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001, the terms 'decision' and 'decision-making process' of the institution concerned are to be seen in a particular light where the Council is acting in a legislative capacity (see, to that effect, judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 46, and of 22 March 2011, *Access Info Europe* v *Council*, T-233/09, EU:T:2011:105, paragraph 57).

80 Although, in general, giving the public the widest possible right of access, referred to in paragraph 58 above, entails that the public must have a right to full disclosure of the requested documents, the only means of limiting that right being the strict application of the exceptions provided for in Regulation No 1049/2001, those considerations are clearly of particular relevance where those documents are part of the European Union's legislative activity, a fact reflected in recital 6 of Regulation No 1049/2001, which states that even wider access must be granted to documents in precisely such cases. Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights (see, to that effect, judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 46; of 17 October 2013, *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 33, and of 15 September 2016, *Herbert Smith Freehills* v *Council*, T-710/14, EU:T:2016:494, paragraph 35).

81 The principles of publicity and transparency are therefore inherent to the EU legislative process.

82 Second, it must be found that the case-law of the Court of Justice has found there to be a general presumption of non-disclosure only in relation to a set of documents which were clearly defined by the fact that they all belonged to a file relating to ongoing administrative or judicial proceedings (judgment of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraphs 77 and 78), but, until present, never in respect of the legislative process. Moreover, even in respect of administrative proceedings, the presumptions upheld by the EU Courts have been concerned with specific proceedings (see, regarding the review of State aid,

judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraphs 54 and 55; regarding the review of mergers, judgment of 28 June 2012, *Commission* v *Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 123, and, regarding Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1), judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 93), whereas trilogue works cover, by definition, all fields of legislative activity.

83 Lastly, although the Council and the Commission contend that the effectiveness and integrity of the legislative process as set out in Article 13(1) TEU and Article 294 TFEU entitle the institutions to rely on a general presumption of non-disclosure of the fourth column of tables from ongoing trilogues, it should be noted that neither of those articles establishes such a presumption and that there is nothing in their wording to suggest the interpretation advanced by the intervening institutions, particularly since the effectiveness and integrity of the legislative process cannot undermine the principles of publicity and transparency which underlie that process.

84 Accordingly, the Court finds that no general presumption of non-disclosure can be upheld in relation to the fourth column of trilogue tables concerning an ongoing legislative procedure.

– *The existence of serious prejudice to the decision-making process*

85 Since the Parliament cannot base the contested refusal of access on a general presumption of non-disclosure, it remains to be examined whether that institution complied with its obligation to provide, in accordance with the case-law set out in paragraphs 62 and 63 above, explanations as to how full access to the documents at issue could undermine specifically and actually the interest protected by the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001, the likelihood of which must be reasonably foreseeable and not purely hypothetical.

86 As a preliminary matter, it is important to note that the present action does not seek to obtain direct access to ongoing trilogue work within the meaning of Article 12 of Regulation No 1049/2001. Indeed, the present dispute is concerned solely with access to the fourth column of the documents at issue, which may take place only on specific request lodged pursuant to that regulation.

87 In the contested decision, the Parliament stated, in particular, that the tables at issue were drawn up for the purposes of ongoing trilogues, relating to a matter where a final decision had not yet been adopted either by it or by the co-legislators, so that the decision-making process ought to be regarded as ongoing. According to the Parliament, that process would be 'actually, specifically and seriously' affected by the disclosure of the fourth column of the tables at issue on account of the fact that the area of police cooperation, to which those tables related, was very sensitive, in particular as regards data protection and the management board of Europol. The Parliament also relies on the foreseeable risk that disclosing the Presidency of Council's position before the end of the negotiations would be damaging to the good cooperation between institutions and affect the negotiation process, with the prospect of the loss of mutual trust and a revision of working methods, the risk of which could be prevented only after an agreement on all texts had been reached. It also stated that disclosure of the fourth column of the tables at issue would most probably lead to increased public pressure on the persons involved in the negotiations, rendering the adoption of a common position impossible or, at least, considerably more difficult. The Parliament thus invoked the principle that 'nothing is agreed until everything is agreed' to show that disclosure of one element, even if in itself not sensitive, could have negative consequences on all other parts of a dossier. The Parliament therefore concluded that access to the entirety of the fourth column of the tables at issue should be rejected 'until the text agreed has been approved by both parties'.

88 It follows from the foregoing, first, that the Parliament relied on specific considerations concerning an ongoing legislative procedure relating to the very sensitive nature of the area of police cooperation and, in particular, data protection in the context of such cooperation as well as the composition of Europol's management board. Second, the Parliament also relied on considerations of a general nature based, in essence, on the provisional nature of the information contained in the fourth column of the trilogue tables, the climate of trust during trilogue discussions, the risk of external pressure liable to affect the conduct of ongoing discussions, safeguarding its space to think and the temporary nature of the refusal to grant access.

89 In the first place, as far as concerns the specific considerations in the contested decision relating to the legislative procedure in question, it must first be pointed out that the fact, mentioned in the contested decision,

that the documents at issue relate to the area of police cooperation cannot per se suffice in demonstrating the special sensitivity of the documents. To hold otherwise would mean exempting a whole field of EU law from the transparency requirements of legislative action in that field.

90 Second, as regards the assertion that the policies on the management and storage of data held by Europol are of a particularly sensitive nature, the Court notes that the documents at issue concern a proposal for a draft regulation, of general scope, binding in all of its elements and directly applicable in all the Member States, which naturally concerns citizens, all the more so since at issue here is a legislative proposal directly affecting the rights of EU citizens, inter alia their right to personal data protection (see, to that effect, judgment of 22 March 2011, *Access Info Europe* v *Council*, T-233/09, EU:T:2011:105, paragraph 77), from which it follows that the legislative proposal could not be regarded as sensitive by reference to any criterion whatsoever (see, to that effect, judgment of 17 October 2013, *Council* v *Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 63).

91 Third, as regards the assertion that the discussions surrounding the composition of Europol's management board are of a very sensitive nature, the Court points out that this matter seems rather institutional or organisational in nature. Although such a matter may prove delicate, or even difficult, on account of the interests at stake, it cannot, however, be considered to be particularly sensitive in the absence of concrete evidence supporting such an assertion.

92 Fourth, it is clear from the complete version of the documents at issue, now published by the Parliament (see point 26 above), that the provisional proposals or agreements entered into the fourth column of those documents concerned abstract and general matters without any mention whatsoever of sensitive information relating, for example, to the fight against terrorism or organised crime or concerning, in any way, police data in respect of persons, operations or concrete projects.

93 It is clear, in particular, from document LIBE-2013-0091-02 that the text contained in the fourth column is an example of classic legislative work concerning the organisation of an agency, namely Europol, the definition of its relationship with national authorities and of its tasks, the composition of its management board, etc. That column contains rules of a general nature, showing the agreed drafting amendments, indication of the points to be discussed at a later date or the subject of further discussion, shown by the term 'idem' at certain points, and several empty fields.

94 As far as concerns document LIBE-2013-0091-03, the fourth column also does not appear to contain any sensitive information and does no more than provide a limited number of general rules as well as several indications, such as 'the Parliament is invited to reconsider its amendment', 'the amendments by the Parliament may be considered' or 'the amendment by the Parliament could possibly be reflected in a recital', and several empty fields.

95 In addition, the information included in the fourth column of the documents at issue does not appear, in the circumstances of the present case, inherently more 'sensitive' than the information contained in the first three columns to which access was granted to the applicant in the contested decision.

96 Lastly, it should be noted that Regulation No 1049/2001 lays down a specific procedure in Article 9 where the document to which access is requested may be regarded as a 'sensitive document' (judgment of 22 March 2011, *Access Info Europe* v *Council*, T-233/09, EU:T:2011:105, paragraph 78), of which the Parliament did not, however, avail itself in the present case.

97 Accordingly, whilst relating to a matter of some importance, certainly characterised by both political and legal difficulty, the content of the fourth column of the documents at issue does not seem to be particularly sensitive to the point of jeopardising a fundamental interest of the European Union or of the Member States if disclosed (see, to that effect, judgment of 22 March 2011, *Access Info Europe* v *Council*, T-233/09, EU:T:2011:105, paragraph 78).

98 In the second place, as far as concerns the considerations of a general nature advanced in the contested decision, first, it must be noted, as regards the assertion that access, during a trilogue, to the fourth column of the documents at issue would increase public pressure on the rapporteur, shadow rapporteurs and political groups, that, in a system based on the principle of democratic legitimacy, co-legislators must be held accountable for their actions to the public. If citizens are to be able to exercise their democratic rights they must be in a position to

follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information (judgment of 22 March 2011, *Access Info Europe* v *Council*, T-233/09, EU:T:2011:105, paragraph 69). Furthermore, Article 10(3) TEU states that every citizen is to have the right to participate in the democratic life of the Union and that decisions are to be taken as openly and as closely as possible to the citizen. Thus, the expression of public opinion in relation to a particular provisional legislative proposal or agreement agreed in the course of a trilogue and reflected in the fourth column of a trilogue table forms an integral part of the exercise of EU citizens' democratic rights, particularly since, as noted in paragraph 72 above, such agreements are generally subsequently adopted without substantial amendment by the co-legislators.

99 Although it has been recognised in the case-law that the risk of external pressure can constitute a legitimate ground for restricting access to documents related to the decision-making process, the reality of such external pressure must, however, be established with certainty, and evidence must be adduced to show that there is a reasonably foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure (see, to that effect, judgment of 18 December 2008, *Muñiz* v *Commission*, T-144/05, not published, EU:T:2008:596, paragraph 86). There is no tangible evidence in the case file establishing, in the event of disclosure of the fourth column of the documents at issue, the reality of such external pressure. Therefore, nothing in the case file before the Court suggests that, as regards the legislative procedure in question, the Parliament could reasonably expect there to be a reaction beyond what could be expected from the public by any member of a legislative body who proposes an amendment to draft legislation (see, to that effect, judgment of 22 March 2011, *Access Info Europe* v *Council*, T-233/09, EU:T:2011:105, paragraph 74).

100 Second, as regards the provisional nature of information contained in the fourth column of trilogue tables, since its content is liable to evolve in line with the state of progress of the trilogues, the Court notes that the preliminary nature of that information does not per se justify the application of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001, since that provision does not draw a distinction according to the state of progress of the discussions. That provision envisages in general the documents relating to a question where a 'decision has not been taken' by the institution concerned, by contrast with the second subparagraph of Article 4(3) of that regulation, which envisages the situation where a decision has been taken by the institution concerned. In the present case, the preliminary nature of the ongoing discussions and the fact that no agreement or compromise has yet been reached concerning some of the proposals suggested do not therefore establish that the decision-making process has been seriously undermined (judgment of 22 March 2011, *Access Info Europe* v *Council*, T-233/09, EU:T:2011:105, paragraph 76).

101 In that regard, it is irrelevant whether the documents at issue were produced or received at an early, late or final stage of the decision-making process. In the same way, the fact of the documents having been produced or received in a formal or informal context has no effect on the interpretation of the exception laid down in the first sentence of Article 4(3) of Regulation N° 1049/2001 (see, to that effect, judgment of 15 September 2016, *Herbert Smith Freehills* v *Council*, T-710/14, EU:T:2016:494, paragraph 48).

102 Moreover, the Court has already had occasion to observe that a proposal is, by its nature, intended to be discussed and is not liable to remain unchanged following such discussion. Public opinion is perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently (judgment of 22 March 2011, *Access Info Europe* v *Council*, T-233/09, EU:T:2011:105, paragraph 69). For precisely the same reasons, an applicant for access to documents of an ongoing trilogue will be fully aware of the preliminary character of that information. Similarly, he will be perfectly able to grasp that, in line with the principle that 'nothing is agreed until everything is agreed', the information contained in the fourth column is liable to be amended throughout the course of the trilogue discussions until an agreement on the entire text is reached.

103 Third, as regards the ground relating to a potential loss of trust between the institutions of the European Union and the likely deterioration of cooperation between them and, in particular, with the Presidency of Council, it must be borne in mind that the EU institutions are required to comply with the second sentence of Article 13(2) TEU, which states that 'the institutions shall practice mutual sincere cooperation' (judgment of 16 July 2015, *Commission* v *Council*, C-425/13, EU:C:2015:483, paragraph 64). That cooperation is of particular importance for the legislative activity of the European Union, which requires there to be a close process of collaboration between the institutions concerned. Thus, where the responsibility for conducting an EU legislative procedure is conferred on several institutions, they are required, in accordance with the duty of sincere cooperation also set out in the first subparagraph of Article 4(3) TEU, to act and cooperate so that the procedure can be conducted effectively, which implies that any deterioration in the confidence incumbent on the institutions would constitute a failure to fulfil that duty.

104 It must be observed, on the one hand, that it is precisely in accordance with the principle of sincere cooperation that, in this case, the Parliament consulted, as it stated at the hearing, the Council and the Commission before adopting the contested decision, but that, on the other hand, in support of the assertion of the principle set out in paragraph 103 above, the Parliament has not produced any tangible evidence, which implies that the alleged risk is hypothetical in the absence of any specific evidence capable of demonstrating that, as regards the legislative procedure in question, access to the fourth column of the documents at issue would have undermined the loyal cooperation incumbent on the institutions concerned. Moreover, since in the course of trilogues the institutions express their respective positions on a given legislative proposal, and accept that their position could thus evolve, the fact that those elements are then disclosed, on request, is not per se capable of undermining the mutual loyal cooperation which the institutions are required to practice pursuant to Article 13 TEU.

105 Fourth, as regards the need, emphasised by the Parliament, the Council and the Commission in the context of the present proceedings, to have space to think, the Court points out that trilogues are part of the legislative process, as has been stated in paragraph 75 above, and that trilogues represent, in the words of Parliament itself, 'a substantial phase of the legislative procedure, and not a separate "space to think"' (Parliament resolution of 14 September 2011 on public access to documents, paragraph 29).

106 Moreover, as the Parliament stated at the hearing, prior to the entry of the compromise text into the fourth column of trilogue tables, discussions may take place during meetings for the preparation of such text between the various participants, so that the possibility of a free exchange of views is not called into question, particularly since, as noted in paragraph 86 above, the present case does not concern the issue of direct access to the work of the trilogues, but only that of access to documents drawn up in the context of those trilogues following a request for access.

107 Fifth, as regards the ground relating to the temporary character of the refusal, owing to the fact that, once the work is completed, full access to the trilogue tables could, depending on the case, be granted, it must be noted, first of all, that the work of the trilogues could be prolonged over significant periods of time. The applicant thus stated at the hearing, without being contradicted, that the duration of trilogues lasted on average seven to twelve months. There could therefore be a significant period of time during which trilogue work remains a secret from the public. In addition, the duration of that work remains open-ended in so far as it varies according to each legislative procedure.

108 Next, the minutes which the Parliament's negotiating team participating in the trilogues is required to draw up for the next meeting of the relevant parliamentary committee, pursuant to the second subparagraph of Rule 73(4) of the Rules of Procedure of the Parliament, are not capable of remedying the lack of transparency in trilogue work during that period of time. In response to the measures of organisation of procedure, the Parliament explained that these minutes were characterised by 'great flexibility in their form' and that '[there] [was] no uniform practice as regards the form and disclosure of the minutes reporting between the various parliamentary committees'. Such minutes can thus take the form of a communiqué from the president or rapporteur of the relevant commission, addressed to all members or only to the coordinators' meeting, the latter of which is generally held in camera, or generally of an oral communiqué, or even a brief note in the news bulletin of that committee. The absence of detailed and uniform minutes, and the variable disclosure thereof, do not therefore mitigate the lack of transparency of ongoing trilogue work.

109 Lastly, as has been stated in paragraph 70 above, the work of the trilogues constitutes a decisive stage in the legislative process, since the agreement eventually reached is liable to be adopted, mostly without substantial amendment, by the co-legislators (see paragraph 72 above). For those reasons, the refusal to grant the access at issue cannot legitimately be justified by its temporary character, without exception and without distinction. Such a blanket justification, capable of being applied to all trilogues, could de facto operate to all intents and purposes as a general presumption of non-disclosure, reliance on which has, however, been rejected (see paragraphs 76 to 84 above).

110 The Court notes, moreover, that, in its resolution of 11 March 2014 on public access to documents, the Parliament called on the Commission, the Council and itself 'to ensure the greater transparency of informal trilogues, by holding the meetings in public, publishing documentation including calendars, agendas, minutes, documents examined, amendments, decisions taken, information on Member State delegations and their positions and minutes, in a standardised and easily accessible online environment, by default and without prejudice to the exemptions listed in Article 4(1) of Regulation No 1049/2001'.

111 Having regard to all the foregoing, none of the grounds relied on by the Parliament, considered separately or as a whole, demonstrates that it was reasonably foreseeable and not purely hypothetical that full access to the documents at issue was likely to undermine, specifically and actually, the decision-making process at issue within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001.

112 However, the Court notes that the applicant's assertion that the Parliament does not have any discretion to refuse to grant access to documents drawn up in the framework of ongoing trilogues cannot be upheld. That line of argument amounts to denying the institutions the possibility of justifying a refusal to grant access to legislative documents on the basis of the exception set out in the first subparagraph of Article 4(3) of Regulation No 1049/2001, despite the fact that that exception does not exclude the legislative process from its scope. Thus, it remains open to the institutions to refuse, on the basis of that provision, to grant access to certain documents of a legislative nature in duly justified cases.

113 It follows from all the foregoing that the Parliament infringed the first subparagraph of Article 4(3) of Regulation No 1049/2001 by refusing, in the contested decision, to disclose, whilst the procedure was ongoing, the fourth column of the documents at issue on the ground that to do so would seriously undermine its decision-making process.

114 Consequently, it is necessary to annul the contested decision without there being any need to determine whether there is an overriding public interest justifying the disclosure of that information or to consider the second plea, alleging breach of the obligation to state reasons (see, to that effect, judgment of 22 March 2011, *Access Info Europe* v *Council*, T-233/09, EU:T:2011:105, paragraph 85).

**Costs**

115 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Parliament has been unsuccessful, it must be ordered to bear its own costs and to pay those of the applicant, in accordance with the form of order sought by it.

116 In accordance with Article 138(1) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs. The Council and the Commission must therefore bear their own costs.

On those grounds,

THE GENERAL COURT (Seventh Chamber, Extended Composition)

hereby:

1. **Annuls Decision A(2015) 4931 of the European Parliament of 8 July 2015 in so far as it refuses to grant Mr Emilio De Capitani full access to documents LIBE-2013-0091-02 and LIBE-2013-0091-03;**

2. **Orders the Parliament to bear its own costs and to pay those incurred by Mr De Capitani;**

3. **Orders the Council of the European Union and the European Commission to bear their own costs.**

LECTURE 7: EU-SPECIFIC FUNDAMENTAL RIGHTS: OPENNESS AND TRANSPARENCY (II)

Last week, we introduced the specific right to transparency and the ways in which the European Union implemented that right throughout its legal order. In this lecture, we will further develop the right to transparency as shaped by the EU legal order. In doing so, we will focus on the transparency at other institutions, most notably the European Central Bank and the Court of Justice itself. It is remarkable to note, in that context, that the right to transparency is seemingly interpreted even stricter in the context of those two institutions. This lecture questions why that may be the case and explores how future developments are likely to take shape in this field.

*Materials to read:*

- Decision of the Court of Justice of the European Union of 11 October 2016 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions, [2016] *O.J.* C445/3.
- Decision 2004/258/EC of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3), [2004] *O.J.* L80/42.
- General Court, 29 November 2012, Case T-590/10, *Gabi Thesing and Bloomberg Finance v European Central Bank*, ECLI:EU:T:2012:635.
- A. Alemanno, "Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy", 32 *European Law Review* (2014), 72-90 (via eCampus).
- P. Van Cleynenbreugel, 'Confidentiality behind transparent doors : the European Central Bank and the EU law principle of openness', *Maastricht Journal of European and Comparative law (2018)* (via eCampus)

## *Access to Court of Justice documents decision*

DECISION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

of 11 October 2016

concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions

(2016/C 445/03)

THE COURT OF JUSTICE OF THE EUROPEAN UNION,

Having regard to Article 15(3) of the Treaty on the Functioning of the European Union,

Having regard to the opinion of the Administrative Committee of 26 September 2016,

Considering that it is necessary to set out rules concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions,

HEREBY ADOPTS THE PRESENT DECISION:

Article 1

Scope

1. The present Decision shall apply to all documents held by the Court of Justice of the European Union, that is to say, documents drawn up or received by it and in its possession, as part of the exercise of its administrative functions.

2. This Decision applies without prejudice to public rights of access to the documents of the Court of Justice of the European Union which might follow from instruments of international law or acts implementing them.

Article 2

Beneficiaries

1. Any citizen of the European Union and any natural or legal person residing or having its registered office in a Member State has a right of access to the documents of the Court of Justice of the European Union listed in Article 1(1) subject to the conditions laid down in the present Decision.

2. The Court of Justice of the European Union may, subject to the same conditions, grant access to documents to any natural or legal person not residing or having its registered office in a Member State.

Article 3

Exceptions

1. The Court of Justice of the European Union shall refuse access to a document where disclosure would undermine the protection of:

(a) public interest, as regards:

— public security,

— defence and military matters,
— international relations,
— the financial, monetary or economic policy of the European Union or a Member State;

(b) the privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data.

2. The Court of Justice of the European Union shall refuse access to a document where disclosure would undermine the protection of:

— commercial interests of a natural or legal person, including intellectual property,
— court proceedings and legal advice,
— the purpose of inspections, investigations and audits.

3. Access to a document drawn up by the Court of Justice of the European Union for internal use or received by it, which relates to a matter on which the decision has not been taken by it, shall be refused if disclosure of the document would seriously undermine the decision-making process of the Court of Justice of the European Union.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations carried out within the Court of Justice of the European Union or outside thereof if the Court has participated in them shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the decision-making process of the Court of Justice of the European Union.

4. The exceptions set out in paragraphs 2 and 3 shall not apply if there is an overriding public interest in disclosure of the document concerned.

5. If only parts of the requested document are covered by one or more of the exceptions set out in paragraphs 1, 2 and 3, the remaining parts of the document shall be disclosed.

6. The exceptions as laid down in paragraphs 1, 2 and 3 shall apply only for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests, the exceptions may, if necessary, continue to apply after this period.

7. The present Article shall apply without prejudice to the provisions of Article 9.

Article 4

Submission of initial applications

1. Applications for access to a document of the Court of Justice of the European Union must be made in one of the official languages of the European Union on a form which is available on the internet site of the Court of Justice of the European Union. It must be sent preferably electronically in accordance with the instructions set out on the abovementioned internet site or, in exceptional circumstances, by post or by fax.

2. Applications shall be made in a sufficiently precise manner and shall contain, in particular, the elements enabling identification of the document or documents requested and the name and address of the applicant.

3. If an application is not sufficiently precise, the Court of Justice of the European Union shall ask the applicant to clarify the application and shall assist the applicant in doing so.

4. In the event of an application relating to a very long document or to a very large number of documents, the Court of Justice of the European Union may confer with the applicant informally, with a view to finding a fair solution.

5. The applicant is not obliged to state reasons for the application.

Article 5

Processing of initial applications

1. A written acknowledgement of receipt (electronic mail, post or fax) shall be sent to the applicant immediately upon registration of the form containing the application.

2. Within a maximum of 1 month from registration of the application, the Court of Justice of the European Union shall grant access to the document requested by supplying it to the applicant.

3. If the Court of Justice of the European Union is not in a position to grant access to the document requested, it shall, within the period laid down in paragraph 2 and in writing, inform the applicant of the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application within 1 month of receipt of the reply.

4. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 2 may be extended by 1 month, provided that the applicant is notified in advance and that detailed reasons are given.

5. In the case referred to in Article 4(3), the period for replying shall not start to run until the Court of Justice of the European Union has received additional information from the applicant to make the application sufficiently precise.

6. Regulation (EEC, Euratom) No 1182/71 of the Council (OJ L 124, 8.6.1971, p. 1; English Special Edition 1971 (II), p. 354) determining the rules applicable to periods, dates and time limits shall apply by analogy to the calculation of periods.

Article 6

Submission of confirmatory applications

1. In the event of a total or partial refusal of his or her initial application, the applicant may make a confirmatory application.

2. Failure by the Court of Justice of the European Union to reply within the prescribed time limit shall entitle the applicant to make a confirmatory application.

3. The confirmatory application must be sent to the Court of Justice of the European Union within 1 month either of receipt of the total or partial refusal of access to the document requested or, in the absence of any reply to the initial application, of the expiry of the period fixed for the reply.

4. The confirmatory application must be formulated in accordance with the formal requirements set out in Article 4.

Article 7

Processing of confirmatory applications

1. Confirmatory applications shall be handled in the manner prescribed in Article 5, with the exception of the information concerning the right to make a confirmatory application.

2. In the event that the Court of Justice of the European Union refuses, totally or partially, a confirmatory application, it shall inform the applicant of the remedies open to him or her to challenge that refusal, namely instituting court proceedings or making a complaint to the European Ombudsman, under the conditions laid down in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

3. Failure to reply to a confirmatory application within the prescribed time limit shall be considered as a negative reply and entitle the applicant to make use of the procedures set out in paragraph 2.

Article 8

Competent authorities

1. The authority empowered to decide on the reply to be given to an initial application for access to a document shall be the Director of Communications.

2. When the document requested is held by the Registry of the Court of Justice of the European Union or the Registry of the General Court of the European Union, the competent authorities shall be the Deputy Registrar of the Court of Justice and the Deputy Registrar of the General Court respectively.

The Deputy Registrars of the Court of Justice and the General Court may delegate their powers as regards an initial application to an administrator in their Registry.

3. The authority empowered to decide on the reply to be given to a confirmatory application shall be the Registrar of the Court of Justice of the European Union or, where the confirmatory application concerns a document held by the Registry of the General Court of the European Union, the Registrar of the General Court.

4. When a Member State, having received an application for access to a document which it holds and which emanates from the Court of Justice of the European Union in the exercise of its administrative functions, contacts the Court of Justice in order to consult it, the reply to that request for consultation shall be given by the authority who would be empowered pursuant to paragraph 3 to reply to a confirmatory application for access to the same document made directly to the Court of Justice of the European Union.

5. By derogation from paragraph 1, the Registrar of the Court of Justice may designate another authority empowered to decide on the reply to be given to an initial application for access to a document.

Article 9

Third-party documents

1. The Court of Justice of the European Union shall not grant access to third-party documents in its possession until it has received the consent of the third party concerned.

2. For the purposes of the present Article, 'third party' shall mean any natural or legal person or body external to the Court of Justice of the European Union, including the Member States, the other institutions, bodies, offices and agencies of the European Union and non-member States.

3. When the Court of Justice of the European Union receives an application for access to a third-party document, the competent authority shall consult the third party concerned in order to ascertain whether the third party opposes release of that document, unless it decides of its own motion to refuse to release the document on the basis of one of the exceptions set out in Article 3.

Article 10

Means of access

1. Documents shall be supplied in an existing version and format. The Court of Justice of the European Union shall not be required, by virtue of the present Decision, to create a new document or gather information at the request of the applicant.

The copy supplied may be a paper copy or an electronic copy, having full regard to the applicant's preference in that respect.

If documents are voluminous or difficult to handle, the applicant may be invited to consult the documents on the spot.

2. If a document has already been released by the Court of Justice of the European Union or by another institution concerned and is easily accessible, the Court of Justice may merely inform the applicant how to obtain it.

Article 11

Charge for access

1. A fee for producing and sending copies may be charged to the applicant.

2. Consultation on the spot and copies of less than 20 A4 pages shall as a general rule be free of charge.

3. The fee for producing and sending copies shall be calculated on the basis of a tariff fixed by decision of the Registrar of the Court of Justice. This fee shall not exceed the real cost of producing and sending the copies.

4. Published documents shall continue to be subject to their own pricing system.

Article 12

Reproduction of documents

1. This Decision shall be without prejudice to any existing rules on copyright which may limit a third party's right to reproduce or exploit released documents.

2. Documents covered by copyright of which the Court of Justice of the European Union is the holder and which are released by virtue of this Decision may not be reproduced or exploited for commercial purposes without the prior written authorisation of the Court of Justice of the European Union.

Article 13

Application measures

The Registrar of the Court of Justice shall adopt the measures necessary for the application of this Decision. Those measures shall be published on the internet site of the Court of Justice of the European Union.

Article 14

Entry into force

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

It replaces and repeals the Decision of the Court of Justice of the European Union of 11 December 2012 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (OJ C 38, 9.2.2013, p. 2).

Done at Luxembourg, 11 October 2016.

# Decision 2004/258/EC of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3)

Decision of the European Central Bank

of 4 March 2004

on public access to European Central Bank documents

(ECB/2004/3)

(2004/258/EC)

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular to Article 12.3 thereof,

Having regard to the Rules of Procedure of the European Central Bank(1), and in particular to Article 23 thereof,

Whereas:

(1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. Openness enhances the administration's legitimacy, effectiveness and accountability, thus strengthening the principles of democracy.

(2) In the Joint Declaration(2) relating to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents(3), the European Parliament, the Council and the Commission call on the other institutions and bodies of the Union to adopt internal rules on public access to documents which take account of the principles and limits set out in the Regulation. The regime on public access to ECB documents as laid down in Decision ECB/1998/12 of 3 November 1998 concerning public access to documentation and the archives of the European Central Bank(4) should be revised accordingly.

(3) Wider access should be granted to ECB documents, while at the same time protecting the independence of the ECB and of the national central banks (NCBs) foreseen by Article 108 of the Treaty and Article 7 of the Statute, and the confidentiality of certain matters specific to the performance of the ECB's tasks. In order to safeguard the effectiveness of its decision-making process, including its internal consultations and preparations, the proceedings of the meetings of the ECB's decision-making bodies are confidential, unless the relevant body decides to make the outcome of its deliberations public.

(4) However, certain public and private interests should be protected by way of exceptions. Furthermore, the ECB needs to protect the integrity of euro banknotes as a means of payment including, without limitation, the security features against counterfeiting, the technical production specifications, the physical security of stocks and the transportation of euro banknotes.

(5) When NCBs handle requests for ECB documents that are in their possession, they should consult the ECB in order to ensure the full application of this Decision unless it is clear whether or not the document may be disclosed.

(6) In order to bring about greater openness, the ECB should grant access not only to documents drawn up by it, but also to documents received by it while at the same time preserving the right for the third parties concerned to express their positions with regard to access to documents originating from those parties.

(7) In order to ensure that good administrative practice is respected, the ECB should apply a two-stage procedure,

HAS DECIDED AS FOLLOWS:

Article 1

Purpose

The purpose of this Decision is to define the conditions and limits according to which the ECB shall give public access to ECB documents and to promote good administrative practice on public access to such documents.

Article 2

Beneficiaries and scope

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to ECB documents, subject to the conditions and limits defined in this Decision.

2. The ECB may, subject to the same conditions and limits, grant access to ECB documents to any natural or legal person not residing or not having its registered office in a Member State.

3. This Decision shall be without prejudice to rights of public access to ECB documents which might follow from instruments of international law or acts which implement them.

Article 3

Definitions

For the purpose of this Decision:

(a) "document" and "ECB document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) drawn up or held by the ECB and relating to its policies, activities or decisions, as well as documents originating from the European Monetary Institute (EMI) and from the Committee of Governors of the central banks of the Member States of the European Economic Community (Committee of Governors);

(b) "third party" shall mean any natural or legal person, or any entity outside the ECB.

Article 4

Exceptions

1. The ECB shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

- the confidentiality of the proceedings of the ECB's decision-making bodies,

- the financial, monetary or economic policy of the Community or a Member State,

- the internal finances of the ECB or of the NCBs,

- protecting the integrity of euro banknotes,

- public security,

- international financial, monetary or economic relations;

(b) the privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data;

(c) the confidentiality of information that is protected as such under Community law.

2. The ECB shall refuse access to a document where disclosure would undermine the protection of:

- the commercial interests of a natural or legal person, including intellectual property,

- court proceedings and legal advice,

- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the ECB or with NCBs shall be refused even after the decision has been taken, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the ECB shall consult the third party concerned with a view to assessing whether an exception in this Article is applicable, unless it is clear that the document shall or shall not be disclosed.

5. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

6. The exceptions as laid down in this Article shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years unless specifically provided otherwise by the ECB's Governing Council. In the case of documents covered by the exceptions relating to privacy or commercial interests, the exceptions may continue to apply after this period.

Article 5

Documents at the NCBs

Documents that are in the possession of an NCB and have been drawn up by the ECB as well as documents originating from the EMI or the Committee of Governors may be disclosed by the NCB only subject to prior consultation of the ECB concerning the scope of access, unless it is clear that the document shall or shall not be disclosed.

Alternatively the NCB may refer the request to the ECB.

Article 6

Applications

1. An application for access to a document shall be made to the ECB(5) in any written form, including electronic form, in one of the official languages of the Union and in a sufficiently precise manner to enable the ECB to identify the document. The applicant is not obliged to state the reasons for the application.

2. If an application is not sufficiently precise, the ECB shall ask the applicant to clarify the application and shall assist the applicant in doing so.

3. In the event of an application relating to a very long document or to a very large number of documents, the ECB may confer with the applicant informally, with a view to finding a fair solution.

Article 7

Processing of initial applications

1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 20 working days from the receipt of the application, or on receipt of the clarifications requested in accordance with Article 6(2), the Director General Secretariat and Language Services of the ECB shall either grant access to the document requested and provide access in accordance with Article 9 or, in a written reply, state the reasons for total or partial refusal and inform the applicant of their right to make a confirmatory application in accordance with paragraph 2.

2. In the event of total or partial refusal, the applicant may, within 20 working days of receiving the ECB's reply, make a confirmatory application asking the ECB's Executive Board to reconsider its position. Furthermore, failure by the ECB to reply within the prescribed 20 working days' time limit for handling the initial application shall entitle the applicant to make a confirmatory application.

3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, or if the consultation of a third party is required, the ECB may extend the time limit provided for in paragraph 1 by 20 working days, provided that the applicant is notified in advance and that detailed reasons are given.

4. Paragraph 1 shall not apply in case of excessive or unreasonable applications, in particular when they are of a repetitive nature.

Article 8

Processing of confirmatory applications

1. A confirmatory application shall be handled promptly. Within 20 working days from the receipt of such application, the Executive Board shall either grant access to the document requested and provide access in accordance with Article 9 or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the ECB shall inform the applicant of the remedies open to them in accordance with Articles 230 and 195 of the Treaty.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the ECB may extend the time limit provided for in paragraph 1 by 20 working days, provided that the applicant is notified in advance and that detailed reasons are given.

3. Failure by the ECB to reply within the prescribed time limit shall be considered to be a negative reply and shall entitle the applicant to institute court proceedings and/or submit a complaint to the European Ombudsman, under Articles 230 and 195 of the Treaty, respectively.

Article 9

[…]

Decision ECB/1998/12 shall be repealed.

Done at Frankfurt am Main, 4 March 2004.

# Case T-590/10, *Gabi Thesing and Bloomberg Finance v European Central Bank*

In Case T-590/10,

**Gabi Thesing,** residing in London (United Kingdom),

**Bloomberg Finance LP,** established in Wilmington, Delaware (United States),

represented by M. Stephens and R. Lands, Solicitors, and T. Pitt-Payne QC,

applicants,

v

**European Central Bank (ECB),** represented initially by A. Sáinz de Vieuña Barroso, M. López Torres and S. Lambrinoc, and subsequently by M. López Torres and S. Lambrinoc, acting as Agents,

defendant,

APPLICATION for annulment of the decision of the ECB's Executive Board, which was notified to Ms Thesing by letter of the President of the ECB of 21 October 2010, rejecting an application by Ms Thesing for access to two documents concerning the government deficit and debt of the Hellenic Republic,

THE GENERAL COURT (Seventh Chamber),

composed of A. Dittrich (Rapporteur), President, I. Wiszniewska-Białecka and M. Prek, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 14 June 2012,

gives the following

**Judgment**

**Background to the dispute**

1 The first applicant, Ms Gabi Thesing, is a journalist. She works for the second applicant, Bloomberg Finance LP, which operates in London (United Kingdom) under the name of Bloomberg News.

2 On 20 August 2010, the first applicant requested the European Central Bank (ECB) to grant access to document SEC/GovC/X/10/88a, entitled 'The impact on government deficit and debt from off-market swaps. The Greek case' ('the first document'), and to document SEC/GovC/X/10/88b, entitled 'The Titlos transaction and possible existence of similar transactions impacting on the euro area government debt or deficit levels' (the second document). Those documents concerned the use of derivative transactions in financing deficit and in government debt management.

3 By letter of 17 September 2010, the ECB's Director-General of the Secretariat and Language Services informed the first applicant of the decision not to grant access to the requested documents.

4 On 28 September 2010, the applicants sent a confirmatory application to the ECB, under Article 7(2) of Decision 2004/258/EC of the ECB of 4 March 2004 on public access to ECB documents (OJ 2004 L 80, p. 42). That application requested that the Executive Board of the ECB review the ECB's position relating to the refusal to grant access to the documents at issue.

5 By letter of 21 October 2010, the President of the ECB informed the first applicant of the decision of the ECB's Executive Board confirming the decision contained in the letter of 17 September 2010 to refuse access to the documents at issue ('the contested decision'). That refusal was based, in the case of those two documents, on the protection of the public interest so far as concerns the economic policy of the European Union and the Hellenic Republic and on the protection of the ECB's internal deliberations and consultations, pursuant to the second indent of Article 4(1)(a) and Article 4(3) of Decision 2004/258. As regards the second document only, the refusal was also based on the protection of the commercial interests of a natural or legal person, under the first indent of Article 4(2) of that decision.

**Procedure and forms of order sought**

6 By application lodged at the Registry of the General Court on 27 December 2010, the applicants brought the present action.

7 By document lodged at the Registry of the General Court on 11 April 2011, Mr Athanasios Pitsiorlas applied for leave to intervene in this case in support of the form of order sought by the applicants. By order of the President of the Seventh Chamber of the General Court of 14 July 2011, the application was refused.

8 Upon hearing the report of the Judge-Rapporteur, the Court (Seventh Chamber) decided to open the oral procedure.

9 By way of measures of organisation of procedure under Article 64 of its Rules of Procedure, the Court sent a written question on 14 May 2012 to the ECB, to which the ECB was requested to reply at the hearing.

10 By way of a measure of inquiry pursuant to Article 65 of the Rules of Procedure, by order of 21 May 2012 the General Court ordered the ECB to produce the two documents at issue, and stated that they would not be disclosed to the applicants. The ECB complied with that measure of inquiry within the prescribed time-limit.

11 By letter lodged at the Registry of the General Court on 30 May 2012, the applicants requested that further evidence offered in support be placed in the file, namely the judgment of the European Court of Human Rights in *Gillberg v. Sweden* of 3 April 2012 (not yet published in the *Reports of Judgments and Decisions*). By decision of the President of the Seventh Chamber of the Court of 31 May 2012, that request was granted.

12 The parties' oral arguments and their answers to the questions put by the Court were heard at the hearing of 14 June 2012.

13 The applicants claim that the Court should:

– annul the contested decision;

– order the ECB to grant the applicants access to the documents at issue;

– order the ECB to pay the costs.

14 The ECB contends that the Court should:

– dismiss the action as inadmissible in its entirety or, in the alternative, dismiss the second applicant's action as inadmissible;

– dismiss the applicants' second head of claim as inadmissible;

– dismiss the action as unfounded;

– order the applicants to pay the costs.

**Law**

*Admissibility*

15 The ECB, while not raising a plea of inadmissibility under Article 114(1) of the Rules of Procedure, contends that the action is totally or partially inadmissible. In its submission, the applicants' action is inadmissible in its entirety since the application was not signed by their lawyer. Moreover, the second applicant's action is inadmissible, first, on the ground that it does not have standing to bring legal proceedings since it did not request access to the documents at issue, and, second, on the ground that it cannot achieve the application's objective because it has no right of access to the ECB's documents. In addition, the ECB asserts that the applicants' second head of claim, requesting the Court to order the ECB to grant them access to the documents at issue, is inadmissible. Lastly, the ECB contends that the applicants' arguments, set out in the reply, relating to an alleged infringement of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), are not consistent with Article 48(2) of the Rules of Procedure and are thus inadmissible.

The alleged absence of a signature on the application by the applicants' lawyer

16 The ECB contends that the action is inadmissible on the ground that the application that it received was not signed by the applicants' lawyer. Under the first subparagraph of Article 43(1) of the Rules of Procedure, the original of every pleading must be signed by the party's agent or lawyer. In the present case, the original of the application was signed by the applicants' lawyer. The argument of the ECB by which it seeks to claim that the action is inadmissible on the ground that the application was not signed by the applicants' lawyer must therefore be rejected.

Admissibility of the second applicant's action

17 The ECB contends that the second applicant's action is inadmissible, first, on the ground that it does not have standing to bring legal proceedings since it did not request access to the documents at issue and, second, on the ground that it cannot achieve the application's objective because it has no right of access to the ECB's documents.

18 The applicants assert that the first applicant made her initial application for access to the documents at issue both on her own behalf, and on behalf of the second applicant. In any event, the second applicant was party to the confirmatory application. Moreover, the second applicant can achieve the objective referred to in the application since it operates throughout the Union and has seats in Member States other than the United Kingdom. In addition, it has an interest in the success of the first applicant's application.

19 Since the applicants have brought a single action the admissibility of which is not in doubt in relation to the first applicant – which has not moreover been contested by the ECB – it is not necessary, for reasons of procedural economy, to examine the admissibility of the action as regards the second applicant (see, to that effect, Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 31, and Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere'* v *Commission* [2011] ECR I-0000, paragraph 37; judgment of 7 October 2010 in Case T-452/08 *DHL Aviation and DHL Hub Leipzig* v *Commission*, not published in the ECR, paragraph 27, and judgment of 16 December 2010 in Case T-191/09 *HIT Trading and Berkman Forwarding* v *Commission*, not published in the ECR, paragraph 24).

Admissibility of the applicants' second head of claim

20 The ECB submits that the applicants' second head of claim is inadmissible inasmuch as it requests the Court to order the ECB to grant access to the documents at issue.

21 It is settled case-law that the Court is not entitled, when exercising judicial review of legality, to issue directions to the institutions or to assume the role assigned to them. That limitation of the scope of judicial review applies to all types of contentious matters that might be brought before it, including those concerning access to documents (Case T-204/99 *Mattila* v *Council and Commission* [2001] ECR II-2265, paragraph 26, upheld in Case C-353/01 P *Mattila* v *Council and Commission* [2004] ECR I-1073, paragraph 15). When the Court annuls an act of an institution, that institution is required, under Article 266 TFEU, to take the measures necessary to comply with the Court's judgment (Case C-41/00 P *Interporc* v *Commission* [2003] ECR I-2125, paragraph 28).

22 The second head of claim is therefore inadmissible.

Admissibility of the arguments relating to an alleged infringement of Article 10 of the ECHR

23 The applicants submit, in the reply, that the refusal to grant them access to the documents at issue is an infringement of their right to receive information under Article 10 of the ECHR. In order to avoid a breach of the rights conferred by that provision, it is necessary to construe the exceptions to the right of access referred to in Article 4 of Decision 2004/258 in the manner indicated by the applicants.

24 As regards the admissibility of those arguments, it follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure that the original application must state the subject-matter of the proceedings and contain a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a plea or an argument which amplifies a plea put forward previously, whether directly or by implication, in the original application, and which is closely connected therewith, must be declared admissible (Case T-252/97 *Dürbeck* v *Commission* [2000] ECR II-3031, paragraph 39).

25 In the present case, the pleas put forward in the application allege infringement of Article 4 of Decision 2004/258. The alleged infringement of Article 10 of the ECHR by an incorrect interpretation of Article 4 of Decision 2004/258 was raised only at the stage of the reply, and no reasons were provided for the absence of those arguments in the application.

26 However, those arguments relate, in essence, to the interpretation of the right of access to a document under Decision 2004/258. In the applicants' submission, the ECB ought, under Article 6 TEU, to have taken account of Article 10 of the ECHR when interpreting Article 4 of Decision 2004/258 in order to avoid infringing the latter provision. The applicants' arguments therefore relate to the effects of Article 10 of the ECHR in the light of the exceptions to the right of access under Article 4 of that decision. It is therefore apparent that those arguments amount to an amplification of the pleas alleging infringement of Article 4 of Decision 2004/258 in that they are closely connected with the pleas put forward in the application. They must therefore be considered admissible.

Admissibility of the arguments relating to partial access to the documents at issue under Article 4(5) of Decision 2004/258

27 In the application, the applicants did not raise the issue of partial access to the documents at issue. In the light of the ECB's assertion in the defence that the applicants did not contest, in the application, the decision not to grant partial access, the applicants invited the Court, in the reply, to consider, in the alternative, whether the ECB ought to have made partial disclosure of those documents.

28 It must be pointed out that, since the conditions for admissibility of an action and of the complaints set out therein are a matter of public policy, the Court may consider them of its own motion in accordance with Article 113 of the Rules of Procedure (see, to that effect, Case C-160/08 *Commission* v *Germany* [2010] ECR I-3713, paragraph 40).

29 First, it follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure that the application must state the subject-matter of the proceedings and contain a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure.

30 In the light of the foregoing, it must be concluded that the applicants' arguments concerning Article 4(5) of Decision 2004/258 are inadmissible, given that they were not relied upon in the application. Moreover, it must be pointed out that those arguments do not constitute an amplification of the pleas set out by the applicants in the application.

31 Article 4(5) of Decision 2004/258 is not closely connected with Article 4(1) to (3) of that decision. Although the concrete, individual examination of the exceptions referred to in Article 4(1) to (3) of Decision 2004/258 is indeed an essential condition for deciding whether to grant partial access to the documents at issue (see, by analogy, Case T-36/04 *API* v *Commission* [2007] ECR II-3201, paragraph 56), examination of such a possibility does not concern the conditions for the application of the exceptions at issue provided for in Article 4(1) to (3) of

that decision. The requirement of such an examination flows from the principle of proportionality. In the context of Article 4(5) of Decision 2004/258, it must be considered whether the aim pursued in refusing access to the documents at issue may be achieved even if one removes only the passages which might harm one of the public interests protected by Article 4(1) and (2) of that decision or which contain opinions for internal use as part of deliberations and preliminary consultations within the ECB or with the national central banks ('the NCBs') (see, to that effect and by analogy, Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565, paragraphs 27 to 29, and Case T-264/04 *WWF European Policy Programme* v *Council* [2007] ECR II-911, paragraph 50).

32 Second, it is apparent from Article 44(1)(c) of the Rules of Procedure that, in the application, the subject-matter of the proceedings and the summary of the pleas in law must be stated sufficiently clearly and precisely to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. In order to ensure legal certainty and the sound administration of justice it is necessary, for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, but coherently and intelligibly, in the application itself (see order in Case T-481/08 *Alisei* v *Commission* [2010] ECR II-117, paragraph 89 and the case-law cited).

33 In the present case, it was in their reply that the applicants requested the Court to consider whether the ECB ought to have made partial disclosure of the documents at issue, whilst they did not put forward any arguments in this respect in the application.

34 It follows that the applicants' arguments relating to Article 4(5) of Decision 2004/258 must also be rejected as inadmissible on the ground that they do not comply with the requirements referred to in Article 44(1)(c) of the Rules of Procedure.

35 Consequently, the applicants' arguments relating to the possibility of granting partial access must be rejected as inadmissible.

*Substance*

36 The applicants put forward three pleas in law in support of their action. The first alleges infringement of the second indent of Article 4(1)(a) of Decision 2004/258 in so far as the ECB incorrectly interpreted the exception to the right of access relating to the protection of the public interest so far as concerns the economic policy of the Union and the Hellenic Republic. The second plea concerns the exception to the right of access relating to the protection of the commercial interests of a natural or legal person, under the first indent of Article 4(2) of that decision. The third plea alleges infringement of Article 4(3) of that decision relating to the protection of the ECB's internal deliberations and consultations.

37 With respect to the first plea, alleging infringement of the second indent of Article 4(1)(a) of Decision 2004/258, the applicants claim, in essence, that the ECB incorrectly based its refusal to grant them access to the documents at issue on the exception to the right of access provided for in that provision, given that disclosure of those documents would not undermine the protection of the public interest, so far as concerns the economic policy of the Union and the Hellenic Republic.

38 Under the second indent of Article 4(1)(a) of Decision 2004/258, the ECB is to refuse access to a document where disclosure would undermine the protection of the public interest as regards the financial, monetary or economic policy of the Union or a Member State.

39 With respect to the legal framework applicable to the right of access to ECB documents, it must be observed that the second paragraph of Article 1 TEU is devoted to the openness of the Union's decision-making process. In this respect, Article 15(1) TFEU states that, in order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies are to conduct their work as openly as possible. According to the first subparagraph of Article 15(3) TFEU, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, is to have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with that paragraph. Moreover, according to the second subparagraph of Article 15(3), the general principles and limits on grounds of public or private interest governing this right of access to documents are to be determined by the European Parliament and the Council of the European Union, by means of regulations, acting in accordance with the ordinary legislative procedure. In accordance with the third

subparagraph of Article 15(3) TFEU, each institution, body, office or agency is to ensure that its proceedings are transparent and is to elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph of Article 15(3) TFEU. According to the fourth subparagraph of Article 15(3) TFEU, the Court of Justice of the European Union, the ECB and the European Investment Bank are to be subject to this paragraph only when exercising their administrative tasks.

40 Decision 2004/258 seeks, as recitals 1 and 2 in the preamble thereto state, to authorise wider access to ECB documents than that which existed under the system established by Decision ECB/1998/12 of the ECB of 3 November 1998 concerning public access to documentation and the archives of the ECB (OJ 1999 L 110, p. 30), while at the same time protecting the independence of the ECB and of the NCBs, and the confidentiality of certain matters specific to the performance of the ECB's tasks. Article 2(1) of Decision 2004/258 therefore gives any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, a right of access to ECB documents, subject to the conditions and limits defined in that decision.

41 That right is subject to certain limits based on reasons of public or private interest. More specifically, and in accordance with recital 4 in the preamble thereto, Decision 2004/258 provides, in Article 4, for a system of exceptions authorising the ECB to refuse access to a document where disclosure of that document would undermine one of the interests protected by Article 4(1) and (2) or where that document contains opinions for internal use as part of deliberations and preliminary consultations within the ECB or with NCBs. Since the exceptions to the right of access referred to in Article 4 of Decision 2004/258 derogate from the right of access to documents, they must be interpreted and applied strictly.

42 Thus, if the ECB decides to refuse access to a document which it has been asked to disclose under Article 4(1) of Decision 2004/258, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception – among those provided for in that provision – upon which it is relying. Moreover, the risk of that undermining must be reasonably foreseeable and not purely hypothetical (see, by analogy, Case C-506/08 P *Sweden* v *MyTravel and Commission* [2011] ECR I-0000, paragraph 76 and the case-law cited).

43 With respect to the extent of the review of the legality of an ECB decision refusing public access to a document on the basis of the exception relating to the public interest provided for in the second indent of Article 4(1)(a) of Decision 2004/258, the ECB must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by that exception could undermine the public interest. The European Union judicature's review of the legality of such a decision must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers (see, by analogy, Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 34).

44 It is true that the European Union judicature set out those principles in relation to the extent of the review concerning the exceptions to the right of access to the documents referred to in Article 4(1)(a) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43). However, the reasoning on which those principles are based is also valid in a case where the ECB refuses to grant access to a document under the second indent of Article 4(1)(a) of Decision 2004/258. The wording of that latter provision is identical to the wording of the fourth indent of Article 4(1)(a) of Regulation No 1049/2001. In addition, a refusal decision based on the second indent of Article 4(1)(a) of Decision 2004/258 is, just like a decision based on the fourth indent of Article 4(1)(a) of Regulation No 1049/2001, of a complex and delicate nature which calls for the exercise of particular care and the criteria set out in those two provisions are very general (see, to that effect, *Sison* v *Council*, paragraph 43 above, paragraphs 35 and 36).

45 First, with respect to the applicants' arguments that the ECB incorrectly failed to take account of the public interest considerations in favour of disclosure and that there is a compelling public interest for disclosure of the documents at issue which would in fact further the public interest, the Court notes that the exceptions to the right of access to documents provided for in Article 4(1)(a) of Decision 2004/258 are framed in mandatory terms. It follows that the ECB is obliged to refuse access to documents falling under any one of those exceptions once the relevant circumstances are shown to exist, and no weighing up of an 'overriding public interest' is provided for in that provision, in contrast with the exceptions referred to in Article 4(2) and (3) of that decision (see, by analogy, Joined Cases T-3/00 and T-337/04 *Pitsiorlas* v *Council and ECB* [2007] ECR II-4779, paragraph 227 and the case-law cited).

46 Consequently, those arguments of the applicants and their arguments put forward as justification for the overriding public interest alleged must be rejected as irrelevant in the context of the examination of whether the ECB correctly applied the exception to the right of access provided for in the second indent of Article 4(1)(a) of Decision 2004/258.

47 Second, the applicants assert that, contrary to the ECB's submission in its letters of 17 September and 21 October 2010, disclosure of the documents at issue would not undermine the protection of the public interest so far as concerns the economic policy of the Union and the Hellenic Republic. That disclosure would not bear a substantial and acute risk of misleading the public and the markets. Moreover, the fact that the European Commission was carrying out a thorough examination of the relevant issues in the framework of the excessive debt procedure does not constitute a factor against disclosure.

48 In the light of those arguments, it is therefore necessary, in respect of each document referred to in the application, to examine whether the contested decision is vitiated by a manifest error of assessment.

49 With respect to the first document, the ECB justified its refusal to grant access to that document by stating, in its letters of 17 September and 21 October 2010, that that document contained ECB staff assumptions and views regarding the impact of off-market swaps on government deficit and on government debt with a particular view to the case of the Hellenic Republic on the basis of partial data that were available at the time the document was drafted in order to give a snapshot of the situation in March 2010. In the ECB's submission, the information contained in that document was outdated at the time of the request for access. Disclosure of that information would bear the substantial and acute risk of severely misleading the public in general and the financial markets in particular. In a very vulnerable market environment, that disclosure would affect the proper functioning of the financial markets. Thus, disclosure of the information contained in that document would undermine public confidence as regards the effective conduct of economic policy in the Union and the Hellenic Republic. Moreover, as an additional element, the ECB noted, by way of justification for the refusal to grant access to that document, that the issues examined in the document at issue were then part of a thorough examination by the Commission in the framework of the excessive deficit procedure, and that the result of that examination would be published in due time.

50 The first document, submitted by the ECB in response to the measures of inquiry ordered by the Court (see paragraph 10 above), contains, in essence, a description of the manner in which the financial instrument of off-market swaps functions, ECB staff assumptions and views regarding the impact of those swaps on government debt and on government deficit with a particular view to the case of the Hellenic Republic and of possible action envisaged. In particular, that document contains an analysis of the possible impact of the operation of the financial instrument of off-market swaps on the government debt and government deficit of the Hellenic Republic on the basis of various assumptions made in accordance with data which were available at the time that that document was drafted, relating to the manner in which off-market swaps operate.

51 The first document therefore deals with aspects relating to the economic policy of the Union and the Hellenic Republic and falls within the scope of the exception provided for in the second indent of Article 4(1)(a) of Decision 2004/258; moreover, the applicants do not contest this.

52 As regards the issue whether disclosure of the first document would specifically and effectively undermine the protected interest in question, it is common ground, as the ECB stated in its letter of 21 October 2010, that, at the time of the adoption of the contested decision, the European financial markets were in a very vulnerable environment. The stability of those markets was fragile, in particular, because of the economic and financial situation of the Hellenic Republic. It is also common ground that that situation and the related sales of Greek financial assets were causing strong depreciations in the value of those assets, which also triggered losses for Greek and other European holders. The applicants did not dispute that that development had the potential of leading to negative spillover effects on the solvency and funding conditions of other issuers and countries in the euro area. In such an environment, it is clear that market participants use the information disclosed by central banks and that their analyses and decisions are considered a particularly important and reliable source to assess current and prospective financial market developments. Moreover, the ECB was entitled to find that public confidence is an essential element affecting the proper functioning of the financial markets. The ECB was not indeed contradicted in this respect by the applicants.

53 In the light of the content of the first document and the environment in which the European financial markets found themselves, as described above, the Court takes the view that the ECB did not commit a manifest error of

assessment in considering, in its letters of 17 September and 21 October 2010, that disclosure of the information contained in the first document would specifically and effectively undermine the public interest so far as concerns the economic policy of the Union and the Hellenic Republic.

54 In support of its arguments regarding the substantial and acute risk of severely misleading the public in general and the financial markets in particular in a very vulnerable market environment, the ECB asserts that assumptions and views of members of its staff regarding the impact of off-market swaps on government deficit and on government debt, which are contained in the first document, were based on partial information that was available at the time the document was drafted in order to give a snapshot of the situation in March 2010.

55 In this respect, it must be stated that it is apparent from the case-file that the first document, which is based on information that was available before the end of February 2010, was examined by the ECB's Executive Board on 2 March 2010 and submitted to the ECB's Governing Council on 3 March 2010. Since access to that document was definitively refused on 21 October 2010, and therefore more than seven months after it was drafted, it is possible to conclude that that document did not contain, at the time of the definitive refusal, updated data regarding the impact of off-market swaps on government deficit and on government debt, in particular, of the Hellenic Republic. That is corroborated by the fact that on 22 April 2010, Eurostat (the Statistical Office of the European Union) issued a press release, regarding the first notification excessive deficit procedure, presenting the deficit and debt figures for the EU Member States for 2006 to 2009 and including a reservation on the Greek data citing, inter alia, uncertainties in the recording of off-market swaps. In this respect, Eurostat also announced investigations which might lead to a revision of the deficit and debt figures.

56 None the less, the fact that, on 21 October 2010, the data contained in the first document were outdated and that they gave only a snapshot of the factual situation at the time that the document was drafted does not permit the conclusion that, in the event of disclosure of that document, financial market participants would also have regarded as outdated and therefore of no value ECB staff assumptions and views regarding the impact of off-market swaps on government deficit and on government debt which are contained in that document.

57 Although it is true that those participants are professionals who can be expected to use information taken from documents in the context of their work, the fact remains that they consider assumptions and views originating from the ECB to be particularly important and reliable for assessing the financial market. It cannot reasonably be precluded that, even if those assumptions and views were made on the basis of data available well before 21 October 2010, they would have been regarded as still valid on that date. Moreover, it can be assumed that, by relying on those assumptions and views that were based on a certain known factual situation, those professionals might have inferred, on the basis of additional data, assumptions and views allegedly held by the ECB regarding the government deficit and government debt at the time that the ECB definitively refused access to that document. In this respect, any clarification by the ECB on the disclosed version of that document, indicating that the information contained therein was no longer up to date, would not have been able to prevent disclosure of that document from misleading the public and financial market participants in particular on the situation regarding the government deficit and government debt as assessed by the ECB.

58 In the light of the very vulnerable environment in which the financial markets found themselves at the time of adoption of the contested decision, the assessment that such an error would undermine the economic policy of the Union and the Hellenic Republic cannot be rejected as manifestly incorrect. Indeed, such an error might have had negative consequences on access, in particular for that Member State, to the financial markets and might therefore have affected the effective conduct of economic policy in the Hellenic Republic and the Union.

59 The ECB was therefore entitled to base its refusal to grant access to the first document on the exception provided for in the second indent of Article 4(1)(a) of Decision 2004/258.

60 With respect to the second document, the ECB justified its refusal to grant access to that document by stating, in its letter of 17 September 2010, that it contained the ECB's staff assumptions and views regarding the 'Titlos' transaction, the possible existence of similar transactions impacting on the euro area government debt or deficit levels, the relevance for the Eurosystem collateral framework, associated risk control measures, and their possible revision. According to the ECB, Titlos plc is a special purpose financial vehicle that was created on 26 February 2009 by the National Bank of Greece. Titlos plc issued a certain amount in euro of asset-backed securities due in September 2039. The ECB specifies that the underlying asset for the asset-backed securities named 'Titlos' was an interest rate swap between the National Bank of Greece and the Hellenic Republic. The 'Titlos' asset was required to be eligible as collateral for Eurosystem credit operations, and this was assessed by

the central bank of another Member State after consultation with the ECB. According to the ECB's reasoning in its letter of 17 September 2010, since that document was closely connected with the first document, it also fell within the exception to the right of access referred to in the second indent of Article 4(1)(a) of Decision 2004/258. Subsequently, in its letter of 21 October 2010, the ECB no longer made a distinction between the first and second document in its statement of reasons for the refusal. According to the ECB, the reasoning set out in paragraph 49 above relating to the refusal to grant access to the first document was therefore also valid in relation to the second document.

61 The second document, which was submitted by the ECB in response to the measures of inquiry ordered by the Court (see paragraph 10 above), contains, in essence, the background to the 'Titlos' transaction as well as an examination carried out by ECB staff of the financial structure of that transaction and the possible existence of similar transactions. In this respect, the manner in which the Hellenic Republic used off-market swaps and the consequences of those swaps for existing risks were inter alia analysed. Moreover, that document contains several conclusions regarding the Hellenic Republic and the Eurosystem based on the analyses carried out.

62 That document therefore deals with aspects relating to the economic policy of the Union and the Hellenic Republic and falls within the scope of the exception provided for in the second indent of Article 4(1)(a) of Decision 2004/258; moreover, the applicants do not contest this.

63 As regards the issue whether disclosure of the second document would specifically and effectively undermine the protected interest in question, the Court notes that the content of that document is closely connected with that of the first document. In a very vulnerable environment for the financial markets such as that which existed at the time of adoption of the contested decision (see paragraph 52 above), it must be stated that the ECB's assessment that disclosure of the analyses and conclusions contained in the second document would undermine the economic policy of the Union and the Hellenic Republic is not vitiated by a manifest error. Even if those analyses and conclusions were based on the partial data available at the time that the second document was drafted, their disclosure might have influenced the financial markets and their assessment of the situation regarding the government deficit and the government debt of the Hellenic Republic in the same manner as disclosure of the first document (see paragraphs 56 to 58 above). Such repercussions might have had negative consequences on access, in particular for that Member State, to the financial markets and might therefore have affected the effective conduct of economic policy in the Hellenic Republic and the Union.

64 Consequently, the ECB was entitled to base its refusal to grant access to the second document on the exception provided for in the second indent of Article 4(1)(a) of Decision 2004/258.

65 In so far as the ECB based its refusal to grant access to the documents at issue on the exception referred to in the second indent of Article 4(1)(a) of Decision 2004/258, the contested decision is not therefore vitiated by a manifest error of assessment.

66 That conclusion is not undermined by the applicants' arguments relating to Article 10 of the ECHR.

67 The applicants claim that, in order to avoid a breach of their rights under Article 10 of the ECHR, it is necessary to construe and apply the exception referred to in the second indent of Article 4(1)(a) of Decision 2004/258 in the manner stated by the applicants. In this respect, they refer to the judgments of the European Court of Human Rights in *Társaság a Szabadságjogokért v. Hungary* of 14 April 2009, *Kenedi v. Hungary* of 26 May 2009 (not yet published in the *Reports of Judgments and Decisions*) and *Gillberg v. Sweden*, paragraph 11 above.

68 Article 10 of the ECHR provides, in its relevant part, that everyone has the right to freedom of expression and that this right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence.

69 In this respect, the Court observes that Article 52(3) of the Charter of Fundamental Rights of the European Union (OJ 2010 C 83, p. 389; 'the Charter'), which has the same legal value as the Treaties in accordance with the first subparagraph of Article 6(1) TEU, provides that, in so far as the Charter contains rights which correspond

to rights guaranteed by the ECHR, the meaning and scope of those rights are to be the same as those laid down by the ECHR. However, that provision is not to prevent Union law providing more extensive protection.

70 Pursuant to Article 52(7) of the Charter, the explanations drawn up as a way of providing guidance in the interpretation of the Charter, namely the Explanations relating to the Charter (OJ 2007 C 303, p. 17), are to be given due regard by the courts of the Union and of the Member States.

71 It is apparent from the Explanations relating to the Charter that Article 10 of the ECHR corresponds to Article 11 of the Charter, according to which everyone is to have the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The freedom and pluralism of the media are to be respected.

72 According to Article 52(1) and (2) of the Charter of Fundamental Rights, any limitation on the exercise of the rights and freedoms recognised by that charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. Rights recognised by the Charter for which provision is made in the Treaties are to be exercised under the conditions and within the limits defined by those Treaties. That being so, it is clear that Article 11 of the Charter, in conjunction with Article 52(1) and (2) of the Charter, contains rights which correspond to those guaranteed by Article 10 of the ECHR. Those articles of the Charter must therefore be given the same meaning and the same scope as Article 10 of the ECHR, as interpreted by the case-law of the European Court of Human Rights (see, by analogy, Case C-400/10 PPU *McB* [2010] ECR I-8965, paragraph 53, and Case C-256/11 *Dereci and Others* [2011] ECR II-0000, paragraph 70).

73 The Court notes that, with respect to the right of access to documents of the Union's institutions, bodies, offices and agencies, the Charter provides for a special fundamental right. Under Article 42 of the Charter, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, is to have a right of access to those documents, whatever their medium. However, the applicants did not claim that there was an infringement of that special right, but merely asserted an alleged infringement of the general right of freedom of expression guaranteed by Article 10 of the ECHR and Article 11 of the Charter. In so doing, they did not explain how, in their view, the ECB's conduct could amount to an infringement of Article 10 of the ECHR and Article 11 of the Charter.

74 With respect to the issue whether, for the purposes of the application of the second indent of Article 4(1)(a) of Decision 2004/258, the ECB misconstrued the scope of the right of access as interpreted in the light of Articles 11 and 52 of the Charter and of Article 10 of the ECHR by refusing to grant access to the documents at issue, the applicants merely refer to the judgments of the European Court of Human Rights in *Társaság a Szabadságjogokért v. Hungary*, paragraph 67 above, *Kenedi v. Hungary*, paragraph 67 above, and *Gillberg v. Sweden*, paragraph 11 above.

75 However, those judgments do not permit the conclusion that, by refusing to grant access to the documents at issue, the ECB misconstrued the scope of the right of access as interpreted in the light of Articles 11 and 52 of the Charter and of Article 10 of the ECHR.

76 In *Kenedi v. Hungary*, paragraph 67 above, the European Court of Human Rights found that there had been an infringement of Article 10 of the ECHR on the ground that the measure in question in that case was not prescribed by law (see paragraph 45 of that judgment). In the present case, the refusal to grant access to the documents at issue was based on the second indent of Article 4(1)(a) of Decision 2004/258. That decision was adopted pursuant to Article 23(2) of ECB Decision 2004/257/EC of 19 February 2004 adopting the Rules of Procedure of the ECB (OJ 2004 L 80, p. 33), in conjunction with Article 12(3) of the Protocol on the Statute of the European System of Central Banks and of the ECB (OJ 1992 C 191, p. 68), and with Article 8 EC. That refusal sought to achieve the legitimate aim of protecting the public interest so far as concerns the economic policy of the Union and the Hellenic Republic.

77 Moreover, although it is true that, in *Gillberg v. Sweden*, paragraph 11 above, the European Court of Human Rights found that the applicant in that case did not, under Article 10 of the ECHR, have a negative right to refuse to make available the documents concerned (paragraph 94 of that judgment), that case can be distinguished from the present one. Whilst the documents concerned in *Gillberg v. Sweden*, paragraph 11 above, were not the property

of the person who refused to grant access to them (paragraphs 92 and 93 of that judgment), in the present case, the documents at issue requested by the applicants were the property of the ECB. Moreover, unlike in *Gillberg v. Sweden* (paragraph 93 of that judgment), the ECB's refusal to grant access to those documents was not contrary to a court decision ordering the ECB to grant access to them.

78 As regards *Társaság a Szabadságjogokért v. Hungary*, paragraph 67 above, it is true that that judgment deals with the need to limit the right of access to information. However, the facts in that case are not similar to those of the present case, and that judgment cannot therefore be usefully relied upon in the present case. *Társaság a Szabadságjogokért v. Hungary*, paragraph 67 above, concerned the refusal to communicate information relating to a constitutional complaint brought by a public figure on the ground of the personality rights of the latter. In that complaint, it was alleged that the opinions of public figures on public matters are related to their person and therefore constitute private data which cannot be disclosed without their consent (see paragraph 37 of that judgment). By contrast, this case does not concern alleged private data of a public figure.

79 Moreover, the Court notes that the contested decision does not contain a general prohibition on receiving ECB information relating to the government deficit and the government debt of the Hellenic Republic. In this respect, it should also be observed that, in applying the exceptions to the right of access provided for in Article 4 of Decision 2004/258, the ECB did not limit that right solely to documents falling within the exercise of its administrative tasks, as referred to in the fourth subparagraph of Article 15(3) TFEU (see paragraph 39 above).

80 With respect to the applicants' arguments that the public must have access to information regarding, first, the level of debt of the Hellenic Republic and, second, the question whether the Greek authorities provided complete and correct information to Eurostat on the Greek Government debt, including the off-market swap operations, it must be stated that, at the time of adoption of the contested decision, the Eurostat report entitled 'Report on Greek Government deficit and debt statistics' of 8 January 2010 explained the persistent weaknesses of the Greek fiscal data by reference to instances of misreporting by the Greek authorities of deficit and debt data. Moreover, in the Eurostat note entitled 'Information note on Greece – 24.02.2010', it is stated that, for the first time, the Greek authorities declared the existence of an off-market swap operation in 2001 and that Eurostat would request the Greek authorities to supply, as soon as possible, all the information necessary for a complete evaluation and recording of this operation in the next excessive deficit procedure notification. Moreover, on 22 April 2010, Eurostat issued a press release, regarding the first notification excessive deficit procedure, presenting the deficit and debt figures for the EU Member States for 2006 to 2009 and including a reservation on the Greek data citing, inter alia, uncertainties in the recording of off-market swaps.

81 In those circumstances, the applicants' arguments relating to the judgments in *Társaság a Szabadságjogokért v. Hungary*, paragraph 67 above, *Kenedi v. Hungary*, paragraph 67 above, and *Gillberg v. Sweden*, paragraph 11 above, must be rejected.

82 Consequently the first plea must be rejected.

83 Given that the ECB was entitled to base its refusal to grant access to the documents at issue on the exception to the right of access provided for in the second indent of Article 4(1)(a) of Decision 2004/258, it is no longer necessary for the Court to examine the second and third pleas concerning the exceptions to the right of access provided for in the first indent of Article 4(2), and in Article 4(3) of that decision.

84 In the light of all the foregoing, the action must be dismissed in its entirety as in part inadmissible and in part unfounded.

**Costs**

85 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

86 As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the ECB.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Ms Gabi Thesing and Bloomberg Finance LP to bear their own costs and to pay those incurred by the European Central Bank (ECB).**

LECTURE 8: EU-SPECIFIC FUNDAMENTAL RIGHTS: DATA PROTECTION (I)

One of the most remarkable and typically EU-centred 'fundamental rights' is the right to the protection of one's personal data. Enshrined in Article 8 of the Charter of Fundamental Rights, data protection has been at the core of the EU's attempts to protect individual's privacy by giving them control over who possesses their personal information. As a right distinct from the traditional human right to the respect of private life, the EU has developed a secondary legislation framework to implement this particular right. A 1995 Directive has been adopted to that extent.

In an attempt to develop a more perfect internal market, the European Union has taken up the challenge to promote and develop the emergence of a digital single market, in which cross-border online transactions are facilitated. The establishment of such a market has to a significant extent increased the possibility for individuals' personal data to be assembled and transferred throughout the European Union and beyond. The risk of those data being transferred has given rise to increased debates on the need for and extent of EU regulation governing and structuring such transfers. As a result, a new regulatory framework has seen the light of day in 2016, entering into force on 24 May 2018. The purpose of this lecture is to demonstrate how the European Union regulates the internal market by means of ever more detailed regulation, responding to needs and worries of EU citizens and how, along the way, fundamental rights are being implemented.

The next two lectures will focus more explicitly on the conditions attached to data protection, focusing on the consent-based regime and on the territorial scope of data protection.

*Materials to read:*

- Directive 95/46 of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] O.J. L281/31.
- Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

## Directive 95/46

DIRECTIVE 95/46/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 24 October 1995

on the protection of individuals with regard to the processing of personal data and on the free movement of such data

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof,

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

Having regard to the opinion of the Economic and Social Committee (2),

Acting in accordance with the procedure referred to in Article 189b of the Treaty (3),

(1) Whereas the objectives of the Community, as laid down in the Treaty, as amended by the Treaty on European Union, include creating an ever closer union among the peoples of Europe, fostering closer relations between the States belonging to the Community, ensuring economic and social progress by common action to eliminate the barriers which divide Europe, encouraging the constant improvement of the living conditions of its peoples, preserving and strengthening peace and liberty and promoting democracy on the basis of the fundamental rights recognized in the constitution and laws of the Member States and in the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(2) Whereas data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals;

(3) Whereas the establishment and functioning of an internal market in which, in accordance with Article 7a of the Treaty, the free movement of goods, persons, services and capital is ensured require not only that personal data should be able to flow freely from one Member State to another, but also that the fundamental rights of individuals should be safeguarded;

(4) Whereas increasingly frequent recourse is being had in the Community to the processing of personal data in the various spheres of economic and social activity; whereas the progress made in information technology is making the processing and exchange of such data considerably easier;

(5) Whereas the economic and social integration resulting from the establishment and functioning of the internal market within the meaning of Article 7a of the Treaty will necessarily lead to a substantial increase in cross-border flows of personal data between all those involved in a private or public capacity in economic and social activity in the Member States; whereas the exchange of personal data between undertakings in different Member States is set to increase; whereas the national authorities in the various Member States are being called upon by virtue of Community law to collaborate and exchange personal data so as to be able to perform their duties or carry out tasks on behalf of an authority in another Member State within the context of the area without internal frontiers as constituted by the internal market;

(6) Whereas, furthermore, the increase in scientific and technical cooperation and the coordinated introduction of new telecommunications networks in the Community necessitate and facilitate cross-border flows of personal data;

(7) Whereas the difference in levels of protection of the rights and freedoms of individuals, notably the right to privacy, with regard to the processing of personal data afforded in the Member States may prevent the transmission of such data from the territory of one Member State to that of another Member State; whereas this difference may therefore constitute an obstacle to the pursuit of a number of economic activities at Community level, distort competition and impede authorities in the discharge of their responsibilities under Community law; whereas this difference in levels of protection is due to the existence of a wide variety of national laws, regulations and administrative provisions;

(8) Whereas, in order to remove the obstacles to flows of personal data, the level of protection of the rights and freedoms of individuals with regard to the processing of such data must be equivalent in all Member States; whereas this objective is vital to the internal market but cannot be achieved by the Member States alone, especially in view of the scale of the divergences which currently exist between the relevant laws in the Member States and the need to coordinate the laws of the Member States so as to ensure that the cross-border flow of personal data is regulated in a consistent manner that is in keeping with the objective of the internal market as provided for in Article 7a of the Treaty; whereas Community action to approximate those laws is therefore needed;

(9) Whereas, given the equivalent protection resulting from the approximation of national laws, the Member States will no longer be able to inhibit the free movement between them of personal data on grounds relating to protection of the rights and freedoms of individuals, and in particular the right to privacy; whereas Member States will be left a margin for manoeuvre, which may, in the context of implementation of the Directive, also be exercised by the business and social partners; whereas Member States will therefore be able to specify in their national law the general conditions governing the lawfulness of data processing; whereas in doing so the Member States shall strive to improve the protection currently provided by their legislation; whereas, within the limits of this margin for manoeuvre and in accordance with Community law, disparities could arise in the implementation of the Directive, and this could have an effect on the movement of data within a Member State as well as within the Community;

(10) Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognized both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of Community law; whereas, for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community;

(11) Whereas the principles of the protection of the rights and freedoms of individuals, notably the right to privacy, which are contained in this Directive, give substance to and amplify those contained in the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data;

(12) Whereas the protection principles must apply to all processing of personal data by any person whose activities are governed by Community law; whereas there should be excluded the processing of data carried out by a natural person in the exercise of activities which are exclusively personal or domestic, such as correspondence and the holding of records of addresses;

(13) Whereas the acitivities referred to in Titles V and VI of the Treaty on European Union regarding public safety, defence, State security or the acitivities of the State in the area of criminal laws fall outside the scope of Community law, without prejudice to the obligations incumbent upon Member States under Article 56 (2), Article 57 or Article 100a of the Treaty establishing the European Community; whereas the processing of personal data that is necessary to safeguard the economic well-being of the State does not fall within the scope of this Directive where such processing relates to State security matters;

(14) Whereas, given the importance of the developments under way, in the framework of the information society, of the techniques used to capture, transmit, manipulate, record, store or communicate sound and image data relating to natural persons, this Directive should be applicable to processing involving such data;

(15) Whereas the processing of such data is covered by this Directive only if it is automated or if the data processed are contained or are intended to be contained in a filing system structured according to specific criteria relating to individuals, so as to permit easy access to the personal data in question;

(16) Whereas the processing of sound and image data, such as in cases of video surveillance, does not come within the scope of this Directive if it is carried out for the purposes of public security, defence, national security or in the course of State activities relating to the area of criminal law or of other activities which do not come within the scope of Community law;

(17) Whereas, as far as the processing of sound and image data carried out for purposes of journalism or the purposes of literary or artistic expression is concerned, in particular in the audiovisual field, the principles of the Directive are to apply in a restricted manner according to the provisions laid down in Article 9;

(18) Whereas, in order to ensure that individuals are not deprived of the protection to which they are entitled under this Directive, any processing of personal data in the Community must be carried out in accordance with the law of one of the Member States; whereas, in this connection, processing carried out under the responsibility of a controller who is established in a Member State should be governed by the law of that State;

(19) Whereas establishment on the territory of a Member State implies the effective and real exercise of activity through stable arrangements; whereas the legal form of such an establishment, whether simply branch or a subsidiary with a legal personality, is not the determining factor in this respect; whereas, when a single controller is established on the territory of several Member States, particularly by means of subsidiaries, he must ensure, in order to avoid any circumvention of national rules, that each of the establishments fulfils the obligations imposed by the national law applicable to its activities;

(20) Whereas the fact that the processing of data is carried out by a person established in a third country must not stand in the way of the protection of individuals provided for in this Directive; whereas in these cases, the processing should be governed by the law of the Member State in which the means used are located, and there should be guarantees to ensure that the rights and obligations provided for in this Directive are respected in practice;

(21) Whereas this Directive is without prejudice to the rules of territoriality applicable in criminal matters;

(22) Whereas Member States shall more precisely define in the laws they enact or when bringing into force the measures taken under this Directive the general circumstances in which processing is lawful; whereas in particular Article 5, in conjunction with Articles 7 and 8, allows Member States, independently of general rules, to provide for special processing conditions for specific sectors and for the various categories of data covered by Article 8;

(23) Whereas Member States are empowered to ensure the implementation of the protection of individuals both by means of a general law on the protection of individuals as regards the processing of personal data and by sectorial laws such as those relating, for example, to statistical institutes;

(24) Whereas the legislation concerning the protection of legal persons with regard to the processing data which concerns them is not affected by this Directive;

(25) Whereas the principles of protection must be reflected, on the one hand, in the obligations imposed on persons, public authorities, enterprises, agencies or other bodies responsible for processing, in particular regarding data quality, technical security, notification to the supervisory authority, and the circumstances under which processing can be carried out, and, on the other hand, in the right conferred on individuals, the data on whom are the subject of processing, to be informed that processing is taking place, to consult the data, to request corrections and even to object to processing in certain circumstances;

(26) Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable; whereas codes of conduct within the meaning of Article 27 may be a useful instrument for providing guidance as to the ways in which data may be rendered anonymous and retained in a form in which identification of the data subject is no longer possible;

(27) Whereas the protection of individuals must apply as much to automatic processing of data as to manual processing; whereas the scope of this protection must not in effect depend on the techniques used, otherwise this

would create a serious risk of circumvention; whereas, nonetheless, as regards manual processing, this Directive covers only filing systems, not unstructured files; whereas, in particular, the content of a filing system must be structured according to specific criteria relating to individuals allowing easy access to the personal data; whereas, in line with the definition in Article 2 (c), the different criteria for determining the constituents of a structured set of personal data, and the different criteria governing access to such a set, may be laid down by each Member State; whereas files or sets of files as well as their cover pages, which are not structured according to specific criteria, shall under no circumstances fall within the scope of this Directive;

(28) Whereas any processing of personal data must be lawful and fair to the individuals concerned; whereas, in particular, the data must be adequate, relevant and not excessive in relation to the purposes for which they are processed; whereas such purposes must be explicit and legitimate and must be determined at the time of collection of the data; whereas the purposes of processing further to collection shall not be incompatible with the purposes as they were originally specified;

(29) Whereas the further processing of personal data for historical, statistical or scientific purposes is not generally to be considered incompatible with the purposes for which the data have previously been collected provided that Member States furnish suitable safeguards; whereas these safeguards must in particular rule out the use of the data in support of measures or decisions regarding any particular individual;

(30) Whereas, in order to be lawful, the processing of personal data must in addition be carried out with the consent of the data subject or be necessary for the conclusion or performance of a contract binding on the data subject, or as a legal requirement, or for the performance of a task carried out in the public interest or in the exercise of official authority, or in the legitimate interests of a natural or legal person, provided that the interests or the rights and freedoms of the data subject are not overriding; whereas, in particular, in order to maintain a balance between the interests involved while guaranteeing effective competition, Member States may determine the circumstances in which personal data may be used or disclosed to a third party in the context of the legitimate ordinary business activities of companies and other bodies; whereas Member States may similarly specify the conditions under which personal data may be disclosed to a third party for the purposes of marketing whether carried out commercially or by a charitable organization or by any other association or foundation, of a political nature for example, subject to the provisions allowing a data subject to object to the processing of data regarding him, at no cost and without having to state his reasons;

(31) Whereas the processing of personal data must equally be regarded as lawful where it is carried out in order to protect an interest which is essential for the data subject's life;

(32) Whereas it is for national legislation to determine whether the controller performing a task carried out in the public interest or in the exercise of official authority should be a public administration or another natural or legal person governed by public law, or by private law such as a professional association;

(33) Whereas data which are capable by their nature of infringing fundamental freedoms or privacy should not be processed unless the data subject gives his explicit consent; whereas, however, derogations from this prohibition must be explicitly provided for in respect of specific needs, in particular where the processing of these data is carried out for certain health-related purposes by persons subject to a legal obligation of professional secrecy or in the course of legitimate activities by certain associations or foundations the purpose of which is to permit the exercise of fundamental freedoms;

(34) Whereas Member States must also be authorized, when justified by grounds of important public interest, to derogate from the prohibition on processing sensitive categories of data where important reasons of public interest so justify in areas such as public health and social protection - especially in order to ensure the quality and cost-effectiveness of the procedures used for settling claims for benefits and services in the health insurance system - scientific research and government statistics; whereas it is incumbent on them, however, to provide specific and suitable safeguards so as to protect the fundamental rights and the privacy of individuals;

(35) Whereas, moreover, the processing of personal data by official authorities for achieving aims, laid down in constitutional law or international public law, of officially recognized religious associations is carried out on important grounds of public interest;

(36) Whereas where, in the course of electoral activities, the operation of the democratic system requires in certain Member States that political parties compile data on people's political opinion, the processing of such data may be permitted for reasons of important public interest, provided that appropriate safeguards are established;

(37) Whereas the processing of personal data for purposes of journalism or for purposes of literary of artistic expression, in particular in the audiovisual field, should qualify for exemption from the requirements of certain provisions of this Directive in so far as this is necessary to reconcile the fundamental rights of individuals with freedom of information and notably the right to receive and impart information, as guaranteed in particular in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas Member States should therefore lay down exemptions and derogations necessary for the purpose of balance between fundamental rights as regards general measures on the legitimacy of data processing, measures on the transfer of data to third countries and the power of the supervisory authority; whereas this should not, however, lead Member States to lay down exemptions from the measures to ensure security of processing; whereas at least the supervisory authority responsible for this sector should also be provided with certain ex-post powers, e.g. to publish a regular report or to refer matters to the judicial authorities;

(38) Whereas, if the processing of data is to be fair, the data subject must be in a position to learn of the existence of a processing operation and, where data are collected from him, must be given accurate and full information, bearing in mind the circumstances of the collection;

(39) Whereas certain processing operations involve data which the controller has not collected directly from the data subject; whereas, furthermore, data can be legitimately disclosed to a third party, even if the disclosure was not anticipated at the time the data were collected from the data subject; whereas, in all these cases, the data subject should be informed when the data are recorded or at the latest when the data are first disclosed to a third party;

(40) Whereas, however, it is not necessary to impose this obligation of the data subject already has the information; whereas, moreover, there will be no such obligation if the recording or disclosure are expressly provided for by law or if the provision of information to the data subject proves impossible or would involve disproportionate efforts, which could be the case where processing is for historical, statistical or scientific purposes; whereas, in this regard, the number of data subjects, the age of the data, and any compensatory measures adopted may be taken into consideration;

(41) Whereas any person must be able to exercise the right of access to data relating to him which are being processed, in order to verify in particular the accuracy of the data and the lawfulness of the processing; whereas, for the same reasons, every data subject must also have the right to know the logic involved in the automatic processing of data concerning him, at least in the case of the automated decisions referred to in Article 15 (1); whereas this right must not adversely affect trade secrets or intellectual property and in particular the copyright protecting the software; whereas these considerations must not, however, result in the data subject being refused all information;

(42) Whereas Member States may, in the interest of the data subject or so as to protect the rights and freedoms of others, restrict rights of access and information; whereas they may, for example, specify that access to medical data may be obtained only through a health professional;

(43) Whereas restrictions on the rights of access and information and on certain obligations of the controller may similarly be imposed by Member States in so far as they are necessary to safeguard, for example, national security, defence, public safety, or important economic or financial interests of a Member State or the Union, as well as criminal investigations and prosecutions and action in respect of breaches of ethics in the regulated professions; whereas the list of exceptions and limitations should include the tasks of monitoring, inspection or regulation necessary in the three last-mentioned areas concerning public security, economic or financial interests and crime prevention; whereas the listing of tasks in these three areas does not affect the legitimacy of exceptions or restrictions for reasons of State security or defence;

(44) Whereas Member States may also be led, by virtue of the provisions of Community law, to derogate from the provisions of this Directive concerning the right of access, the obligation to inform individuals, and the quality of data, in order to secure certain of the purposes referred to above;

(45) Whereas, in cases where data might lawfully be processed on grounds of public interest, official authority or the legitimate interests of a natural or legal person, any data subject should nevertheless be entitled, on legitimate and compelling grounds relating to his particular situation, to object to the processing of any data relating to himself; whereas Member States may nevertheless lay down national provisions to the contrary;

(46) Whereas the protection of the rights and freedoms of data subjects with regard to the processing of personal data requires that appropriate technical and organizational measures be taken, both at the time of the design of the processing system and at the time of the processing itself, particularly in order to maintain security and thereby to prevent any unauthorized processing; whereas it is incumbent on the Member States to ensure that controllers comply with these measures; whereas these measures must ensure an appropriate level of security, taking into account the state of the art and the costs of their implementation in relation to the risks inherent in the processing and the nature of the data to be protected;

(47) Whereas where a message containing personal data is transmitted by means of a telecommunications or electronic mail service, the sole purpose of which is the transmission of such messages, the controller in respect of the personal data contained in the message will normally be considered to be the person from whom the message originates, rather than the person offering the transmission services; whereas, nevertheless, those offering such services will normally be considered controllers in respect of the processing of the additional personal data necessary for the operation of the service;

(48) Whereas the procedures for notifying the supervisory authority are designed to ensure disclosure of the purposes and main features of any processing operation for the purpose of verification that the operation is in accordance with the national measures taken under this Directive;

(49) Whereas, in order to avoid unsuitable administrative formalities, exemptions from the obligation to notify and simplification of the notification required may be provided for by Member States in cases where processing is unlikely adversely to affect the rights and freedoms of data subjects, provided that it is in accordance with a measure taken by a Member State specifying its limits; whereas exemption or simplification may similarly be provided for by Member States where a person appointed by the controller ensures that the processing carried out is not likely adversely to affect the rights and freedoms of data subjects; whereas such a data protection official, whether or not an employee of the controller, must be in a position to exercise his functions in complete independence;

(50) Whereas exemption or simplification could be provided for in cases of processing operations whose sole purpose is the keeping of a register intended, according to national law, to provide information to the public and open to consultation by the public or by any person demonstrating a legitimate interest;

(51) Whereas, nevertheless, simplification or exemption from the obligation to notify shall not release the controller from any of the other obligations resulting from this Directive;

(52) Whereas, in this context, ex post facto verification by the competent authorities must in general be considered a sufficient measure;

(53) Whereas, however, certain processing operation are likely to pose specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes, such as that of excluding individuals from a right, benefit or a contract, or by virtue of the specific use of new technologies; whereas it is for Member States, if they so wish, to specify such risks in their legislation;

(54) Whereas with regard to all the processing undertaken in society, the amount posing such specific risks should be very limited; whereas Member States must provide that the supervisory authority, or the data protection official in cooperation with the authority, check such processing prior to it being carried out; whereas following this prior check, the supervisory authority may, according to its national law, give an opinion or an authorization regarding the processing; whereas such checking may equally take place in the course of the preparation either of a measure of the national parliament or of a measure based on such a legislative measure, which defines the nature of the processing and lays down appropriate safeguards;

(55) Whereas, if the controller fails to respect the rights of data subjects, national legislation must provide for a judicial remedy; whereas any damage which a person may suffer as a result of unlawful processing must be

compensated for by the controller, who may be exempted from liability if he proves that he is not responsible for the damage, in particular in cases where he establishes fault on the part of the data subject or in case of force majeure; whereas sanctions must be imposed on any person, whether governed by private of public law, who fails to comply with the national measures taken under this Directive;

(56) Whereas cross-border flows of personal data are necessary to the expansion of international trade; whereas the protection of individuals guaranteed in the Community by this Directive does not stand in the way of transfers of personal data to third countries which ensure an adequate level of protection; whereas the adequacy of the level of protection afforded by a third country must be assessed in the light of all the circumstances surrounding the transfer operation or set of transfer operations;

(57) Whereas, on the other hand, the transfer of personal data to a third country which does not ensure an adequate level of protection must be prohibited;

(58) Whereas provisions should be made for exemptions from this prohibition in certain circumstances where the data subject has given his consent, where the transfer is necessary in relation to a contract or a legal claim, where protection of an important public interest so requires, for example in cases of international transfers of data between tax or customs administrations or between services competent for social security matters, or where the transfer is made from a register established by law and intended for consultation by the public or persons having a legitimate interest; whereas in this case such a transfer should not involve the entirety of the data or entire categories of the data contained in the register and, when the register is intended for consultation by persons having a legitimate interest, the transfer should be made only at the request of those persons or if they are to be the recipients;

(59) Whereas particular measures may be taken to compensate for the lack of protection in a third country in cases where the controller offers appropriate safeguards; whereas, moreover, provision must be made for procedures for negotiations between the Community and such third countries;

(60) Whereas, in any event, transfers to third countries may be effected only in full compliance with the provisions adopted by the Member States pursuant to this Directive, and in particular Article 8 thereof;

(61) Whereas Member States and the Commission, in their respective spheres of competence, must encourage the trade associations and other representative organizations concerned to draw up codes of conduct so as to facilitate the application of this Directive, taking account of the specific characteristics of the processing carried out in certain sectors, and respecting the national provisions adopted for its implementation;

(62) Whereas the establishment in Member States of supervisory authorities, exercising their functions with complete independence, is an essential component of the protection of individuals with regard to the processing of personal data;

(63) Whereas such authorities must have the necessary means to perform their duties, including powers of investigation and intervention, particularly in cases of complaints from individuals, and powers to engage in legal proceedings; whereas such authorities must help to ensure transparency of processing in the Member States within whose jurisdiction they fall;

(64) Whereas the authorities in the different Member States will need to assist one another in performing their duties so as to ensure that the rules of protection are properly respected throughout the European Union;

(65) Whereas, at Community level, a Working Party on the Protection of Individuals with regard to the Processing of Personal Data must be set up and be completely independent in the performance of its functions; whereas, having regard to its specific nature, it must advise the Commission and, in particular, contribute to the uniform application of the national rules adopted pursuant to this Directive;

(66) Whereas, with regard to the transfer of data to third countries, the application of this Directive calls for the conferment of powers of implementation on the Commission and the establishment of a procedure as laid down in Council Decision 87/373/EEC (1);

(67) Whereas an agreement on a modus vivendi between the European Parliament, the Council and the Commission concerning the implementing measures for acts adopted in accordance with the procedure laid down in Article 189b of the EC Treaty was reached on 20 December 1994;

(68) Whereas the principles set out in this Directive regarding the protection of the rights and freedoms of individuals, notably their right to privacy, with regard to the processing of personal data may be supplemented or clarified, in particular as far as certain sectors are concerned, by specific rules based on those principles;

(69) Whereas Member States should be allowed a period of not more than three years from the entry into force of the national measures transposing this Directive in which to apply such new national rules progressively to all processing operations already under way; whereas, in order to facilitate their cost-effective implementation, a further period expiring 12 years after the date on which this Directive is adopted will be allowed to Member States to ensure the conformity of existing manual filing systems with certain of the Directive's provisions; whereas, where data contained in such filing systems are manually processed during this extended transition period, those systems must be brought into conformity with these provisions at the time of such processing;

(70) Whereas it is not necessary for the data subject to give his consent again so as to allow the controller to continue to process, after the national provisions taken pursuant to this Directive enter into force, any sensitive data necessary for the performance of a contract concluded on the basis of free and informed consent before the entry into force of these provisions;

(71) Whereas this Directive does not stand in the way of a Member State's regulating marketing activities aimed at consumers residing in territory in so far as such regulation does not concern the protection of individuals with regard to the processing of personal data;

(72) Whereas this Directive allows the principle of public access to official documents to be taken into account when implementing the principles set out in this Directive,

HAVE ADOPTED THIS DIRECTIVE:

## CHAPTER I GENERAL PROVISIONS

### Article 1

Object of the Directive

1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.

2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.

### Article 2

Definitions

For the purposes of this Directive:

(a) 'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) 'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

(c) 'personal data filing system' ('filing system') shall mean any structured set of personal data which are accessible according to specific criteria, whether centralized, decentralized or dispersed on a functional or geographical basis;

(d) 'controller' shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law;

(e) 'processor' shall mean a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller;

(f) 'third party' shall mean any natural or legal person, public authority, agency or any other body other than the data subject, the controller, the processor and the persons who, under the direct authority of the controller or the processor, are authorized to process the data;

(g) 'recipient' shall mean a natural or legal person, public authority, agency or any other body to whom data are disclosed, whether a third party or not; however, authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients;

(h) 'the data subject's consent' shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.

Article 3

Scope

1. This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.

2. This Directive shall not apply to the processing of personal data:

- in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law,

- by a natural person in the course of a purely personal or household activity.

Article 4

National law applicable

1. Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:

(a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;

(b) the controller is not established on the Member State's territory, but in a place where its national law applies by virtue of international public law;

(c) the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community.

2. In the circumstances referred to in paragraph 1 (c), the controller must designate a representative established in the territory of that Member State, without prejudice to legal actions which could be initiated against the controller himself.

CHAPTER II GENERAL RULES ON THE LAWFULNESS OF THE PROCESSING OF PERSONAL DATA

Article 5

Member States shall, within the limits of the provisions of this Chapter, determine more precisely the conditions under which the processing of personal data is lawful.

SECTION I

PRINCIPLES RELATING TO DATA QUALITY

Article 6

1. Member States shall provide that personal data must be:

(a) processed fairly and lawfully;

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;

(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.

2. It shall be for the controller to ensure that paragraph 1 is complied with.

SECTION II

CRITERIA FOR MAKING DATA PROCESSING LEGITIMATE

Article 7

Member States shall provide that personal data may be processed only if:

(a) the data subject has unambiguously given his consent; or

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or

(c) processing is necessary for compliance with a legal obligation to which the controller is subject; or

(d) processing is necessary in order to protect the vital interests of the data subject; or

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1).

SECTION III

SPECIAL CATEGORIES OF PROCESSING

Article 8

The processing of special categories of data

1. Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.

2. Paragraph 1 shall not apply where:

(a) the data subject has given his explicit consent to the processing of those data, except where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject's giving his consent; or

(b) processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law in so far as it is authorized by national law providing for adequate safeguards; or

(c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent; or

(d) processing is carried out in the course of its legitimate activities with appropriate guarantees by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects; or

(e) the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims.

3. Paragraph 1 shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject under national law or rules established by national competent bodies to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy.

4. Subject to the provision of suitable safeguards, Member States may, for reasons of substantial public interest, lay down exemptions in addition to those laid down in paragraph 2 either by national law or by decision of the supervisory authority.

5. Processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law, subject to derogations which may be granted by the Member State under national provisions providing suitable specific safeguards. However, a complete register of criminal convictions may be kept only under the control of official authority.

Member States may provide that data relating to administrative sanctions or judgements in civil cases shall also be processed under the control of official authority.

6. Derogations from paragraph 1 provided for in paragraphs 4 and 5 shall be notified to the Commission.

7. Member States shall determine the conditions under which a national identification number or any other identifier of general application may be processed.

Article 9

Processing of personal data and freedom of expression

Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.

SECTION IV

INFORMATION TO BE GIVEN TO THE DATA SUBJECT

Article 10

Information in cases of collection of data from the data subject

Member States shall provide that the controller or his representative must provide a data subject from whom data relating to himself are collected with at least the following information, except where he already has it:

(a) the identity of the controller and of his representative, if any;

(b) the purposes of the processing for which the data are intended;

(c) any further information such as

- the recipients or categories of recipients of the data,

- whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply,

- the existence of the right of access to and the right to rectify the data concerning him

in so far as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.

Article 11

Information where the data have not been obtained from the data subject

1. Where the data have not been obtained from the data subject, Member States shall provide that the controller or his representative must at the time of undertaking the recording of personal data or if a disclosure to a third party is envisaged, no later than the time when the data are first disclosed provide the data subject with at least the following information, except where he already has it:

(a) the identity of the controller and of his representative, if any;

(b) the purposes of the processing;

(c) any further information such as

- the categories of data concerned,

- the recipients or categories of recipients,

- the existence of the right of access to and the right to rectify the data concerning him

in so far as such further information is necessary, having regard to the specific circumstances in which the data are processed, to guarantee fair processing in respect of the data subject.

2. Paragraph 1 shall not apply where, in particular for processing for statistical purposes or for the purposes of historical or scientific research, the provision of such information proves impossible or would involve a disproportionate effort or if recording or disclosure is expressly laid down by law. In these cases Member States shall provide appropriate safeguards.

SECTION V

THE DATA SUBJECT'S RIGHT OF ACCESS TO DATA

Article 12

Right of access

Member States shall guarantee every data subject the right to obtain from the controller:

(a) without constraint at reasonable intervals and without excessive delay or expense:

- confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed,

- communication to him in an intelligible form of the data undergoing processing and of any available information as to their source,

- knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 15 (1);

(b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;

(c) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort.

SECTION VI

EXEMPTIONS AND RESTRICTIONS

Article 13

Exemptions and restrictions

1. Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6 (1), 10, 11 (1), 12 and 21 when such a restriction constitutes a necessary measures to safeguard:

(a) national security;

(b) defence;

(c) public security;

(d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions;

(e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;

(f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);

(g) the protection of the data subject or of the rights and freedoms of others.

2. Subject to adequate legal safeguards, in particular that the data are not used for taking measures or decisions regarding any particular individual, Member States may, where there is clearly no risk of breaching the privacy of the data subject, restrict by a legislative measure the rights provided for in Article 12 when data are processed solely for purposes of scientific research or are kept in personal form for a period which does not exceed the period necessary for the sole purpose of creating statistics.

SECTION VII

THE DATA SUBJECT'S RIGHT TO OBJECT

Article 14

The data subject's right to object

Member States shall grant the data subject the right:

(a) at least in the cases referred to in Article 7 (e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data;

(b) to object, on request and free of charge, to the processing of personal data relating to him which the controller anticipates being processed for the purposes of direct marketing, or to be informed before personal data are disclosed for the first time to third parties or used on their behalf for the purposes of direct marketing, and to be expressly offered the right to object free of charge to such disclosures or uses.

Member States shall take the necessary measures to ensure that data subjects are aware of the existence of the right referred to in the first subparagraph of (b).

Article 15

Automated individual decisions

1. Member States shall grant the right to every person not to be subject to a decision which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data intended

to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc.

2. Subject to the other Articles of this Directive, Member States shall provide that a person may be subjected to a decision of the kind referred to in paragraph 1 if that decision:

(a) is taken in the course of the entering into or performance of a contract, provided the request for the entering into or the performance of the contract, lodged by the data subject, has been satisfied or that there are suitable measures to safeguard his legitimate interests, such as arrangements allowing him to put his point of view; or

(b) is authorized by a law which also lays down measures to safeguard the data subject's legitimate interests.

SECTION VIII

CONFIDENTIALITY AND SECURITY OF PROCESSING

Article 16

Confidentiality of processing

Any person acting under the authority of the controller or of the processor, including the processor himself, who has access to personal data must not process them except on instructions from the controller, unless he is required to do so by law.

Article 17

Security of processing

1. Member States shall provide that the controller must implement appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.

Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.

2. The Member States shall provide that the controller must, where processing is carried out on his behalf, choose a processor providing sufficient guarantees in respect of the technical security measures and organizational measures governing the processing to be carried out, and must ensure compliance with those measures.

3. The carrying out of processing by way of a processor must be governed by a contract or legal act binding the processor to the controller and stipulating in particular that:

- the processor shall act only on instructions from the controller,

- the obligations set out in paragraph 1, as defined by the law of the Member State in which the processor is established, shall also be incumbent on the processor.

4. For the purposes of keeping proof, the parts of the contract or the legal act relating to data protection and the requirements relating to the measures referred to in paragraph 1 shall be in writing or in another equivalent form.

SECTION IX

NOTIFICATION

Article 18

Obligation to notify the supervisory authority

1. Member States shall provide that the controller or his representative, if any, must notify the supervisory authority referred to in Article 28 before carrying out any wholly or partly automatic processing operation or set of such operations intended to serve a single purpose or several related purposes.

2. Member States may provide for the simplification of or exemption from notification only in the following cases and under the following conditions:

- where, for categories of processing operations which are unlikely, taking account of the data to be processed, to affect adversely the rights and freedoms of data subjects, they specify the purposes of the processing, the data or categories of data undergoing processing, the category or categories of data subject, the recipients or categories of recipient to whom the data are to be disclosed and the length of time the data are to be stored, and/or

- where the controller, in compliance with the national law which governs him, appoints a personal data protection official, responsible in particular:

- for ensuring in an independent manner the internal application of the national provisions taken pursuant to this Directive

- for keeping the register of processing operations carried out by the controller, containing the items of information referred to in Article 21 (2),

thereby ensuring that the rights and freedoms of the data subjects are unlikely to be adversely affected by the processing operations.

3. Member States may provide that paragraph 1 does not apply to processing whose sole purpose is the keeping of a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person demonstrating a legitimate interest.

4. Member States may provide for an exemption from the obligation to notify or a simplification of the notification in the case of processing operations referred to in Article 8 (2) (d).

5. Member States may stipulate that certain or all non-automatic processing operations involving personal data shall be notified, or provide for these processing operations to be subject to simplified notification.

Article 19

Contents of notification

1. Member States shall specify the information to be given in the notification. It shall include at least:

(a) the name and address of the controller and of his representative, if any;

(b) the purpose or purposes of the processing;

(c) a description of the category or categories of data subject and of the data or categories of data relating to them;

(d) the recipients or categories of recipient to whom the data might be disclosed;

(e) proposed transfers of data to third countries;

(f) a general description allowing a preliminary assessment to be made of the appropriateness of the measures taken pursuant to Article 17 to ensure security of processing.

2. Member States shall specify the procedures under which any change affecting the information referred to in paragraph 1 must be notified to the supervisory authority.

Article 20

Prior checking

1. Member States shall determine the processing operations likely to present specific risks to the rights and freedoms of data subjects and shall check that these processing operations are examined prior to the start thereof.

2. Such prior checks shall be carried out by the supervisory authority following receipt of a notification from the controller or by the data protection official, who, in cases of doubt, must consult the supervisory authority.

3. Member States may also carry out such checks in the context of preparation either of a measure of the national parliament or of a measure based on such a legislative measure, which define the nature of the processing and lay down appropriate safeguards.

Article 21

Publicizing of processing operations

1. Member States shall take measures to ensure that processing operations are publicized.

2. Member States shall provide that a register of processing operations notified in accordance with Article 18 shall be kept by the supervisory authority.

The register shall contain at least the information listed in Article 19 (1) (a) to (e).

The register may be inspected by any person.

3. Member States shall provide, in relation to processing operations not subject to notification, that controllers or another body appointed by the Member States make available at least the information referred to in Article 19 (1) (a) to (e) in an appropriate form to any person on request.

Member States may provide that this provision does not apply to processing whose sole purpose is the keeping of a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can provide proof of a legitimate interest.

CHAPTER III JUDICIAL REMEDIES, LIABILITY AND SANCTIONS

Article 22

Remedies

Without prejudice to any administrative remedy for which provision may be made, inter alia before the supervisory authority referred to in Article 28, prior to referral to the judicial authority, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question.

Article 23

Liability

1. Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered.

2. The controller may be exempted from this liability, in whole or in part, if he proves that he is not responsible for the event giving rise to the damage.

Article 24

Sanctions

The Member States shall adopt suitable measures to ensure the full implementation of the provisions of this Directive and shall in particular lay down the sanctions to be imposed in case of infringement of the provisions adopted pursuant to this Directive.

CHAPTER IV TRANSFER OF PERSONAL DATA TO THIRD COUNTRIES

Article 25

Principles

1. The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection.

2. The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country.

3. The Member States and the Commission shall inform each other of cases where they consider that a third country does not ensure an adequate level of protection within the meaning of paragraph 2.

4. Where the Commission finds, under the procedure provided for in Article 31 (2), that a third country does not ensure an adequate level of protection within the meaning of paragraph 2 of this Article, Member States shall take the measures necessary to prevent any transfer of data of the same type to the third country in question.

5. At the appropriate time, the Commission shall enter into negotiations with a view to remedying the situation resulting from the finding made pursuant to paragraph 4.

6. The Commission may find, in accordance with the procedure referred to in Article 31 (2), that a third country ensures an adequate level of protection within the meaning of paragraph 2 of this Article, by reason of its domestic law or of the international commitments it has entered into, particularly upon conclusion of the negotiations referred to in paragraph 5, for the protection of the private lives and basic freedoms and rights of individuals.

Member States shall take the measures necessary to comply with the Commission's decision.

Article 26

Derogations

1. By way of derogation from Article 25 and save where otherwise provided by domestic law governing particular cases, Member States shall provide that a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25 (2) may take place on condition that:

(a) the data subject has given his consent unambiguously to the proposed transfer; or

(b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of precontractual measures taken in response to the data subject's request; or

(c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and a third party; or

(d) the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims; or

(e) the transfer is necessary in order to protect the vital interests of the data subject; or

(f) the transfer is made from a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate legitimate interest, to the extent that the conditions laid down in law for consultation are fulfilled in the particular case.

2. Without prejudice to paragraph 1, a Member State may authorize a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25 (2), where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights; such safeguards may in particular result from appropriate contractual clauses.

3. The Member State shall inform the Commission and the other Member States of the authorizations it grants pursuant to paragraph 2.

If a Member State or the Commission objects on justified grounds involving the protection of the privacy and fundamental rights and freedoms of individuals, the Commission shall take appropriate measures in accordance with the procedure laid down in Article 31 (2).

Member States shall take the necessary measures to comply with the Commission's decision.

4. Where the Commission decides, in accordance with the procedure referred to in Article 31 (2), that certain standard contractual clauses offer sufficient safeguards as required by paragraph 2, Member States shall take the necessary measures to comply with the Commission's decision.

CHAPTER V CODES OF CONDUCT

Article 27

1. The Member States and the Commission shall encourage the drawing up of codes of conduct intended to contribute to the proper implementation of the national provisions adopted by the Member States pursuant to this Directive, taking account of the specific features of the various sectors.

2. Member States shall make provision for trade associations and other bodies representing other categories of controllers which have drawn up draft national codes or which have the intention of amending or extending existing national codes to be able to submit them to the opinion of the national authority.

Member States shall make provision for this authority to ascertain, among other things, whether the drafts submitted to it are in accordance with the national provisions adopted pursuant to this Directive. If it sees fit, the authority shall seek the views of data subjects or their representatives.

3. Draft Community codes, and amendments or extensions to existing Community codes, may be submitted to the Working Party referred to in Article 29. This Working Party shall determine, among other things, whether the drafts submitted to it are in accordance with the national provisions adopted pursuant to this Directive. If it sees fit, the authority shall seek the views of data subjects or their representatives. The Commission may ensure appropriate publicity for the codes which have been approved by the Working Party.

## CHAPTER VI SUPERVISORY AUTHORITY AND WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA

### Article 28

Supervisory authority

1. Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive.

These authorities shall act with complete independence in exercising the functions entrusted to them.

2. Each Member State shall provide that the supervisory authorities are consulted when drawing up administrative measures or regulations relating to the protection of individuals' rights and freedoms with regard to the processing of personal data.

3. Each authority shall in particular be endowed with:

- investigative powers, such as powers of access to data forming the subject-matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties,

- effective powers of intervention, such as, for example, that of delivering opinions before processing operations are carried out, in accordance with Article 20, and ensuring appropriate publication of such opinions, of ordering the blocking, erasure or destruction of data, of imposing a temporary or definitive ban on processing, of warning or admonishing the controller, or that of referring the matter to national parliaments or other political institutions,

- the power to engage in legal proceedings where the national provisions adopted pursuant to this Directive have been violated or to bring these violations to the attention of the judicial authorities.

Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts.

4. Each supervisory authority shall hear claims lodged by any person, or by an association representing that person, concerning the protection of his rights and freedoms in regard to the processing of personal data. The person concerned shall be informed of the outcome of the claim.

Each supervisory authority shall, in particular, hear claims for checks on the lawfulness of data processing lodged by any person when the national provisions adopted pursuant to Article 13 of this Directive apply. The person shall at any rate be informed that a check has taken place.

5. Each supervisory authority shall draw up a report on its activities at regular intervals. The report shall be made public.

6. Each supervisory authority is competent, whatever the national law applicable to the processing in question, to exercise, on the territory of its own Member State, the powers conferred on it in accordance with paragraph 3. Each authority may be requested to exercise its powers by an authority of another Member State.

The supervisory authorities shall cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information.

7. Member States shall provide that the members and staff of the supervisory authority, even after their employment has ended, are to be subject to a duty of professional secrecy with regard to confidential information to which they have access.

### Article 29

Working Party on the Protection of Individuals with regard to the Processing of Personal Data

1. A Working Party on the Protection of Individuals with regard to the Processing of Personal Data, hereinafter referred to as 'the Working Party', is hereby set up.

It shall have advisory status and act independently.

2. The Working Party shall be composed of a representative of the supervisory authority or authorities designated by each Member State and of a representative of the authority or authorities established for the Community institutions and bodies, and of a representative of the Commission.

Each member of the Working Party shall be designated by the institution, authority or authorities which he represents. Where a Member State has designated more than one supervisory authority, they shall nominate a joint representative. The same shall apply to the authorities established for Community institutions and bodies.

3. The Working Party shall take decisions by a simple majority of the representatives of the supervisory authorities.

4. The Working Party shall elect its chairman. The chairman's term of office shall be two years. His appointment shall be renewable.

5. The Working Party's secretariat shall be provided by the Commission.

6. The Working Party shall adopt its own rules of procedure.

7. The Working Party shall consider items placed on its agenda by its chairman, either on his own initiative or at the request of a representative of the supervisory authorities or at the Commission's request.

Article 30

1. The Working Party shall:

(a) examine any question covering the application of the national measures adopted under this Directive in order to contribute to the uniform application of such measures;

(b) give the Commission an opinion on the level of protection in the Community and in third countries;

(c) advise the Commission on any proposed amendment of this Directive, on any additional or specific measures to safeguard the rights and freedoms of natural persons with regard to the processing of personal data and on any other proposed Community measures affecting such rights and freedoms;

(d) give an opinion on codes of conduct drawn up at Community level.

2. If the Working Party finds that divergences likely to affect the equivalence of protection for persons with regard to the processing of personal data in the Community are arising between the laws or practices of Member States, it shall inform the Commission accordingly.

3. The Working Party may, on its own initiative, make recommendations on all matters relating to the protection of persons with regard to the processing of personal data in the Community.

4. The Working Party's opinions and recommendations shall be forwarded to the Commission and to the committee referred to in Article 31.

5. The Commission shall inform the Working Party of the action it has taken in response to its opinions and recommendations. It shall do so in a report which shall also be forwarded to the European Parliament and the Council. The report shall be made public.

6. The Working Party shall draw up an annual report on the situation regarding the protection of natural persons with regard to the processing of personal data in the Community and in third countries, which it shall transmit to the Commission, the European Parliament and the Council. The report shall be made public.

## CHAPTER VII COMMUNITY IMPLEMENTING MEASURES

### Article 31

### The Committee

1. The Commission shall be assisted by a committee composed of the representatives of the Member States and chaired by the representative of the Commission.

2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter.

The opinion shall be delivered by the majority laid down in Article 148 (2) of the Treaty. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

The Commission shall adopt measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the committee, they shall be communicated by the Commission to the Council forthwith. It that event:

- the Commission shall defer application of the measures which it has decided for a period of three months from the date of communication,

- the Council, acting by a qualified majority, may take a different decision within the time limit referred to in the first indent.

## FINAL PROVISIONS

### Article 32

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive at the latest at the end of a period of three years from the date of its adoption.

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

2. Member States shall ensure that processing already under way on the date the national provisions adopted pursuant to this Directive enter into force, is brought into conformity with these provisions within three years of this date.

By way of derogation from the preceding subparagraph, Member States may provide that the processing of data already held in manual filing systems on the date of entry into force of the national provisions adopted in implementation of this Directive shall be brought into conformity with Articles 6, 7 and 8 of this Directive within 12 years of the date on which it is adopted. Member States shall, however, grant the data subject the right to obtain, at his request and in particular at the time of exercising his right of access, the rectification, erasure or blocking of data which are incomplete, inaccurate or stored in a way incompatible with the legitimate purposes pursued by the controller.

3. By way of derogation from paragraph 2, Member States may provide, subject to suitable safeguards, that data kept for the sole purpose of historical research need not be brought into conformity with Articles 6, 7 and 8 of this Directive.

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

Article 33

The Commission shall report to the Council and the European Parliament at regular intervals, starting not later than three years after the date referred to in Article 32 (1), on the implementation of this Directive, attaching to its report, if necessary, suitable proposals for amendments. The report shall be made public.

The Commission shall examine, in particular, the application of this Directive to the data processing of sound and image data relating to natural persons and shall submit any appropriate proposals which prove to be necessary, taking account of developments in information technology and in the light of the state of progress in the information society.

Article 34

This Directive is addressed to the Member States.

Done at Luxembourg, 24 October 1995.

## Regulation 2016/679, General Data Protection Regulation

[…]

CHAPTER I

General provisions

Article 1

Subject-matter and objectives

1. This Regulation lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data.

2. This Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data.

3. The free movement of personal data within the Union shall be neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data.

Article 2

Material scope

1. This Regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.

2. This Regulation does not apply to the processing of personal data:

(a) in the course of an activity which falls outside the scope of Union law;
(b) by the Member States when carrying out activities which fall within the scope of Chapter 2 of Title V of the TEU;
(c) by a natural person in the course of a purely personal or household activity;
(d) by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.

3. For the processing of personal data by the Union institutions, bodies, offices and agencies, Regulation (EC) No 45/2001 applies. Regulation (EC) No 45/2001 and other Union legal acts applicable to such processing of personal data shall be adapted to the principles and rules of this Regulation in accordance with Article 98.

4. This Regulation shall be without prejudice to the application of Directive 2000/31/EC, in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive.

Article 3

Territorial scope

1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.

2. This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:

(a)the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
(b) the monitoring of their behaviour as far as their behaviour takes place within the Union.

3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.

Article 4

Definitions

For the purposes of this Regulation:

(1)‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;
(2)‘processing’ means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;
(3)‘restriction of processing’ means the marking of stored personal data with the aim of limiting their processing in the future;
(4)‘profiling’ means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements;
(5)‘pseudonymisation’ means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person;
(6)‘filing system’ means any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis;
(7)‘controller’ means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;
(8)‘processor’ means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller;
(9)‘recipient’ means a natural or legal person, public authority, agency or another body, to which the personal data are disclosed, whether a third party or not. However, public authorities which may receive personal data in the framework of a particular inquiry in accordance with Union or Member State law shall not be regarded as recipients; the processing of those data by those public authorities shall be in compliance with the applicable data protection rules according to the purposes of the processing;
(10)‘third party’ means a natural or legal person, public authority, agency or body other than the data subject, controller, processor and persons who, under the direct authority of the controller or processor, are authorised to process personal data;
(11)‘consent’ of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her;
(12)‘personal data breach’ means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed;
(13)‘genetic data’ means personal data relating to the inherited or acquired genetic characteristics of a natural person which give unique information about the physiology or the health of that natural person and which result, in particular, from an analysis of a biological sample from the natural person in question;
(14)‘biometric data’ means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data;

(15)‘data concerning health’ means personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status;
(16)‘main establishment’ means:

(a)as regards a controller with establishments in more than one Member State, the place of its central administration in the Union, unless the decisions on the purposes and means of the processing of personal data are taken in another establishment of the controller in the Union and the latter establishment has the power to have such decisions implemented, in which case the establishment having taken such decisions is to be considered to be the main establishment;
(b)as regards a processor with establishments in more than one Member State, the place of its central administration in the Union, or, if the processor has no central administration in the Union, the establishment of the processor in the Union where the main processing activities in the context of the activities of an establishment of the processor take place to the extent that the processor is subject to specific obligations under this Regulation;

(17)‘representative’ means a natural or legal person established in the Union who, designated by the controller or processor in writing pursuant to Article 27, represents the controller or processor with regard to their respective obligations under this Regulation;
(18)‘enterprise’ means a natural or legal person engaged in an economic activity, irrespective of its legal form, including partnerships or associations regularly engaged in an economic activity;
(19) ‘group of undertakings’ means a controlling undertaking and its controlled undertakings;
(20)‘binding corporate rules’ means personal data protection policies which are adhered to by a controller or processor established on the territory of a Member State for transfers or a set of transfers of personal data to a controller or processor in one or more third countries within a group of undertakings, or group of enterprises engaged in a joint economic activity;
(21)‘supervisory authority’ means an independent public authority which is established by a Member State pursuant to Article 51;
(22)‘supervisory authority concerned’ means a supervisory authority which is concerned by the processing of personal data because:

(a)the controller or processor is established on the territory of the Member State of that supervisory authority;
(b)data subjects residing in the Member State of that supervisory authority are substantially affected or likely to be substantially affected by the processing; or
(c) a complaint has been lodged with that supervisory authority;

(23)‘cross-border processing’ means either:

(a)processing of personal data which takes place in the context of the activities of establishments in more than one Member State of a controller or processor in the Union where the controller or processor is established in more than one Member State; or
(b)processing of personal data which takes place in the context of the activities of a single establishment of a controller or processor in the Union but which substantially affects or is likely to substantially affect data subjects in more than one Member State.

(24)‘relevant and reasoned objection’ means an objection to a draft decision as to whether there is an infringement of this Regulation, or whether envisaged action in relation to the controller or processor complies with this Regulation, which clearly demonstrates the significance of the risks posed by the draft decision as regards the fundamental rights and freedoms of data subjects and, where applicable, the free flow of personal data within the Union;
(25)‘information society service’ means a service as defined in point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council (19);
(26)‘international organisation’ means an organisation and its subordinate bodies governed by public international law, or any other body which is set up by, or on the basis of, an agreement between two or more countries.

CHAPTER II

Principles

Article 5

Principles relating to processing of personal data

1. Personal data shall be:

(a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');
(b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes ('purpose limitation');
(c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation');
(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy');
(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation');
(f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality').

2. The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability').

Article 6

Lawfulness of processing

1. Processing shall be lawful only if and to the extent that at least one of the following applies:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
(c) processing is necessary for compliance with a legal obligation to which the controller is subject;
(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;
(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.

2. Member States may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to processing for compliance with points (c) and (e) of paragraph 1 by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX.

3. The basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by:

(a) Union law; or
(b) Member State law to which the controller is subject.

The purpose of the processing shall be determined in that legal basis or, as regards the processing referred to in point (e) of paragraph 1, shall be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. That legal basis may contain specific provisions to adapt the application of rules of this Regulation, inter alia: the general conditions governing the lawfulness of processing by the controller; the types of data which are subject to the processing; the data subjects concerned; the entities to, and the purposes for which, the personal data may be disclosed; the purpose limitation; storage periods; and processing operations and processing procedures, including measures to ensure lawful and fair processing such as those for other specific processing situations as provided for in Chapter IX. The Union or the Member State law shall meet an objective of public interest and be proportionate to the legitimate aim pursued.

4. Where the processing for a purpose other than that for which the personal data have been collected is not based on the data subject's consent or on a Union or Member State law which constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives referred to in Article 23(1), the controller shall, in order to ascertain whether processing for another purpose is compatible with the purpose for which the personal data are initially collected, take into account, inter alia:

(a) any link between the purposes for which the personal data have been collected and the purposes of the intended further processing;
(b) the context in which the personal data have been collected, in particular regarding the relationship between data subjects and the controller;
(c) the nature of the personal data, in particular whether special categories of personal data are processed, pursuant to Article 9, or whether personal data related to criminal convictions and offences are processed, pursuant to Article 10;
(d) the possible consequences of the intended further processing for data subjects;
(e) the existence of appropriate safeguards, which may include encryption or pseudonymisation.

Article 7

Conditions for consent

1. Where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data.

2. If the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language. Any part of such a declaration which constitutes an infringement of this Regulation shall not be binding.

3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent.

4. When assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.

Article 8

Conditions applicable to child's consent in relation to information society services

1. Where point (a) of Article 6(1) applies, in relation to the offer of information society services directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child.

Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years.

2. The controller shall make reasonable efforts to verify in such cases that consent is given or authorised by the holder of parental responsibility over the child, taking into consideration available technology.

3. Paragraph 1 shall not affect the general contract law of Member States such as the rules on the validity, formation or effect of a contract in relation to a child.

Article 9

Processing of special categories of personal data

1. Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited.

2. Paragraph 1 shall not apply if one of the following applies:

(a) the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject;
(b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorised by Union or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject;
(c) processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent;
(d) processing is carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the data subjects;
(e) processing relates to personal data which are manifestly made public by the data subject;
(f) processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity;
(g) processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject;
(h) processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional and subject to the conditions and safeguards referred to in paragraph 3;
(i) processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy;
(j) processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) based on Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

3. Personal data referred to in paragraph 1 may be processed for the purposes referred to in point (h) of paragraph 2 when those data are processed by or under the responsibility of a professional subject to the obligation of professional secrecy under Union or Member State law or rules established by national competent bodies or by another person also subject to an obligation of secrecy under Union or Member State law or rules established by national competent bodies.

4. Member States may maintain or introduce further conditions, including limitations, with regard to the processing of genetic data, biometric data or data concerning health.

Article 10

Processing of personal data relating to criminal convictions and offences

Processing of personal data relating to criminal convictions and offences or related security measures based on Article 6(1) shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects. Any comprehensive register of criminal convictions shall be kept only under the control of official authority.

Article 11

Processing which does not require identification

1. If the purposes for which a controller processes personal data do not or do no longer require the identification of a data subject by the controller, the controller shall not be obliged to maintain, acquire or process additional information in order to identify the data subject for the sole purpose of complying with this Regulation.

2. Where, in cases referred to in paragraph 1 of this Article, the controller is able to demonstrate that it is not in a position to identify the data subject, the controller shall inform the data subject accordingly, if possible. In such cases, Articles 15 to 20 shall not apply except where the data subject, for the purpose of exercising his or her rights under those articles, provides additional information enabling his or her identification.

CHAPTER III

Rights of the data subject

Section 1

Transparency and modalities

Article 12

Transparent information, communication and modalities for the exercise of the rights of the data subject

1. The controller shall take appropriate measures to provide any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child. The information shall be provided in writing, or by other means, including, where appropriate, by electronic means. When requested by the data subject, the information may be provided orally, provided that the identity of the data subject is proven by other means.

2. The controller shall facilitate the exercise of data subject rights under Articles 15 to 22. In the cases referred to in Article 11(2), the controller shall not refuse to act on the request of the data subject for exercising his or her rights under Articles 15 to 22, unless the controller demonstrates that it is not in a position to identify the data subject.

3. The controller shall provide information on action taken on a request under Articles 15 to 22 to the data subject without undue delay and in any event within one month of receipt of the request. That period may be extended by two further months where necessary, taking into account the complexity and number of the requests. The controller shall inform the data subject of any such extension within one month of receipt of the request, together with the reasons for the delay. Where the data subject makes the request by electronic form means, the information shall be provided by electronic means where possible, unless otherwise requested by the data subject.

4. If the controller does not take action on the request of the data subject, the controller shall inform the data subject without delay and at the latest within one month of receipt of the request of the reasons for not taking action and on the possibility of lodging a complaint with a supervisory authority and seeking a judicial remedy.

5. Information provided under Articles 13 and 14 and any communication and any actions taken under Articles 15 to 22 and 34 shall be provided free of charge. Where requests from a data subject are manifestly unfounded or excessive, in particular because of their repetitive character, the controller may either:

(a) charge a reasonable fee taking into account the administrative costs of providing the information or communication or taking the action requested; or
(b) refuse to act on the request.

The controller shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

6. Without prejudice to Article 11, where the controller has reasonable doubts concerning the identity of the natural person making the request referred to in Articles 15 to 21, the controller may request the provision of additional information necessary to confirm the identity of the data subject.

7. The information to be provided to data subjects pursuant to Articles 13 and 14 may be provided in combination with standardised icons in order to give in an easily visible, intelligible and clearly legible manner a meaningful overview of the intended processing. Where the icons are presented electronically they shall be machine-readable.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 92 for the purpose of determining the information to be presented by the icons and the procedures for providing standardised icons.

Section 2

Information and access to personal data

Article 13

Information to be provided where personal data are collected from the data subject

1. Where personal data relating to a data subject are collected from the data subject, the controller shall, at the time when personal data are obtained, provide the data subject with all of the following information:

(a) the identity and the contact details of the controller and, where applicable, of the controller's representative;
(b) the contact details of the data protection officer, where applicable;
(c) the purposes of the processing for which the personal data are intended as well as the legal basis for the processing;
(d) where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party;
(e) the recipients or categories of recipients of the personal data, if any;
(f) where applicable, the fact that the controller intends to transfer personal data to a third country or international organisation and the existence or absence of an adequacy decision by the Commission, or in the case of transfers referred to in Article 46 or 47, or the second subparagraph of Article 49(1), reference to the appropriate or suitable safeguards and the means by which to obtain a copy of them or where they have been made available.

2. In addition to the information referred to in paragraph 1, the controller shall, at the time when personal data are obtained, provide the data subject with the following further information necessary to ensure fair and transparent processing:

(a) the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;

(b)the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability;
(c)where the processing is based on point (a) of Article 6(1) or point (a) of Article 9(2), the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;
(d) the right to lodge a complaint with a supervisory authority;
(e)whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the personal data and of the possible consequences of failure to provide such data;
(f)the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

3. Where the controller intends to further process the personal data for a purpose other than that for which the personal data were collected, the controller shall provide the data subject prior to that further processing with information on that other purpose and with any relevant further information as referred to in paragraph 2.

4. Paragraphs 1, 2 and 3 shall not apply where and insofar as the data subject already has the information.

Article 14

Information to be provided where personal data have not been obtained from the data subject

1. Where personal data have not been obtained from the data subject, the controller shall provide the data subject with the following information:

(a)the identity and the contact details of the controller and, where applicable, of the controller's representative;
(b) the contact details of the data protection officer, where applicable;
(c)the purposes of the processing for which the personal data are intended as well as the legal basis for the processing;
(d) the categories of personal data concerned;
(e) the recipients or categories of recipients of the personal data, if any;
(f)where applicable, that the controller intends to transfer personal data to a recipient in a third country or international organisation and the existence or absence of an adequacy decision by the Commission, or in the case of transfers referred to in Article 46 or 47, or the second subparagraph of Article 49(1), reference to the appropriate or suitable safeguards and the means to obtain a copy of them or where they have been made available.

2. In addition to the information referred to in paragraph 1, the controller shall provide the data subject with the following information necessary to ensure fair and transparent processing in respect of the data subject:

(a)the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;
(b)where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party;
(c)the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject and to object to processing as well as the right to data portability;
(d)where processing is based on point (a) of Article 6(1) or point (a) of Article 9(2), the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;
(e) the right to lodge a complaint with a supervisory authority;
(f)from which source the personal data originate, and if applicable, whether it came from publicly accessible sources;
(g)the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

3. The controller shall provide the information referred to in paragraphs 1 and 2:

(a) within a reasonable period after obtaining the personal data, but at the latest within one month, having regard to the specific circumstances in which the personal data are processed;
(b) if the personal data are to be used for communication with the data subject, at the latest at the time of the first communication to that data subject; or
(c) if a disclosure to another recipient is envisaged, at the latest when the personal data are first disclosed.

4. Where the controller intends to further process the personal data for a purpose other than that for which the personal data were obtained, the controller shall provide the data subject prior to that further processing with information on that other purpose and with any relevant further information as referred to in paragraph 2.

5. Paragraphs 1 to 4 shall not apply where and insofar as:

(a) the data subject already has the information;
(b) the provision of such information proves impossible or would involve a disproportionate effort, in particular for processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, subject to the conditions and safeguards referred to in Article 89(1) or in so far as the obligation referred to in paragraph 1 of this Article is likely to render impossible or seriously impair the achievement of the objectives of that processing. In such cases the controller shall take appropriate measures to protect the data subject's rights and freedoms and legitimate interests, including making the information publicly available;
(c) obtaining or disclosure is expressly laid down by Union or Member State law to which the controller is subject and which provides appropriate measures to protect the data subject's legitimate interests; or
(d) where the personal data must remain confidential subject to an obligation of professional secrecy regulated by Union or Member State law, including a statutory obligation of secrecy.

Article 15

Right of access by the data subject

1. The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information:

(a) the purposes of the processing;
(b) the categories of personal data concerned;
(c) the recipients or categories of recipient to whom the personal data have been or will be disclosed, in particular recipients in third countries or international organisations;
(d) where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period;
(e) the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject or to object to such processing;
(f) the right to lodge a complaint with a supervisory authority;
(g) where the personal data are not collected from the data subject, any available information as to their source;
(h) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

2. Where personal data are transferred to a third country or to an international organisation, the data subject shall have the right to be informed of the appropriate safeguards pursuant to Article 46 relating to the transfer.

3. The controller shall provide a copy of the personal data undergoing processing. For any further copies requested by the data subject, the controller may charge a reasonable fee based on administrative costs. Where the data subject makes the request by electronic means, and unless otherwise requested by the data subject, the information shall be provided in a commonly used electronic form.

4. The right to obtain a copy referred to in paragraph 3 shall not adversely affect the rights and freedoms of others.

Section 3

Rectification and erasure

Article 16

Right to rectification

The data subject shall have the right to obtain from the controller without undue delay the rectification of inaccurate personal data concerning him or her. Taking into account the purposes of the processing, the data subject shall have the right to have incomplete personal data completed, including by means of providing a supplementary statement.

Article 17

Right to erasure ('right to be forgotten')

1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

(a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
(b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;
(c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);
(d) the personal data have been unlawfully processed;
(e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;
(f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).

2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.

3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:

(a) for exercising the right of freedom of expression and information;
(b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
(c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3);
(d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or
(e) for the establishment, exercise or defence of legal claims.

Article 18

Right to restriction of processing

1. The data subject shall have the right to obtain from the controller restriction of processing where one of the following applies:

(a) the accuracy of the personal data is contested by the data subject, for a period enabling the controller to verify the accuracy of the personal data;
(b) the processing is unlawful and the data subject opposes the erasure of the personal data and requests the restriction of their use instead;
(c) the controller no longer needs the personal data for the purposes of the processing, but they are required by the data subject for the establishment, exercise or defence of legal claims;
(d) the data subject has objected to processing pursuant to Article 21(1) pending the verification whether the legitimate grounds of the controller override those of the data subject.

2. Where processing has been restricted under paragraph 1, such personal data shall, with the exception of storage, only be processed with the data subject's consent or for the establishment, exercise or defence of legal claims or for the protection of the rights of another natural or legal person or for reasons of important public interest of the Union or of a Member State.

3. A data subject who has obtained restriction of processing pursuant to paragraph 1 shall be informed by the controller before the restriction of processing is lifted.

Article 19

Notification obligation regarding rectification or erasure of personal data or restriction of processing

The controller shall communicate any rectification or erasure of personal data or restriction of processing carried out in accordance with Article 16, Article 17(1) and Article 18 to each recipient to whom the personal data have been disclosed, unless this proves impossible or involves disproportionate effort. The controller shall inform the data subject about those recipients if the data subject requests it.

Article 20

Right to data portability

1. The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided, where:

(a) the processing is based on consent pursuant to point (a) of Article 6(1) or point (a) of Article 9(2) or on a contract pursuant to point (b) of Article 6(1); and
(b) the processing is carried out by automated means.

2. In exercising his or her right to data portability pursuant to paragraph 1, the data subject shall have the right to have the personal data transmitted directly from one controller to another, where technically feasible.

3. The exercise of the right referred to in paragraph 1 of this Article shall be without prejudice to Article 17. That right shall not apply to processing necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.

4. The right referred to in paragraph 1 shall not adversely affect the rights and freedoms of others.

Section 4

Right to object and automated individual decision-making

Article 21

Right to object

1. The data subject shall have the right to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her which is based on point (e) or (f) of Article 6(1), including profiling based on those provisions. The controller shall no longer process the personal data unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.

2. Where personal data are processed for direct marketing purposes, the data subject shall have the right to object at any time to processing of personal data concerning him or her for such marketing, which includes profiling to the extent that it is related to such direct marketing.

3. Where the data subject objects to processing for direct marketing purposes, the personal data shall no longer be processed for such purposes.

4. At the latest at the time of the first communication with the data subject, the right referred to in paragraphs 1 and 2 shall be explicitly brought to the attention of the data subject and shall be presented clearly and separately from any other information.

5. In the context of the use of information society services, and notwithstanding Directive 2002/58/EC, the data subject may exercise his or her right to object by automated means using technical specifications.

6. Where personal data are processed for scientific or historical research purposes or statistical purposes pursuant to Article 89(1), the data subject, on grounds relating to his or her particular situation, shall have the right to object to processing of personal data concerning him or her, unless the processing is necessary for the performance of a task carried out for reasons of public interest.

Article 22

Automated individual decision-making, including profiling

1. The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.

2. Paragraph 1 shall not apply if the decision:

(a) is necessary for entering into, or performance of, a contract between the data subject and a data controller;
(b) is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or
(c) is based on the data subject's explicit consent.

3. In the cases referred to in points (a) and (c) of paragraph 2, the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision.

4. Decisions referred to in paragraph 2 shall not be based on special categories of personal data referred to in Article 9(1), unless point (a) or (g) of Article 9(2) applies and suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place.

Section 5

Restrictions

Article 23

Restrictions

1. Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 12 to 22 and Article 34, as well as Article 5 in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 22, when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard:

(a) national security;
(b) defence;
(c) public security;
(d) the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security;
(e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation a matters, public health and social security;
(f) the protection of judicial independence and judicial proceedings;
(g) the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions;
(h) a monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority in the cases referred to in points (a) to (e) and (g);
(i) the protection of the data subject or the rights and freedoms of others;
(j) the enforcement of civil law claims.

2. In particular, any legislative measure referred to in paragraph 1 shall contain specific provisions at least, where relevant, as to:

(a) the purposes of the processing or categories of processing;
(b) the categories of personal data;
(c) the scope of the restrictions introduced;
(d) the safeguards to prevent abuse or unlawful access or transfer;
(e) the specification of the controller or categories of controllers;
(f) the storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing;
(g) the risks to the rights and freedoms of data subjects; and
(h) the right of data subjects to be informed about the restriction, unless that may be prejudicial to the purpose of the restriction.

CHAPTER IV

Controller and processor

Section 1

General obligations

Article 24

Responsibility of the controller

1. Taking into account the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons, the controller shall implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with this Regulation. Those measures shall be reviewed and updated where necessary.

2. Where proportionate in relation to processing activities, the measures referred to in paragraph 1 shall include the implementation of appropriate data protection policies by the controller.

3. Adherence to approved codes of conduct as referred to in Article 40 or approved certification mechanisms as referred to in Article 42 may be used as an element by which to demonstrate compliance with the obligations of the controller.

Article 25

Data protection by design and by default

1. Taking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing, the controller shall, both at the time of the determination of the means for processing and at the time of the processing itself, implement appropriate technical and organisational measures, such as pseudonymisation, which are designed to implement data-protection principles, such as data minimisation, in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of this Regulation and protect the rights of data subjects.

2. The controller shall implement appropriate technical and organisational measures for ensuring that, by default, only personal data which are necessary for each specific purpose of the processing are processed. That obligation applies to the amount of personal data collected, the extent of their processing, the period of their storage and their accessibility. In particular, such measures shall ensure that by default personal data are not made accessible without the individual's intervention to an indefinite number of natural persons.

3. An approved certification mechanism pursuant to Article 42 may be used as an element to demonstrate compliance with the requirements set out in paragraphs 1 and 2 of this Article.

Article 26

Joint controllers

1. Where two or more controllers jointly determine the purposes and means of processing, they shall be joint controllers. They shall in a transparent manner determine their respective responsibilities for compliance with the obligations under this Regulation, in particular as regards the exercising of the rights of the data subject and their respective duties to provide the information referred to in Articles 13 and 14, by means of an arrangement between them unless, and in so far as, the respective responsibilities of the controllers are determined by Union or Member State law to which the controllers are subject. The arrangement may designate a contact point for data subjects.

2. The arrangement referred to in paragraph 1 shall duly reflect the respective roles and relationships of the joint controllers vis-à-vis the data subjects. The essence of the arrangement shall be made available to the data subject.

3. Irrespective of the terms of the arrangement referred to in paragraph 1, the data subject may exercise his or her rights under this Regulation in respect of and against each of the controllers.

Article 27

Representatives of controllers or processors not established in the Union

1. Where Article 3(2) applies, the controller or the processor shall designate in writing a representative in the Union.

2. The obligation laid down in paragraph 1 of this Article shall not apply to:

(a) processing which is occasional, does not include, on a large scale, processing of special categories of data as referred to in Article 9(1) or processing of personal data relating to criminal convictions and offences referred to in Article 10, and is unlikely to result in a risk to the rights and freedoms of natural persons, taking into account the nature, context, scope and purposes of the processing; or
(b) a public authority or body.

3. The representative shall be established in one of the Member States where the data subjects, whose personal data are processed in relation to the offering of goods or services to them, or whose behaviour is monitored, are.

4. The representative shall be mandated by the controller or processor to be addressed in addition to or instead of the controller or the processor by, in particular, supervisory authorities and data subjects, on all issues related to processing, for the purposes of ensuring compliance with this Regulation.

5. The designation of a representative by the controller or processor shall be without prejudice to legal actions which could be initiated against the controller or the processor themselves.

Article 28

Processor

1. Where processing is to be carried out on behalf of a controller, the controller shall use only processors providing sufficient guarantees to implement appropriate technical and organisational measures in such a manner that processing will meet the requirements of this Regulation and ensure the protection of the rights of the data subject.

2. The processor shall not engage another processor without prior specific or general written authorisation of the controller. In the case of general written authorisation, the processor shall inform the controller of any intended changes concerning the addition or replacement of other processors, thereby giving the controller the opportunity to object to such changes.

3. Processing by a processor shall be governed by a contract or other legal act under Union or Member State law, that is binding on the processor with regard to the controller and that sets out the subject-matter and duration of the processing, the nature and purpose of the processing, the type of personal data and categories of data subjects and the obligations and rights of the controller. That contract or other legal act shall stipulate, in particular, that the processor:

(a) processes the personal data only on documented instructions from the controller, including with regard to transfers of personal data to a third country or an international organisation, unless required to do so by Union or Member State law to which the processor is subject; in such a case, the processor shall inform the controller of that legal requirement before processing, unless that law prohibits such information on important grounds of public interest;
(b) ensures that persons authorised to process the personal data have committed themselves to confidentiality or are under an appropriate statutory obligation of confidentiality;
(c) takes all measures required pursuant to Article 32;
(d) respects the conditions referred to in paragraphs 2 and 4 for engaging another processor;
(e) taking into account the nature of the processing, assists the controller by appropriate technical and organisational measures, insofar as this is possible, for the fulfilment of the controller's obligation to respond to requests for exercising the data subject's rights laid down in Chapter III;
(f) assists the controller in ensuring compliance with the obligations pursuant to Articles 32 to 36 taking into account the nature of processing and the information available to the processor;
(g) at the choice of the controller, deletes or returns all the personal data to the controller after the end of the provision of services relating to processing, and deletes existing copies unless Union or Member State law requires storage of the personal data;
(h) makes available to the controller all information necessary to demonstrate compliance with the obligations laid down in this Article and allow for and contribute to audits, including inspections, conducted by the controller or another auditor mandated by the controller.

With regard to point (h) of the first subparagraph, the processor shall immediately inform the controller if, in its opinion, an instruction infringes this Regulation or other Union or Member State data protection provisions.

4. Where a processor engages another processor for carrying out specific processing activities on behalf of the controller, the same data protection obligations as set out in the contract or other legal act between the controller and the processor as referred to in paragraph 3 shall be imposed on that other processor by way of a contract or other legal act under Union or Member State law, in particular providing sufficient guarantees to implement appropriate technical and organisational measures in such a manner that the processing will meet the requirements of this Regulation. Where that other processor fails to fulfil its data protection obligations, the initial processor shall remain fully liable to the controller for the performance of that other processor's obligations.

5. Adherence of a processor to an approved code of conduct as referred to in Article 40 or an approved certification mechanism as referred to in Article 42 may be used as an element by which to demonstrate sufficient guarantees as referred to in paragraphs 1 and 4 of this Article.

6. Without prejudice to an individual contract between the controller and the processor, the contract or the other legal act referred to in paragraphs 3 and 4 of this Article may be based, in whole or in part, on standard contractual clauses referred to in paragraphs 7 and 8 of this Article, including when they are part of a certification granted to the controller or processor pursuant to Articles 42 and 43.

7. The Commission may lay down standard contractual clauses for the matters referred to in paragraph 3 and 4 of this Article and in accordance with the examination procedure referred to in Article 93(2).

8. A supervisory authority may adopt standard contractual clauses for the matters referred to in paragraph 3 and 4 of this Article and in accordance with the consistency mechanism referred to in Article 63.

9. The contract or the other legal act referred to in paragraphs 3 and 4 shall be in writing, including in electronic form.

10. Without prejudice to Articles 82, 83 and 84, if a processor infringes this Regulation by determining the purposes and means of processing, the processor shall be considered to be a controller in respect of that processing.

Article 29

Processing under the authority of the controller or processor

The processor and any person acting under the authority of the controller or of the processor, who has access to personal data, shall not process those data except on instructions from the controller, unless required to do so by Union or Member State law.

Article 30

Records of processing activities

1. Each controller and, where applicable, the controller's representative, shall maintain a record of processing activities under its responsibility. That record shall contain all of the following information:

(a) the name and contact details of the controller and, where applicable, the joint controller, the controller's representative and the data protection officer;
(b) the purposes of the processing;
(c) a description of the categories of data subjects and of the categories of personal data;
(d) the categories of recipients to whom the personal data have been or will be disclosed including recipients in third countries or international organisations;

(e)where applicable, transfers of personal data to a third country or an international organisation, including the identification of that third country or international organisation and, in the case of transfers referred to in the second subparagraph of Article 49(1), the documentation of suitable safeguards;
(f) where possible, the envisaged time limits for erasure of the different categories of data;
(g)where possible, a general description of the technical and organisational security measures referred to in Article 32(1).

2. Each processor and, where applicable, the processor's representative shall maintain a record of all categories of processing activities carried out on behalf of a controller, containing:

(a)the name and contact details of the processor or processors and of each controller on behalf of which the processor is acting, and, where applicable, of the controller's or the processor's representative, and the data protection officer;
(b) the categories of processing carried out on behalf of each controller;
(c)where applicable, transfers of personal data to a third country or an international organisation, including the identification of that third country or international organisation and, in the case of transfers referred to in the second subparagraph of Article 49(1), the documentation of suitable safeguards;
(d)where possible, a general description of the technical and organisational security measures referred to in Article 32(1).

3. The records referred to in paragraphs 1 and 2 shall be in writing, including in electronic form.

4. The controller or the processor and, where applicable, the controller's or the processor's representative, shall make the record available to the supervisory authority on request.

5. The obligations referred to in paragraphs 1 and 2 shall not apply to an enterprise or an organisation employing fewer than 250 persons unless the processing it carries out is likely to result in a risk to the rights and freedoms of data subjects, the processing is not occasional, or the processing includes special categories of data as referred to in Article 9(1) or personal data relating to criminal convictions and offences referred to in Article 10.

Article 31

Cooperation with the supervisory authority

The controller and the processor and, where applicable, their representatives, shall cooperate, on request, with the supervisory authority in the performance of its tasks.

Section 2

Security of personal data

Article 32

Security of processing

1. Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the controller and the processor shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk, including inter alia as appropriate:

(a) the pseudonymisation and encryption of personal data;
(b)the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;
(c)the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident;

(d)a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing.

2. In assessing the appropriate level of security account shall be taken in particular of the risks that are presented by processing, in particular from accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to personal data transmitted, stored or otherwise processed.

3. Adherence to an approved code of conduct as referred to in Article 40 or an approved certification mechanism as referred to in Article 42 may be used as an element by which to demonstrate compliance with the requirements set out in paragraph 1 of this Article.

4. The controller and processor shall take steps to ensure that any natural person acting under the authority of the controller or the processor who has access to personal data does not process them except on instructions from the controller, unless he or she is required to do so by Union or Member State law.

Article 33

Notification of a personal data breach to the supervisory authority

1. In the case of a personal data breach, the controller shall without undue delay and, where feasible, not later than 72 hours after having become aware of it, notify the personal data breach to the supervisory authority competent in accordance with Article 55, unless the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons. Where the notification to the supervisory authority is not made within 72 hours, it shall be accompanied by reasons for the delay.

2. The processor shall notify the controller without undue delay after becoming aware of a personal data breach.

3. The notification referred to in paragraph 1 shall at least:

(a)describe the nature of the personal data breach including where possible, the categories and approximate number of data subjects concerned and the categories and approximate number of personal data records concerned;
(b)communicate the name and contact details of the data protection officer or other contact point where more information can be obtained;
(c) describe the likely consequences of the personal data breach;
(d)describe the measures taken or proposed to be taken by the controller to address the personal data breach, including, where appropriate, measures to mitigate its possible adverse effects.

4. Where, and in so far as, it is not possible to provide the information at the same time, the information may be provided in phases without undue further delay.

5. The controller shall document any personal data breaches, comprising the facts relating to the personal data breach, its effects and the remedial action taken. That documentation shall enable the supervisory authority to verify compliance with this Article.

Article 34

Communication of a personal data breach to the data subject

1. When the personal data breach is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall communicate the personal data breach to the data subject without undue delay.

2. The communication to the data subject referred to in paragraph 1 of this Article shall describe in clear and plain language the nature of the personal data breach and contain at least the information and measures referred to in points (b), (c) and (d) of Article 33(3).

3. The communication to the data subject referred to in paragraph 1 shall not be required if any of the following conditions are met:

(a) the controller has implemented appropriate technical and organisational protection measures, and those measures were applied to the personal data affected by the personal data breach, in particular those that render the personal data unintelligible to any person who is not authorised to access it, such as encryption;
(b) the controller has taken subsequent measures which ensure that the high risk to the rights and freedoms of data subjects referred to in paragraph 1 is no longer likely to materialise;
(c) it would involve disproportionate effort. In such a case, there shall instead be a public communication or similar measure whereby the data subjects are informed in an equally effective manner.

4. If the controller has not already communicated the personal data breach to the data subject, the supervisory authority, having considered the likelihood of the personal data breach resulting in a high risk, may require it to do so or may decide that any of the conditions referred to in paragraph 3 are met.

Section 3

Data protection impact assessment and prior consultation

Article 35

Data protection impact assessment

1. Where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data. A single assessment may address a set of similar processing operations that present similar high risks.

2. The controller shall seek the advice of the data protection officer, where designated, when carrying out a data protection impact assessment.

3. A data protection impact assessment referred to in paragraph 1 shall in particular be required in the case of:

(a) a systematic and extensive evaluation of personal aspects relating to natural persons which is based on automated processing, including profiling, and on which decisions are based that produce legal effects concerning the natural person or similarly significantly affect the natural person;
(b) processing on a large scale of special categories of data referred to in Article 9(1), or of personal data relating to criminal convictions and offences referred to in Article 10; or
(c) a systematic monitoring of a publicly accessible area on a large scale.

4. The supervisory authority shall establish and make public a list of the kind of processing operations which are subject to the requirement for a data protection impact assessment pursuant to paragraph 1. The supervisory authority shall communicate those lists to the Board referred to in Article 68.

5. The supervisory authority may also establish and make public a list of the kind of processing operations for which no data protection impact assessment is required. The supervisory authority shall communicate those lists to the Board.

6. Prior to the adoption of the lists referred to in paragraphs 4 and 5, the competent supervisory authority shall apply the consistency mechanism referred to in Article 63 where such lists involve processing activities which are related to the offering of goods or services to data subjects or to the monitoring of their behaviour in several Member States, or may substantially affect the free movement of personal data within the Union.

7. The assessment shall contain at least:

(a) a systematic description of the envisaged processing operations and the purposes of the processing, including, where applicable, the legitimate interest pursued by the controller;
(b) an assessment of the necessity and proportionality of the processing operations in relation to the purposes;
(c) an assessment of the risks to the rights and freedoms of data subjects referred to in paragraph 1; and
(d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with this Regulation taking into account the rights and legitimate interests of data subjects and other persons concerned.

8. Compliance with approved codes of conduct referred to in Article 40 by the relevant controllers or processors shall be taken into due account in assessing the impact of the processing operations performed by such controllers or processors, in particular for the purposes of a data protection impact assessment.

9. Where appropriate, the controller shall seek the views of data subjects or their representatives on the intended processing, without prejudice to the protection of commercial or public interests or the security of processing operations.

10. Where processing pursuant to point (c) or (e) of Article 6(1) has a legal basis in Union law or in the law of the Member State to which the controller is subject, that law regulates the specific processing operation or set of operations in question, and a data protection impact assessment has already been carried out as part of a general impact assessment in the context of the adoption of that legal basis, paragraphs 1 to 7 shall not apply unless Member States deem it to be necessary to carry out such an assessment prior to processing activities.

11. Where necessary, the controller shall carry out a review to assess if processing is performed in accordance with the data protection impact assessment at least when there is a change of the risk represented by processing operations.

Article 36

Prior consultation

1. The controller shall consult the supervisory authority prior to processing where a data protection impact assessment under Article 35 indicates that the processing would result in a high risk in the absence of measures taken by the controller to mitigate the risk.

2. Where the supervisory authority is of the opinion that the intended processing referred to in paragraph 1 would infringe this Regulation, in particular where the controller has insufficiently identified or mitigated the risk, the supervisory authority shall, within period of up to eight weeks of receipt of the request for consultation, provide written advice to the controller and, where applicable to the processor, and may use any of its powers referred to in Article 58. That period may be extended by six weeks, taking into account the complexity of the intended processing. The supervisory authority shall inform the controller and, where applicable, the processor, of any such extension within one month of receipt of the request for consultation together with the reasons for the delay. Those periods may be suspended until the supervisory authority has obtained information it has requested for the purposes of the consultation.

3. When consulting the supervisory authority pursuant to paragraph 1, the controller shall provide the supervisory authority with:

(a) where applicable, the respective responsibilities of the controller, joint controllers and processors involved in the processing, in particular for processing within a group of undertakings;
(b) the purposes and means of the intended processing;
(c) the measures and safeguards provided to protect the rights and freedoms of data subjects pursuant to this Regulation;
(d) where applicable, the contact details of the data protection officer;
(e) the data protection impact assessment provided for in Article 35; and
(f) any other information requested by the supervisory authority.

4. Member States shall consult the supervisory authority during the preparation of a proposal for a legislative measure to be adopted by a national parliament, or of a regulatory measure based on such a legislative measure, which relates to processing.

5. Notwithstanding paragraph 1, Member State law may require controllers to consult with, and obtain prior authorisation from, the supervisory authority in relation to processing by a controller for the performance of a task carried out by the controller in the public interest, including processing in relation to social protection and public health.

Section 4

Data protection officer

Article 37

Designation of the data protection officer

1. The controller and the processor shall designate a data protection officer in any case where:

(a) the processing is carried out by a public authority or body, except for courts acting in their judicial capacity;
(b) the core activities of the controller or the processor consist of processing operations which, by virtue of their nature, their scope and/or their purposes, require regular and systematic monitoring of data subjects on a large scale; or
(c) the core activities of the controller or the processor consist of processing on a large scale of special categories of data pursuant to Article 9 and personal data relating to criminal convictions and offences referred to in Article 10.

2. A group of undertakings may appoint a single data protection officer provided that a data protection officer is easily accessible from each establishment.

3. Where the controller or the processor is a public authority or body, a single data protection officer may be designated for several such authorities or bodies, taking account of their organisational structure and size.

4. In cases other than those referred to in paragraph 1, the controller or processor or associations and other bodies representing categories of controllers or processors may or, where required by Union or Member State law shall, designate a data protection officer. The data protection officer may act for such associations and other bodies representing controllers or processors.

5. The data protection officer shall be designated on the basis of professional qualities and, in particular, expert knowledge of data protection law and practices and the ability to fulfil the tasks referred to in Article 39.

6. The data protection officer may be a staff member of the controller or processor, or fulfil the tasks on the basis of a service contract.

7. The controller or the processor shall publish the contact details of the data protection officer and communicate them to the supervisory authority.

Article 38

Position of the data protection officer

1. The controller and the processor shall ensure that the data protection officer is involved, properly and in a timely manner, in all issues which relate to the protection of personal data.

2. The controller and processor shall support the data protection officer in performing the tasks referred to in Article 39 by providing resources necessary to carry out those tasks and access to personal data and processing operations, and to maintain his or her expert knowledge.

3. The controller and processor shall ensure that the data protection officer does not receive any instructions regarding the exercise of those tasks. He or she shall not be dismissed or penalised by the controller or the processor for performing his tasks. The data protection officer shall directly report to the highest management level of the controller or the processor.

4. Data subjects may contact the data protection officer with regard to all issues related to processing of their personal data and to the exercise of their rights under this Regulation.

5. The data protection officer shall be bound by secrecy or confidentiality concerning the performance of his or her tasks, in accordance with Union or Member State law.

6. The data protection officer may fulfil other tasks and duties. The controller or processor shall ensure that any such tasks and duties do not result in a conflict of interests.

Article 39

Tasks of the data protection officer

1. The data protection officer shall have at least the following tasks:

(a) to inform and advise the controller or the processor and the employees who carry out processing of their obligations pursuant to this Regulation and to other Union or Member State data protection provisions;
(b) to monitor compliance with this Regulation, with other Union or Member State data protection provisions and with the policies of the controller or processor in relation to the protection of personal data, including the assignment of responsibilities, awareness-raising and training of staff involved in processing operations, and the related audits;
(c) to provide advice where requested as regards the data protection impact assessment and monitor its performance pursuant to Article 35;
(d) to cooperate with the supervisory authority;
(e) to act as the contact point for the supervisory authority on issues relating to processing, including the prior consultation referred to in Article 36, and to consult, where appropriate, with regard to any other matter.

2. The data protection officer shall in the performance of his or her tasks have due regard to the risk associated with processing operations, taking into account the nature, scope, context and purposes of processing.

Section 5

Codes of conduct and certification

Article 40

Codes of conduct

1. The Member States, the supervisory authorities, the Board and the Commission shall encourage the drawing up of codes of conduct intended to contribute to the proper application of this Regulation, taking account of the specific features of the various processing sectors and the specific needs of micro, small and medium-sized enterprises.

2. Associations and other bodies representing categories of controllers or processors may prepare codes of conduct, or amend or extend such codes, for the purpose of specifying the application of this Regulation, such as with regard to:

(a) fair and transparent processing;

(b) the legitimate interests pursued by controllers in specific contexts;
(c) the collection of personal data;
(d) the pseudonymisation of personal data;
(e) the information provided to the public and to data subjects;
(f) the exercise of the rights of data subjects;
(g) the information provided to, and the protection of, children, and the manner in which the consent of the holders of parental responsibility over children is to be obtained;
(h) the measures and procedures referred to in Articles 24 and 25 and the measures to ensure security of processing referred to in Article 32;
(i) the notification of personal data breaches to supervisory authorities and the communication of such personal data breaches to data subjects;
(j) the transfer of personal data to third countries or international organisations; or
(k) out-of-court proceedings and other dispute resolution procedures for resolving disputes between controllers and data subjects with regard to processing, without prejudice to the rights of data subjects pursuant to Articles 77 and 79.

3. In addition to adherence by controllers or processors subject to this Regulation, codes of conduct approved pursuant to paragraph 5 of this Article and having general validity pursuant to paragraph 9 of this Article may also be adhered to by controllers or processors that are not subject to this Regulation pursuant to Article 3 in order to provide appropriate safeguards within the framework of personal data transfers to third countries or international organisations under the terms referred to in point (e) of Article 46(2). Such controllers or processors shall make binding and enforceable commitments, via contractual or other legally binding instruments, to apply those appropriate safeguards including with regard to the rights of data subjects.

4. A code of conduct referred to in paragraph 2 of this Article shall contain mechanisms which enable the body referred to in Article 41(1) to carry out the mandatory monitoring of compliance with its provisions by the controllers or processors which undertake to apply it, without prejudice to the tasks and powers of supervisory authorities competent pursuant to Article 55 or 56.

5. Associations and other bodies referred to in paragraph 2 of this Article which intend to prepare a code of conduct or to amend or extend an existing code shall submit the draft code, amendment or extension to the supervisory authority which is competent pursuant to Article 55. The supervisory authority shall provide an opinion on whether the draft code, amendment or extension complies with this Regulation and shall approve that draft code, amendment or extension if it finds that it provides sufficient appropriate safeguards.

6. Where the draft code, or amendment or extension is approved in accordance with paragraph 5, and where the code of conduct concerned does not relate to processing activities in several Member States, the supervisory authority shall register and publish the code.

7. Where a draft code of conduct relates to processing activities in several Member States, the supervisory authority which is competent pursuant to Article 55 shall, before approving the draft code, amendment or extension, submit it in the procedure referred to in Article 63 to the Board which shall provide an opinion on whether the draft code, amendment or extension complies with this Regulation or, in the situation referred to in paragraph 3 of this Article, provides appropriate safeguards.

8. Where the opinion referred to in paragraph 7 confirms that the draft code, amendment or extension complies with this Regulation, or, in the situation referred to in paragraph 3, provides appropriate safeguards, the Board shall submit its opinion to the Commission.

9. The Commission may, by way of implementing acts, decide that the approved code of conduct, amendment or extension submitted to it pursuant to paragraph 8 of this Article have general validity within the Union. Those implementing acts shall be adopted in accordance with the examination procedure set out in Article 93(2).

10. The Commission shall ensure appropriate publicity for the approved codes which have been decided as having general validity in accordance with paragraph 9.

11. The Board shall collate all approved codes of conduct, amendments and extensions in a register and shall make them publicly available by way of appropriate means.

Article 41

Monitoring of approved codes of conduct

1. Without prejudice to the tasks and powers of the competent supervisory authority under Articles 57 and 58, the monitoring of compliance with a code of conduct pursuant to Article 40 may be carried out by a body which has an appropriate level of expertise in relation to the subject-matter of the code and is accredited for that purpose by the competent supervisory authority.

2. A body as referred to in paragraph 1 may be accredited to monitor compliance with a code of conduct where that body has:

(a) demonstrated its independence and expertise in relation to the subject-matter of the code to the satisfaction of the competent supervisory authority;
(b) established procedures which allow it to assess the eligibility of controllers and processors concerned to apply the code, to monitor their compliance with its provisions and to periodically review its operation;
(c) established procedures and structures to handle complaints about infringements of the code or the manner in which the code has been, or is being, implemented by a controller or processor, and to make those procedures and structures transparent to data subjects and the public; and
(d) demonstrated to the satisfaction of the competent supervisory authority that its tasks and duties do not result in a conflict of interests.

3. The competent supervisory authority shall submit the draft criteria for accreditation of a body as referred to in paragraph 1 of this Article to the Board pursuant to the consistency mechanism referred to in Article 63.

4. Without prejudice to the tasks and powers of the competent supervisory authority and the provisions of Chapter VIII, a body as referred to in paragraph 1 of this Article shall, subject to appropriate safeguards, take appropriate action in cases of infringement of the code by a controller or processor, including suspension or exclusion of the controller or processor concerned from the code. It shall inform the competent supervisory authority of such actions and the reasons for taking them.

5. The competent supervisory authority shall revoke the accreditation of a body as referred to in paragraph 1 if the conditions for accreditation are not, or are no longer, met or where actions taken by the body infringe this Regulation.

6. This Article shall not apply to processing carried out by public authorities and bodies.

Article 42

Certification

1. The Member States, the supervisory authorities, the Board and the Commission shall encourage, in particular at Union level, the establishment of data protection certification mechanisms and of data protection seals and marks, for the purpose of demonstrating compliance with this Regulation of processing operations by controllers and processors. The specific needs of micro, small and medium-sized enterprises shall be taken into account.

2. In addition to adherence by controllers or processors subject to this Regulation, data protection certification mechanisms, seals or marks approved pursuant to paragraph 5 of this Article may be established for the purpose of demonstrating the existence of appropriate safeguards provided by controllers or processors that are not subject to this Regulation pursuant to Article 3 within the framework of personal data transfers to third countries or international organisations under the terms referred to in point (f) of Article 46(2). Such controllers or processors shall make binding and enforceable commitments, via contractual or other legally binding instruments, to apply those appropriate safeguards, including with regard to the rights of data subjects.

3. The certification shall be voluntary and available via a process that is transparent.

4. A certification pursuant to this Article does not reduce the responsibility of the controller or the processor for compliance with this Regulation and is without prejudice to the tasks and powers of the supervisory authorities which are competent pursuant to Article 55 or 56.

5. A certification pursuant to this Article shall be issued by the certification bodies referred to in Article 43 or by the competent supervisory authority, on the basis of criteria approved by that competent supervisory authority pursuant to Article 58(3) or by the Board pursuant to Article 63. Where the criteria are approved by the Board, this may result in a common certification, the European Data Protection Seal.

6. The controller or processor which submits its processing to the certification mechanism shall provide the certification body referred to in Article 43, or where applicable, the competent supervisory authority, with all information and access to its processing activities which are necessary to conduct the certification procedure.

7. Certification shall be issued to a controller or processor for a maximum period of three years and may be renewed, under the same conditions, provided that the relevant requirements continue to be met. Certification shall be withdrawn, as applicable, by the certification bodies referred to in Article 43 or by the competent supervisory authority where the requirements for the certification are not or are no longer met.

8. The Board shall collate all certification mechanisms and data protection seals and marks in a register and shall make them publicly available by any appropriate means.

Article 43

Certification bodies

1. Without prejudice to the tasks and powers of the competent supervisory authority under Articles 57 and 58, certification bodies which have an appropriate level of expertise in relation to data protection shall, after informing the supervisory authority in order to allow it to exercise its powers pursuant to point (h) of Article 58(2) where necessary, issue and renew certification. Member States shall ensure that those certification bodies are accredited by one or both of the following:

(a) the supervisory authority which is competent pursuant to Article 55 or 56;
(b) the national accreditation body named in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council (20) in accordance with EN-ISO/IEC 17065/2012 and with the additional requirements established by the supervisory authority which is competent pursuant to Article 55 or 56.

2. Certification bodies referred to in paragraph 1 shall be accredited in accordance with that paragraph only where they have:

(a) demonstrated their independence and expertise in relation to the subject-matter of the certification to the satisfaction of the competent supervisory authority;
(b) undertaken to respect the criteria referred to in Article 42(5) and approved by the supervisory authority which is competent pursuant to Article 55 or 56 or by the Board pursuant to Article 63;
(c) established procedures for the issuing, periodic review and withdrawal of data protection certification, seals and marks;
(d) established procedures and structures to handle complaints about infringements of the certification or the manner in which the certification has been, or is being, implemented by the controller or processor, and to make those procedures and structures transparent to data subjects and the public; and
(e) demonstrated, to the satisfaction of the competent supervisory authority, that their tasks and duties do not result in a conflict of interests.

3. The accreditation of certification bodies as referred to in paragraphs 1 and 2 of this Article shall take place on the basis of criteria approved by the supervisory authority which is competent pursuant to Article 55 or 56 or by the Board pursuant to Article 63. In the case of accreditation pursuant to point (b) of paragraph 1 of this Article, those requirements shall complement those envisaged in Regulation (EC) No 765/2008 and the technical rules that describe the methods and procedures of the certification bodies.

4. The certification bodies referred to in paragraph 1 shall be responsible for the proper assessment leading to the certification or the withdrawal of such certification without prejudice to the responsibility of the controller or processor for compliance with this Regulation. The accreditation shall be issued for a maximum period of five years and may be renewed on the same conditions provided that the certification body meets the requirements set out in this Article.

5. The certification bodies referred to in paragraph 1 shall provide the competent supervisory authorities with the reasons for granting or withdrawing the requested certification.

6. The requirements referred to in paragraph 3 of this Article and the criteria referred to in Article 42(5) shall be made public by the supervisory authority in an easily accessible form. The supervisory authorities shall also transmit those requirements and criteria to the Board. The Board shall collate all certification mechanisms and data protection seals in a register and shall make them publicly available by any appropriate means.

7. Without prejudice to Chapter VIII, the competent supervisory authority or the national accreditation body shall revoke an accreditation of a certification body pursuant to paragraph 1 of this Article where the conditions for the accreditation are not, or are no longer, met or where actions taken by a certification body infringe this Regulation.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 92 for the purpose of specifying the requirements to be taken into account for the data protection certification mechanisms referred to in Article 42(1).

9. The Commission may adopt implementing acts laying down technical standards for certification mechanisms and data protection seals and marks, and mechanisms to promote and recognise those certification mechanisms, seals and marks. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 93(2).

## CHAPTER V

## Transfers of personal data to third countries or international organisations

### Article 44

### General principle for transfers

Any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if, subject to the other provisions of this Regulation, the conditions laid down in this Chapter are complied with by the controller and processor, including for onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation. All provisions in this Chapter shall be applied in order to ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined.

### Article 45

### Transfers on the basis of an adequacy decision

1. A transfer of personal data to a third country or an international organisation may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection. Such a transfer shall not require any specific authorisation.

2. When assessing the adequacy of the level of protection, the Commission shall, in particular, take account of the following elements:

(a) the rule of law, respect for human rights and fundamental freedoms, relevant legislation, both general and sectoral, including concerning public security, defence, national security and criminal law and the access of

public authorities to personal data, as well as the implementation of such legislation, data protection rules, professional rules and security measures, including rules for the onward transfer of personal data to another third country or international organisation which are complied with in that country or international organisation, case-law, as well as effective and enforceable data subject rights and effective administrative and judicial redress for the data subjects whose personal data are being transferred;

(b) the existence and effective functioning of one or more independent supervisory authorities in the third country or to which an international organisation is subject, with responsibility for ensuring and enforcing compliance with the data protection rules, including adequate enforcement powers, for assisting and advising the data subjects in exercising their rights and for cooperation with the supervisory authorities of the Member States; and

(c) the international commitments the third country or international organisation concerned has entered into, or other obligations arising from legally binding conventions or instruments as well as from its participation in multilateral or regional systems, in particular in relation to the protection of personal data.

3. The Commission, after assessing the adequacy of the level of protection, may decide, by means of implementing act, that a third country, a territory or one or more specified sectors within a third country, or an international organisation ensures an adequate level of protection within the meaning of paragraph 2 of this Article. The implementing act shall provide for a mechanism for a periodic review, at least every four years, which shall take into account all relevant developments in the third country or international organisation. The implementing act shall specify its territorial and sectoral application and, where applicable, identify the supervisory authority or authorities referred to in point (b) of paragraph 2 of this Article. The implementing act shall be adopted in accordance with the examination procedure referred to in Article 93(2).

4. The Commission shall, on an ongoing basis, monitor developments in third countries and international organisations that could affect the functioning of decisions adopted pursuant to paragraph 3 of this Article and decisions adopted on the basis of Article 25(6) of Directive 95/46/EC.

5. The Commission shall, where available information reveals, in particular following the review referred to in paragraph 3 of this Article, that a third country, a territory or one or more specified sectors within a third country, or an international organisation no longer ensures an adequate level of protection within the meaning of paragraph 2 of this Article, to the extent necessary, repeal, amend or suspend the decision referred to in paragraph 3 of this Article by means of implementing acts without retro-active effect. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 93(2).

On duly justified imperative grounds of urgency, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 93(3).

6. The Commission shall enter into consultations with the third country or international organisation with a view to remedying the situation giving rise to the decision made pursuant to paragraph 5.

7. A decision pursuant to paragraph 5 of this Article is without prejudice to transfers of personal data to the third country, a territory or one or more specified sectors within that third country, or the international organisation in question pursuant to Articles 46 to 49.

8. The Commission shall publish in the Official Journal of the European Union and on its website a list of the third countries, territories and specified sectors within a third country and international organisations for which it has decided that an adequate level of protection is or is no longer ensured.

9. Decisions adopted by the Commission on the basis of Article 25(6) of Directive 95/46/EC shall remain in force until amended, replaced or repealed by a Commission Decision adopted in accordance with paragraph 3 or 5 of this Article.

Article 46

Transfers subject to appropriate safeguards

1. In the absence of a decision pursuant to Article 45(3), a controller or processor may transfer personal data to a third country or an international organisation only if the controller or processor has provided appropriate

safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.

2. The appropriate safeguards referred to in paragraph 1 may be provided for, without requiring any specific authorisation from a supervisory authority, by:

(a) a legally binding and enforceable instrument between public authorities or bodies;
(b) binding corporate rules in accordance with Article 47;
(c) standard data protection clauses adopted by the Commission in accordance with the examination procedure referred to in Article 93(2);
(d) standard data protection clauses adopted by a supervisory authority and approved by the Commission pursuant to the examination procedure referred to in Article 93(2);
(e) an approved code of conduct pursuant to Article 40 together with binding and enforceable commitments of the controller or processor in the third country to apply the appropriate safeguards, including as regards data subjects' rights; or
(f) an approved certification mechanism pursuant to Article 42 together with binding and enforceable commitments of the controller or processor in the third country to apply the appropriate safeguards, including as regards data subjects' rights.

3. Subject to the authorisation from the competent supervisory authority, the appropriate safeguards referred to in paragraph 1 may also be provided for, in particular, by:

(a) contractual clauses between the controller or processor and the controller, processor or the recipient of the personal data in the third country or international organisation; or
(b) provisions to be inserted into administrative arrangements between public authorities or bodies which include enforceable and effective data subject rights.

4. The supervisory authority shall apply the consistency mechanism referred to in Article 63 in the cases referred to in paragraph 3 of this Article.

5. Authorisations by a Member State or supervisory authority on the basis of Article 26(2) of Directive 95/46/EC shall remain valid until amended, replaced or repealed, if necessary, by that supervisory authority. Decisions adopted by the Commission on the basis of Article 26(4) of Directive 95/46/EC shall remain in force until amended, replaced or repealed, if necessary, by a Commission Decision adopted in accordance with paragraph 2 of this Article.

Article 47

Binding corporate rules

1. The competent supervisory authority shall approve binding corporate rules in accordance with the consistency mechanism set out in Article 63, provided that they:

(a) are legally binding and apply to and are enforced by every member concerned of the group of undertakings, or group of enterprises engaged in a joint economic activity, including their employees;
(b) expressly confer enforceable rights on data subjects with regard to the processing of their personal data; and
(c) fulfil the requirements laid down in paragraph 2.

2. The binding corporate rules referred to in paragraph 1 shall specify at least:

(a) the structure and contact details of the group of undertakings, or group of enterprises engaged in a joint economic activity and of each of its members;
(b) the data transfers or set of transfers, including the categories of personal data, the type of processing and its purposes, the type of data subjects affected and the identification of the third country or countries in question;
(c) their legally binding nature, both internally and externally;
(d) the application of the general data protection principles, in particular purpose limitation, data minimisation, limited storage periods, data quality, data protection by design and by default, legal basis for processing,

processing of special categories of personal data, measures to ensure data security, and the requirements in respect of onward transfers to bodies not bound by the binding corporate rules;

(e) the rights of data subjects in regard to processing and the means to exercise those rights, including the right not to be subject to decisions based solely on automated processing, including profiling in accordance with Article 22, the right to lodge a complaint with the competent supervisory authority and before the competent courts of the Member States in accordance with Article 79, and to obtain redress and, where appropriate, compensation for a breach of the binding corporate rules;

(f) the acceptance by the controller or processor established on the territory of a Member State of liability for any breaches of the binding corporate rules by any member concerned not established in the Union; the controller or the processor shall be exempt from that liability, in whole or in part, only if it proves that that member is not responsible for the event giving rise to the damage;

(g) how the information on the binding corporate rules, in particular on the provisions referred to in points (d), (e) and (f) of this paragraph is provided to the data subjects in addition to Articles 13 and 14;

(h) the tasks of any data protection officer designated in accordance with Article 37 or any other person or entity in charge of the monitoring compliance with the binding corporate rules within the group of undertakings, or group of enterprises engaged in a joint economic activity, as well as monitoring training and complaint-handling;

(i) the complaint procedures;

(j) the mechanisms within the group of undertakings, or group of enterprises engaged in a joint economic activity for ensuring the verification of compliance with the binding corporate rules. Such mechanisms shall include data protection audits and methods for ensuring corrective actions to protect the rights of the data subject. Results of such verification should be communicated to the person or entity referred to in point (h) and to the board of the controlling undertaking of a group of undertakings, or of the group of enterprises engaged in a joint economic activity, and should be available upon request to the competent supervisory authority;

(k) the mechanisms for reporting and recording changes to the rules and reporting those changes to the supervisory authority;

(l) the cooperation mechanism with the supervisory authority to ensure compliance by any member of the group of undertakings, or group of enterprises engaged in a joint economic activity, in particular by making available to the supervisory authority the results of verifications of the measures referred to in point (j);

(m) the mechanisms for reporting to the competent supervisory authority any legal requirements to which a member of the group of undertakings, or group of enterprises engaged in a joint economic activity is subject in a third country which are likely to have a substantial adverse effect on the guarantees provided by the binding corporate rules; and

(n) the appropriate data protection training to personnel having permanent or regular access to personal data.

3. The Commission may specify the format and procedures for the exchange of information between controllers, processors and supervisory authorities for binding corporate rules within the meaning of this Article. Those implementing acts shall be adopted in accordance with the examination procedure set out in Article 93(2).

Article 48

Transfers or disclosures not authorised by Union law

Any judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data may only be recognised or enforceable in any manner if based on an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State, without prejudice to other grounds for transfer pursuant to this Chapter.

Article 49

Derogations for specific situations

1. In the absence of an adequacy decision pursuant to Article 45(3), or of appropriate safeguards pursuant to Article 46, including binding corporate rules, a transfer or a set of transfers of personal data to a third country or an international organisation shall take place only on one of the following conditions:

(a)the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards;
(b)the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request;
(c)the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person;
(d) the transfer is necessary for important reasons of public interest;
(e) the transfer is necessary for the establishment, exercise or defence of legal claims;
(f)the transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent;
(g)the transfer is made from a register which according to Union or Member State law is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate a legitimate interest, but only to the extent that the conditions laid down by Union or Member State law for consultation are fulfilled in the particular case.

Where a transfer could not be based on a provision in Article 45 or 46, including the provisions on binding corporate rules, and none of the derogations for a specific situation referred to in the first subparagraph of this paragraph is applicable, a transfer to a third country or an international organisation may take place only if the transfer is not repetitive, concerns only a limited number of data subjects, is necessary for the purposes of compelling legitimate interests pursued by the controller which are not overridden by the interests or rights and freedoms of the data subject, and the controller has assessed all the circumstances surrounding the data transfer and has on the basis of that assessment provided suitable safeguards with regard to the protection of personal data. The controller shall inform the supervisory authority of the transfer. The controller shall, in addition to providing the information referred to in Articles 13 and 14, inform the data subject of the transfer and on the compelling legitimate interests pursued.

2. A transfer pursuant to point (g) of the first subparagraph of paragraph 1 shall not involve the entirety of the personal data or entire categories of the personal data contained in the register. Where the register is intended for consultation by persons having a legitimate interest, the transfer shall be made only at the request of those persons or if they are to be the recipients.

3. Points (a), (b) and (c) of the first subparagraph of paragraph 1 and the second subparagraph thereof shall not apply to activities carried out by public authorities in the exercise of their public powers.

4. The public interest referred to in point (d) of the first subparagraph of paragraph 1 shall be recognised in Union law or in the law of the Member State to which the controller is subject.

5. In the absence of an adequacy decision, Union or Member State law may, for important reasons of public interest, expressly set limits to the transfer of specific categories of personal data to a third country or an international organisation. Member States shall notify such provisions to the Commission.

6. The controller or processor shall document the assessment as well as the suitable safeguards referred to in the second subparagraph of paragraph 1 of this Article in the records referred to in Article 30.

Article 50

International cooperation for the protection of personal data

In relation to third countries and international organisations, the Commission and supervisory authorities shall take appropriate steps to:

(a)develop international cooperation mechanisms to facilitate the effective enforcement of legislation for the protection of personal data;
(b)provide international mutual assistance in the enforcement of legislation for the protection of personal data, including through notification, complaint referral, investigative assistance and information exchange, subject to appropriate safeguards for the protection of personal data and other fundamental rights and freedoms;

(c) engage relevant stakeholders in discussion and activities aimed at furthering international cooperation in the enforcement of legislation for the protection of personal data;
(d) promote the exchange and documentation of personal data protection legislation and practice, including on jurisdictional conflicts with third countries.

[…]

Article 99

Entry into force and application

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

2. It shall apply from 25 May 2018.

LECTURE 9: EU-SPECIFIC FUNDAMENTAL RIGHTS: DATA PROTECTION (II)

Following up on the previous lecture outlining the general framework of the EU right to data protection, this lecture will focus in particular on the conditions attached to that right. In essence, data protection is structured around the obligation for data subjects to consent to the use of their data. This lecture explores the conditions attached to consent as well as rights derived from this consent-based approach. Particular specific attention will be devoted to the right to be forgotten in that regard.

*Materials to read:*

- Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (see last week)
- Court of Justice, 13 May 2014, Case C-131/12, *Google Spain,* ECLI:EU:C:2014:317.
- Court of Justice, 9 March 2017, Case C-398/15, *Salvatore Manni*, ECLI:EU:C:2017:197.
- Court of Justice, 5 June 2018, Case C-210/16, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH,* ECLI:EU:C:2018:388.

## Case C-131/12, *Google Spain*

JUDGMENT OF THE COURT (Grand Chamber)

In Case C-131/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Audiencia Nacional (Spain), made by decision of 27 February 2012, received at the Court on 9 March 2012, in the proceedings

**Google Spain SL,**

**Google Inc.**

v

**Agencia Española de Protección de Datos (AEPD),**

**Mario Costeja González,**

THE COURT (Grand Chamber),

[…]

1 This request for a preliminary ruling concerns the interpretation of Article 2(b) and (d), Article 4(1)(a) and (c), Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) and of Article 8 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between, on the one hand, Google Spain SL ('Google Spain') and Google Inc. and, on the other, the Agencia Española de Protección de Datos (Spanish Data Protection Agency; 'the AEPD') and Mr Costeja González concerning a decision by the AEPD upholding the complaint lodged by Mr Costeja González against those two companies and ordering Google Inc. to adopt the measures necessary to withdraw personal data relating to Mr Costeja González from its index and to prevent access to the data in the future.

**Legal context**

*European Union law*

3 Directive 95/46 which, according to Article 1, has the object of protecting the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data, and of removing obstacles to the free flow of such data, states in recitals 2, 10, 18 to 20 and 25 in its preamble:

'(2) … data-processing systems are designed to serve man; … they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to … the well-being of individuals;

...

(10) … the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [, signed in Rome on 4 November 1950,] and in the general principles of Community law; … for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community;

...

(18) … in order to ensure that individuals are not deprived of the protection to which they are entitled under this Directive, any processing of personal data in the Community must be carried out in accordance with the law of one of the Member States; … in this connection, processing carried out under the responsibility of a controller who is established in a Member State should be governed by the law of that State;

(19) … establishment on the territory of a Member State implies the effective and real exercise of activity through stable arrangements; … the legal form of such an establishment, whether simply [a] branch or a subsidiary with a legal personality, is not the determining factor in this respect; … when a single controller is established on the territory of several Member States, particularly by means of subsidiaries, he must ensure, in order to avoid any circumvention of national rules, that each of the establishments fulfils the obligations imposed by the national law applicable to its activities;

(20) … the fact that the processing of data is carried out by a person established in a third country must not stand in the way of the protection of individuals provided for in this Directive; … in these cases, the processing should be governed by the law of the Member State in which the means used are located, and there should be guarantees to ensure that the rights and obligations provided for in this Directive are respected in practice;

...

(25) … the principles of protection must be reflected, on the one hand, in the obligations imposed on persons … responsible for processing, in particular regarding data quality, technical security, notification to the supervisory authority, and the circumstances under which processing can be carried out, and, on the other hand, in the right conferred on individuals, the data on whom are the subject of processing, to be informed that processing is taking place, to consult the data, to request corrections and even to object to processing in certain circumstances'.

4 Article 2 of Directive 95/46 states that '[f]or the purposes of this Directive:

(a) "personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) "processing of personal data" ("processing") shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

...

(d) "controller" shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law;

...'

5 Article 3 of Directive 95/46, entitled 'Scope', states in paragraph 1:

'This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.'

6 Article 4 of Directive 95/46, entitled 'National law applicable', provides:

‘1. Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:

(a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;

(b) the controller is not established on the Member State’s territory, but in a place where its national law applies by virtue of international public law;

(c) the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community.

2. In the circumstances referred to in paragraph 1(c), the controller must designate a representative established in the territory of that Member State, without prejudice to legal actions which could be initiated against the controller himself.’

7 In Section I (entitled ‘Principles relating to data quality’) of Chapter II of Directive 95/46, Article 6 is worded as follows:

‘1. Member States shall provide that personal data must be:

(a) processed fairly and lawfully;

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;

(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.

2. It shall be for the controller to ensure that paragraph 1 is complied with.’

8 In Section II (entitled ‘Criteria for making data processing legitimate’) of Chapter II of Directive 95/46, Article 7 provides:

‘Member States shall provide that personal data may be processed only if:

...

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests [or] fundamental rights and freedoms of the data subject which require protection under Article 1(1).’

9 Article 9 of Directive 95/46, entitled ‘Processing of personal data and freedom of expression’, provides:

‘Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.’

10 Article 12 of Directive 95/46, entitled ‘Rights of access’, provides:

‘Member States shall guarantee every data subject the right to obtain from the controller:

...

(b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;

...’

11 Article 14 of Directive 95/46, entitled ‘The data subject’s right to object’, provides:

‘Member States shall grant the data subject the right:

(a) at least in the cases referred to in Article 7(e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data;

...’

12 Article 28 of Directive 95/46, entitled ‘Supervisory authority’, is worded as follows:

‘1. Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive.

...

3. Each authority shall in particular be endowed with:

– investigative powers, such as powers of access to data forming the subject-matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties,

– effective powers of intervention, such as, for example, that … of ordering the blocking, erasure or destruction of data, of imposing a temporary or definitive ban on processing …

– ...

Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts.

4. Each supervisory authority shall hear claims lodged by any person, or by an association representing that person, concerning the protection of his rights and freedoms in regard to the processing of personal data. The person concerned shall be informed of the outcome of the claim.

...

6. Each supervisory authority is competent, whatever the national law applicable to the processing in question, to exercise, on the territory of its own Member State, the powers conferred on it in accordance with paragraph 3. Each authority may be requested to exercise its powers by an authority of another Member State.

The supervisory authorities shall cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information.

...'

*Spanish law*

13 Directive 95/46 was transposed into Spanish Law by Organic Law No 15/1999 of 13 December 1999 on the protection of personal data (BOE No 298 of 14 December 1999, p. 43088).

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

14 On 5 March 2010, Mr Costeja González, a Spanish national resident in Spain, lodged with the AEPD a complaint against La Vanguardia Ediciones SL, which publishes a daily newspaper with a large circulation, in particular in Catalonia (Spain) ('La Vanguardia'), and against Google Spain and Google Inc. The complaint was based on the fact that, when an internet user entered Mr Costeja González's name in the search engine of the Google group ('Google Search'), he would obtain links to two pages of La Vanguardia's newspaper, of 19 January and 9 March 1998 respectively, on which an announcement mentioning Mr Costeja González's name appeared for a real-estate auction connected with attachment proceedings for the recovery of social security debts.

15 By that complaint, Mr Costeja González requested, first, that La Vanguardia be required either to remove or alter those pages so that the personal data relating to him no longer appeared or to use certain tools made available by search engines in order to protect the data. Second, he requested that Google Spain or Google Inc. be required to remove or conceal the personal data relating to him so that they ceased to be included in the search results and no longer appeared in the links to La Vanguardia. Mr Costeja González stated in this context that the attachment proceedings concerning him had been fully resolved for a number of years and that reference to them was now entirely irrelevant.

16 By decision of 30 July 2010, the AEPD rejected the complaint in so far as it related to La Vanguardia, taking the view that the publication by it of the information in question was legally justified as it took place upon order of the Ministry of Labour and Social Affairs and was intended to give maximum publicity to the auction in order to secure as many bidders as possible.

17 On the other hand, the complaint was upheld in so far as it was directed against Google Spain and Google Inc. The AEPD considered in this regard that operators of search engines are subject to data protection legislation given that they carry out data processing for which they are responsible and act as intermediaries in the information society. The AEPD took the view that it has the power to require the withdrawal of data and the prohibition of access to certain data by the operators of search engines when it considers that the locating and dissemination of the data are liable to compromise the fundamental right to data protection and the dignity of persons in the broad sense, and this would also encompass the mere wish of the person concerned that such data not be known to third parties. The AEPD considered that that obligation may be owed directly by operators of search engines, without it being necessary to erase the data or information from the website where they appear, including when retention of the information on that site is justified by a statutory provision.

18 Google Spain and Google Inc. brought separate actions against that decision before the Audiencia Nacional (National High Court). The Audiencia Nacional joined the actions.

19 That court states in the order for reference that the actions raise the question of what obligations are owed by operators of search engines to protect personal data of persons concerned who do not wish that certain information, which is published on third parties' websites and contains personal data relating to them that enable that information to be linked to them, be located, indexed and made available to internet users indefinitely. The answer to that question depends on the way in which Directive 95/46 must be interpreted in the context of these technologies, which appeared after the directive's publication.

20 In those circumstances, the Audiencia Nacional decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. With regard to the territorial application of Directive [95/46] and, consequently, of the Spanish data protection legislation:

(a) must it be considered that an “establishment”, within the meaning of Article 4(1)(a) of Directive 95/46, exists when any one or more of the following circumstances arise:

– when the undertaking providing the search engine sets up in a Member State an office or subsidiary for the purpose of promoting and selling advertising space on the search engine, which orientates its activity towards the inhabitants of that State,

or

– when the parent company designates a subsidiary located in that Member State as its representative and controller for two specific filing systems which relate to the data of customers who have contracted for advertising with that undertaking,

or

– when the office or subsidiary established in a Member State forwards to the parent company, located outside the European Union, requests and requirements addressed to it both by data subjects and by the authorities with responsibility for ensuring observation of the right to data protection, even where such collaboration is engaged in voluntarily?

(b) Must Article 4(1)(c) of Directive 95/46 be interpreted as meaning that there is “use of equipment … situated on the territory of the said Member State”:

– when a search engine uses crawlers or robots to locate and index information contained in web pages located on servers in that Member State,

or

– when it uses a domain name pertaining to a Member State and arranges for searches and the results thereof to be based on the language of that Member State?

(c) Is it possible to regard as a use of equipment, in the terms of Article 4(1)(c) of Directive 95/46, the temporary storage of the information indexed by internet search engines? If the answer to that question is affirmative, can it be considered that that connecting factor is present when the undertaking refuses to disclose the place where it stores those indexes, invoking reasons of competition?

(d) Regardless of the answers to the foregoing questions and particularly in the event that the Court … considers that the connecting factors referred to in Article 4 of [Directive 95/46] are not present:

must Directive 95/46 … be applied, in the light of Article 8 of the [Charter], in the Member State where the centre of gravity of the conflict is located and more effective protection of the rights of … Union citizens is possible?

2. As regards the activity of search engines as providers of content in relation to Directive 95/46 …:

(a) in relation to the activity of [Google Search], as a provider of content, consisting in locating information published or included on the net by third parties, indexing it automatically, storing it temporarily and finally making it available to internet users according to a particular order of preference, when that information contains personal data of third parties: must an activity like the one described be interpreted as falling within the concept of “processing of … data” used in Article 2(b) of Directive 95/46?

(b) If the answer to the foregoing question is affirmative, and once again in relation to an activity like the one described:

must Article 2(d) of Directive 95/46 be interpreted as meaning that the undertaking managing [Google Search] is to be regarded as the "controller" of the personal data contained in the web pages that it indexes?

(c) In the event that the answer to the foregoing question is affirmative:

may the [AEPD], protecting the rights embodied in [Article] 12(b) and [subparagraph (a) of the first paragraph of Article 14] of Directive 95/46, directly impose on [Google Search] a requirement that it withdraw from its indexes an item of information published by third parties, without addressing itself in advance or simultaneously to the owner of the web page on which that information is located?

(d) In the event that the answer to the foregoing question is affirmative:

would the obligation of search engines to protect those rights be excluded when the information that contains the personal data has been lawfully published by third parties and is kept on the web page from which it originates?

3. Regarding the scope of the right of erasure and/or the right to object, in relation to the "derecho al olvido" (the "right to be forgotten"), the following question is asked:

must it be considered that the rights to erasure and blocking of data, provided for in Article 12(b), and the right to object, provided for by [subparagraph (a) of the first paragraph of Article 14] of Directive 95/46, extend to enabling the data subject to address himself to search engines in order to prevent indexing of the information relating to him personally, published on third parties' web pages, invoking his wish that such information should not be known to internet users when he considers that it might be prejudicial to him or he wishes it to be consigned to oblivion, even though the information in question has been lawfully published by third parties?'

**Consideration of the questions referred**

*Question 2(a) and (b), concerning the material scope of Directive 95/46*

21 By Question 2(a) and (b), which it is appropriate to examine first, the referring court asks, in essence, whether Article 2(b) of Directive 95/46 is to be interpreted as meaning that the activity of a search engine as a provider of content which consists in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference must be classified as 'processing of personal data' within the meaning of that provision when that information contains personal data. If the answer is in the affirmative, the referring court seeks to ascertain furthermore whether Article 2(d) of Directive 95/46 is to be interpreted as meaning that the operator of a search engine must be regarded as the 'controller' in respect of that processing of the personal data, within the meaning of that provision.

22 According to Google Spain and Google Inc., the activity of search engines cannot be regarded as processing of the data which appear on third parties' web pages displayed in the list of search results, given that search engines process all the information available on the internet without effecting a selection between personal data and other information. Furthermore, even if that activity must be classified as 'data processing', the operator of a search engine cannot be regarded as a 'controller' in respect of that processing since it has no knowledge of those data and does not exercise control over the data.

23 On the other hand, Mr Costeja González, the Spanish, Italian, Austrian and Polish Governments and the European Commission consider that that activity quite clearly involves 'data processing' within the meaning of Directive 95/46, which is distinct from the data processing by the publishers of websites and pursues different objectives from such processing. The operator of a search engine is the 'controller' in respect of the data processing carried out by it since it is the operator that determines the purposes and means of that processing.

24 In the Greek Government's submission, the activity in question constitutes such 'processing', but inasmuch as search engines serve merely as intermediaries, the undertakings which operate them cannot be regarded as 'controllers', except where they store data in an 'intermediate memory' or 'cache memory' for a period which exceeds that which is technically necessary.

25 Article 2(b) of Directive 95/46 defines 'processing of personal data' as 'any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction'.

26 As regards in particular the internet, the Court has already had occasion to state that the operation of loading personal data on an internet page must be considered to be such 'processing' within the meaning of Article 2(b) of Directive 95/46 (see Case C-101/01 *Lindqvist* EU:C:2003:596, paragraph 25).

27 So far as concerns the activity at issue in the main proceedings, it is not contested that the data found, indexed and stored by search engines and made available to their users include information relating to identified or identifiable natural persons and thus 'personal data' within the meaning of Article 2(a) of that directive.

28 Therefore, it must be found that, in exploring the internet automatically, constantly and systematically in search of the information which is published there, the operator of a search engine 'collects' such data which it subsequently 'retrieves', 'records' and 'organises' within the framework of its indexing programmes, 'stores' on its servers and, as the case may be, 'discloses' and 'makes available' to its users in the form of lists of search results. As those operations are referred to expressly and unconditionally in Article 2(b) of Directive 95/46, they must be classified as 'processing' within the meaning of that provision, regardless of the fact that the operator of the search engine also carries out the same operations in respect of other types of information and does not distinguish between the latter and the personal data.

29 Nor is the foregoing finding affected by the fact that those data have already been published on the internet and are not altered by the search engine.

30 The Court has already held that the operations referred to in Article 2(b) of Directive 95/46 must also be classified as such processing where they exclusively concern material that has already been published in unaltered form in the media. It has indeed observed in that regard that a general derogation from the application of Directive 95/46 in such a case would largely deprive the directive of its effect (see, to this effect, Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* EU:C:2008:727, paragraphs 48 and 49).

31 Furthermore, it follows from the definition contained in Article 2(b) of Directive 95/46 that, whilst the alteration of personal data indeed constitutes processing within the meaning of the directive, the other operations which are mentioned there do not, on the other hand, in any way require that the personal data be altered.

32 As to the question whether the operator of a search engine must be regarded as the 'controller' in respect of the processing of personal data that is carried out by that engine in the context of an activity such as that at issue in the main proceedings, it should be recalled that Article 2(d) of Directive 95/46 defines 'controller' as 'the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data'.

33 It is the search engine operator which determines the purposes and means of that activity and thus of the processing of personal data that it itself carries out within the framework of that activity and which must, consequently, be regarded as the 'controller' in respect of that processing pursuant to Article 2(d).

34 Furthermore, it would be contrary not only to the clear wording of that provision but also to its objective — which is to ensure, through a broad definition of the concept of 'controller', effective and complete protection of data subjects — to exclude the operator of a search engine from that definition on the ground that it does not exercise control over the personal data published on the web pages of third parties.

35 In this connection, it should be pointed out that the processing of personal data carried out in the context of the activity of a search engine can be distinguished from and is additional to that carried out by publishers of websites, consisting in loading those data on an internet page.

36 Moreover, it is undisputed that that activity of search engines plays a decisive role in the overall dissemination of those data in that it renders the latter accessible to any internet user making a search on the basis of the data subject's name, including to internet users who otherwise would not have found the web page on which those data are published.

37 Also, the organisation and aggregation of information published on the internet that are effected by search engines with the aim of facilitating their users' access to that information may, when users carry out their search on the basis of an individual's name, result in them obtaining through the list of results a structured overview of the information relating to that individual that can be found on the internet enabling them to establish a more or less detailed profile of the data subject.

38 Inasmuch as the activity of a search engine is therefore liable to affect significantly, and additionally compared with that of the publishers of websites, the fundamental rights to privacy and to the protection of personal data, the operator of the search engine as the person determining the purposes and means of that activity must ensure, within the framework of its responsibilities, powers and capabilities, that the activity meets the requirements of Directive 95/46 in order that the guarantees laid down by the directive may have full effect and that effective and complete protection of data subjects, in particular of their right to privacy, may actually be achieved.

39 Finally, the fact that publishers of websites have the option of indicating to operators of search engines, by means in particular of exclusion protocols such as 'robot.txt' or codes such as 'noindex' or 'noarchive', that they wish specific information published on their site to be wholly or partially excluded from the search engines' automatic indexes does not mean that, if publishers of websites do not so indicate, the operator of a search engine is released from its responsibility for the processing of personal data that it carries out in the context of the engine's activity.

40 That fact does not alter the position that the purposes and means of that processing are determined by the operator of the search engine. Furthermore, even if that option for publishers of websites were to mean that they determine the means of that processing jointly with that operator, this finding would not remove any of the latter's responsibility as Article 2(d) of Directive 95/46 expressly provides that that determination may be made 'alone or jointly with others'.

41 It follows from all the foregoing considerations that the answer to Question 2(a) and (b) is that Article 2(b) and (d) of Directive 95/46 are to be interpreted as meaning that, first, the activity of a search engine consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference must be classified as 'processing of personal data' within the meaning of Article 2(b) when that information contains personal data and, second, the operator of the search engine must be regarded as the 'controller' in respect of that processing, within the meaning of Article 2(d).

*Question 1(a) to (d), concerning the territorial scope of Directive 95/46*

42 By Question 1(a) to (d), the referring court seeks to establish whether it is possible to apply the national legislation transposing Directive 95/46 in circumstances such as those at issue in the main proceedings.

43 In this respect, the referring court has established the following facts:

– Google Search is offered worldwide through the website 'www.google.com'. In numerous States, a local version adapted to the national language exists. The version of Google Search in Spanish is offered through the website 'www.google.es', which has been registered since 16 September 2003. Google Search is one of the most used search engines in Spain.

– Google Search is operated by Google Inc., which is the parent company of the Google Group and has its seat in the United States.

– Google Search indexes websites throughout the world, including websites located in Spain. The information indexed by its 'web crawlers' or robots, that is to say, computer programmes used to locate and sweep up the content of web pages methodically and automatically, is stored temporarily on servers whose State of location is unknown, that being kept secret for reasons of competition.

– Google Search does not merely give access to content hosted on the indexed websites, but takes advantage of that activity and includes, in return for payment, advertising associated with the internet users' search terms, for undertakings which wish to use that tool in order to offer their goods or services to the internet users.

– The Google group has recourse to its subsidiary Google Spain for promoting the sale of advertising space generated on the website 'www.google.com'. Google Spain, which was established on 3 September 2003 and possesses separate legal personality, has its seat in Madrid (Spain). Its activities are targeted essentially at undertakings based in Spain, acting as a commercial agent for the Google group in that Member State. Its objects are to promote, facilitate and effect the sale of on-line advertising products and services to third parties and the marketing of that advertising.

– Google Inc. designated Google Spain as the controller, in Spain, in respect of two filing systems registered by Google Inc. with the AEPD; those filing systems were intended to contain the personal data of the customers who had concluded contracts for advertising services with Google Inc.

44 Specifically, the main issues raised by the referring court concern the notion of 'establishment', within the meaning of Article 4(1)(a) of Directive 95/46, and of 'use of equipment situated on the territory of the said Member State', within the meaning of Article 4(1)(c).

Question 1(a)

45 By Question 1(a), the referring court asks, in essence, whether Article 4(1)(a) of Directive 95/46 is to be interpreted as meaning that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when one or more of the following three conditions are met:

– the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State, or

– the parent company designates a subsidiary located in that Member State as its representative and controller for two specific filing systems which relate to the data of customers who have contracted for advertising with that undertaking, or

– the branch or subsidiary established in a Member State forwards to the parent company, located outside the European Union, requests and requirements addressed to it both by data subjects and by the authorities with responsibility for ensuring observation of the right to protection of personal data, even where such collaboration is engaged in voluntarily.

46 So far as concerns the first of those three conditions, the referring court states that Google Search is operated and managed by Google Inc. and that it has not been established that Google Spain carries out in Spain an activity directly linked to the indexing or storage of information or data contained on third parties' websites. Nevertheless, according to the referring court, the promotion and sale of advertising space, which Google Spain attends to in respect of Spain, constitutes the bulk of the Google group's commercial activity and may be regarded as closely linked to Google Search.

47 Mr Costeja González, the Spanish, Italian, Austrian and Polish Governments and the Commission submit that, in the light of the inextricable link between the activity of the search engine operated by Google Inc. and the activity of Google Spain, the latter must be regarded as an establishment of the former and the processing of personal data is carried out in context of the activities of that establishment. On the other hand, according to Google Spain, Google Inc. and the Greek Government, Article 4(1)(a) of Directive 95/46 is not applicable in the case of the first of the three conditions listed by the referring court.

48 In this regard, it is to be noted first of all that recital 19 in the preamble to Directive 95/46 states that 'establishment on the territory of a Member State implies the effective and real exercise of activity through stable arrangements' and that 'the legal form of such an establishment, whether simply [a] branch or a subsidiary with a legal personality, is not the determining factor'.

49 It is not disputed that Google Spain engages in the effective and real exercise of activity through stable arrangements in Spain. As it moreover has separate legal personality, it constitutes a subsidiary of Google Inc. on Spanish territory and, therefore, an 'establishment' within the meaning of Article 4(1)(a) of Directive 95/46.

50 In order to satisfy the criterion laid down in that provision, it is also necessary that the processing of personal data by the controller be 'carried out in the context of the activities' of an establishment of the controller on the territory of a Member State.

51 Google Spain and Google Inc. dispute that this is the case since the processing of personal data at issue in the main proceedings is carried out exclusively by Google Inc., which operates Google Search without any intervention on the part of Google Spain; the latter's activity is limited to providing support to the Google group's advertising activity which is separate from its search engine service.

52 Nevertheless, as the Spanish Government and the Commission in particular have pointed out, Article 4(1)(a) of Directive 95/46 does not require the processing of personal data in question to be carried out 'by' the establishment concerned itself, but only that it be carried out 'in the context of the activities' of the establishment.

53 Furthermore, in the light of the objective of Directive 95/46 of ensuring effective and complete protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data, those words cannot be interpreted restrictively (see, by analogy, Case C-324/09 *L'Oréal and Others* EU:C:2011:474, paragraphs 62 and 63).

54 It is to be noted in this context that it is clear in particular from recitals 18 to 20 in the preamble to Directive 95/46 and Article 4 thereof that the European Union legislature sought to prevent individuals from being deprived of the protection guaranteed by the directive and that protection from being circumvented, by prescribing a particularly broad territorial scope.

55 In the light of that objective of Directive 95/46 and of the wording of Article 4(1)(a), it must be held that the processing of personal data for the purposes of the service of a search engine such as Google Search, which is operated by an undertaking that has its seat in a third State but has an establishment in a Member State, is carried out 'in the context of the activities' of that establishment if the latter is intended to promote and sell, in that Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable.

56 In such circumstances, the activities of the operator of the search engine and those of its establishment situated in the Member State concerned are inextricably linked since the activities relating to the advertising space constitute the means of rendering the search engine at issue economically profitable and that engine is, at the same time, the means enabling those activities to be performed.

57 As has been stated in paragraphs 26 to 28 of the present judgment, the very display of personal data on a search results page constitutes processing of such data. Since that display of results is accompanied, on the same page, by the display of advertising linked to the search terms, it is clear that the processing of personal data in question is carried out in the context of the commercial and advertising activity of the controller's establishment on the territory of a Member State, in this instance Spanish territory.

58 That being so, it cannot be accepted that the processing of personal data carried out for the purposes of the operation of the search engine should escape the obligations and guarantees laid down by Directive 95/46, which would compromise the directive's effectiveness and the effective and complete protection of the fundamental rights and freedoms of natural persons which the directive seeks to ensure (see, by analogy, *L'Oréal and Others* EU:C:2011:474, paragraphs 62 and 63), in particular their right to privacy, with respect to the processing of personal data, a right to which the directive accords special importance as is confirmed in particular by Article 1(1) thereof and recitals 2 and 10 in its preamble (see, to this effect, Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* EU:C:2003:294, paragraph 70; Case C-553/07 *Rijkeboer* EU:C:2009:293, paragraph 47; and Case C-473/12 *IPI* EU:C:2013:715, paragraph 28 and the case-law cited).

59 Since the first of the three conditions listed by the referring court suffices by itself for it to be concluded that an establishment such as Google Spain satisfies the criterion laid down in Article 4(1)(a) of Directive 95/46, it is unnecessary to examine the other two conditions.

60 It follows from the foregoing that the answer to Question 1(a) is that Article 4(1)(a) of Directive 95/46 is to be interpreted as meaning that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when the

operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State.

Question 1(b) to (d)

61 In view of the answer given to Question 1(a), there is no need to answer Question 1(b) to (d).

*Question 2(c) and (d), concerning the extent of the responsibility of the operator of a search engine under Directive 95/46*

62 By Question 2(c) and (d), the referring court asks, in essence, whether Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, in order to comply with the rights laid down in those provisions, the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.

63 Google Spain and Google Inc. submit that, by virtue of the principle of proportionality, any request seeking the removal of information must be addressed to the publisher of the website concerned because it is he who takes the responsibility for making the information public, who is in a position to appraise the lawfulness of that publication and who has available to him the most effective and least restrictive means of making the information inaccessible. Furthermore, to require the operator of a search engine to withdraw information published on the internet from its indexes would take insufficient account of the fundamental rights of publishers of websites, of other internet users and of that operator itself.

64 According to the Austrian Government, a national supervisory authority may order such an operator to erase information published by third parties from its filing systems only if the data in question have been found previously to be unlawful or incorrect or if the data subject has made a successful objection to the publisher of the website on which that information was published.

65 Mr Costeja González, the Spanish, Italian and Polish Governments and the Commission submit that the national authority may directly order the operator of a search engine to withdraw from its indexes and intermediate memory information containing personal data that has been published by third parties, without having to approach beforehand or simultaneously the publisher of the web page on which that information appears. Furthermore, according to Mr Costeja González, the Spanish and Italian Governments and the Commission, the fact that the information has been published lawfully and that it still appears on the original web page has no effect on the obligations of that operator under Directive 95/46. On the other hand, according to the Polish Government that fact is such as to release the operator from its obligations.

66 First of all, it should be remembered that, as is apparent from Article 1 and recital 10 in the preamble, Directive 95/46 seeks to ensure a high level of protection of the fundamental rights and freedoms of natural persons, in particular their right to privacy, with respect to the processing of personal data (see, to this effect, *IPI* EU:C:2013:715, paragraph 28).

67 According to recital 25 in the preamble to Directive 95/46, the principles of protection laid down by the directive are reflected, on the one hand, in the obligations imposed on persons responsible for processing, in particular regarding data quality, technical security, notification to the supervisory authority and the circumstances under which processing can be carried out, and, on the other hand, in the rights conferred on individuals whose data are the subject of processing to be informed that processing is taking place, to consult the data, to request corrections and even to object to processing in certain circumstances.

68 The Court has already held that the provisions of Directive 95/46, in so far as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to privacy, must necessarily be interpreted in the light of fundamental rights, which, according to settled case-law, form an integral part of the general principles of law whose observance the Court ensures and which are now set out in the Charter (see, in

particular, Case C-274/99 P *Connolly* v *Commission* EU:C:2001:127, paragraph 37, and *Österreichischer Rundfunk and Others* EU:C:2003:294, paragraph 68).

69 Article 7 of the Charter guarantees the right to respect for private life, whilst Article 8 of the Charter expressly proclaims the right to the protection of personal data. Article 8(2) and (3) specify that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law, that everyone has the right of access to data which have been collected concerning him or her and the right to have the data rectified, and that compliance with these rules is to be subject to control by an independent authority. Those requirements are implemented inter alia by Articles 6, 7, 12, 14 and 28 of Directive 95/46.

70 Article 12(b) of Directive 95/46 provides that Member States are to guarantee every data subject the right to obtain from the controller, as appropriate, the rectification, erasure or blocking of data the processing of which does not comply with the provisions of Directive 95/46, in particular because of the incomplete or inaccurate nature of the data. As this final point relating to the case where certain requirements referred to in Article 6(1)(d) of Directive 95/46 are not observed is stated by way of example and is not exhaustive, it follows that non-compliant nature of the processing, which is capable of conferring upon the data subject the right guaranteed in Article 12(b) of the directive, may also arise from non-observance of the other conditions of lawfulness that are imposed by the directive upon the processing of personal data.

71 In this connection, it should be noted that, subject to the exceptions permitted under Article 13 of Directive 95/46, all processing of personal data must comply, first, with the principles relating to data quality set out in Article 6 of the directive and, secondly, with one of the criteria for making data processing legitimate listed in Article 7 of the directive (see *Österreichischer Rundfunk and Others* EU:C:2003:294, paragraph 65; Joined Cases C-468/10 and C-469/10 *ASNEF and FECEMD* EU:C:2011:777, paragraph 26; and Case C-342/12 *Worten* EU:C:2013:355, paragraph 33).

72 Under Article 6 of Directive 95/46 and without prejudice to specific provisions that the Member States may lay down in respect of processing for historical, statistical or scientific purposes, the controller has the task of ensuring that personal data are processed 'fairly and lawfully', that they are 'collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes', that they are 'adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed', that they are 'accurate and, where necessary, kept up to date' and, finally, that they are 'kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed'. In this context, the controller must take every reasonable step to ensure that data which do not meet the requirements of that provision are erased or rectified.

73 As regards legitimation, under Article 7 of Directive 95/46, of processing such as that at issue in the main proceedings carried out by the operator of a search engine, that processing is capable of being covered by the ground in Article 7(f).

74 This provision permits the processing of personal data where it is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject — in particular his right to privacy with respect to the processing of personal data — which require protection under Article 1(1) of the directive. Application of Article 7(f) thus necessitates a balancing of the opposing rights and interests concerned, in the context of which account must be taken of the significance of the data subject's rights arising from Articles 7 and 8 of the Charter (see *ASNEF and FECEMD*, EU:C:2011:777, paragraphs 38 and 40).

75 Whilst the question whether the processing complies with Articles 6 and 7(f) of Directive 95/46 may be determined in the context of a request as provided for in Article 12(b) of the directive, the data subject may, in addition, rely in certain conditions on the right to object laid down in subparagraph (a) of the first paragraph of Article 14 of the directive.

76 Under subparagraph (a) of the first paragraph of Article 14 of Directive 95/46, Member States are to grant the data subject the right, at least in the cases referred to in Article 7(e) and (f) of the directive, to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. The balancing to be carried out under subparagraph (a) of

the first paragraph of Article 14 thus enables account to be taken in a more specific manner of all the circumstances surrounding the data subject's particular situation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data.

77 Requests under Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 may be addressed by the data subject directly to the controller who must then duly examine their merits and, as the case may be, end processing of the data in question. Where the controller does not grant the request, the data subject may bring the matter before the supervisory authority or the judicial authority so that it carries out the necessary checks and orders the controller to take specific measures accordingly.

78 In this connection, it is to be noted that it is clear from Article 28(3) and (4) of Directive 95/46 that each supervisory authority is to hear claims lodged by any person concerning the protection of his rights and freedoms in regard to the processing of personal data and that it has investigative powers and effective powers of intervention enabling it to order in particular the blocking, erasure or destruction of data or to impose a temporary or definitive ban on such processing.

79 It is in the light of those considerations that it is necessary to interpret and apply the provisions of Directive 95/46 governing the data subject's rights when he lodges with the supervisory authority or judicial authority a request such as that at issue in the main proceedings.

80 It must be pointed out at the outset that, as has been found in paragraphs 36 to 38 of the present judgment, processing of personal data, such as that at issue in the main proceedings, carried out by the operator of a search engine is liable to affect significantly the fundamental rights to privacy and to the protection of personal data when the search by means of that engine is carried out on the basis of an individual's name, since that processing enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty — and thereby to establish a more or less detailed profile of him. Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous (see, to this effect, Joined Cases C-509/09 and C-161/10 *eDate Advertising and Others* EU:C:2011:685, paragraph 45).

81 In the light of the potential seriousness of that interference, it is clear that it cannot be justified by merely the economic interest which the operator of such an engine has in that processing. However, inasmuch as the removal of links from the list of results could, depending on the information at issue, have effects upon the legitimate interest of internet users potentially interested in having access to that information, in situations such as that at issue in the main proceedings a fair balance should be sought in particular between that interest and the data subject's fundamental rights under Articles 7 and 8 of the Charter. Whilst it is true that the data subject's rights protected by those articles also override, as a general rule, that interest of internet users, that balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life.

82 Following the appraisal of the conditions for the application of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 which is to be carried out when a request such as that at issue in the main proceedings is lodged with it, the supervisory authority or judicial authority may order the operator of the search engine to remove from the list of results displayed following a search made on the basis of a person's name links to web pages published by third parties containing information relating to that person, without an order to that effect presupposing the previous or simultaneous removal of that name and information — of the publisher's own accord or following an order of one of those authorities — from the web page on which they were published.

83 As has been established in paragraphs 35 to 38 of the present judgment, inasmuch as the data processing carried out in the context of the activity of a search engine can be distinguished from and is additional to that carried out by publishers of websites and affects the data subject's fundamental rights additionally, the operator of the search engine as the controller in respect of that processing must ensure, within the framework of its responsibilities, powers and capabilities, that that processing meets the requirements of Directive 95/46, in order that the guarantees laid down by the directive may have full effect.

84 Given the ease with which information published on a website can be replicated on other sites and the fact that the persons responsible for its publication are not always subject to European Union legislation, effective and complete protection of data users could not be achieved if the latter had to obtain first or in parallel the erasure of the information relating to them from the publishers of websites.

85 Furthermore, the processing by the publisher of a web page consisting in the publication of information relating to an individual may, in some circumstances, be carried out 'solely for journalistic purposes' and thus benefit, by virtue of Article 9 of Directive 95/46, from derogations from the requirements laid down by the directive, whereas that does not appear to be so in the case of the processing carried out by the operator of a search engine. It cannot therefore be ruled out that in certain circumstances the data subject is capable of exercising the rights referred to in Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 against that operator but not against the publisher of the web page.

86 Finally, it must be stated that not only does the ground, under Article 7 of Directive 95/46, justifying the publication of a piece of personal data on a website not necessarily coincide with that which is applicable to the activity of search engines, but also, even where that is the case, the outcome of the weighing of the interests at issue to be carried out under Article 7(f) and subparagraph (a) of the first paragraph of Article 14 of the directive may differ according to whether the processing carried out by the operator of a search engine or that carried out by the publisher of the web page is at issue, given that, first, the legitimate interests justifying the processing may be different and, second, the consequences of the processing for the data subject, and in particular for his private life, are not necessarily the same.

87 Indeed, since the inclusion in the list of results, displayed following a search made on the basis of a person's name, of a web page and of the information contained on it relating to that person makes access to that information appreciably easier for any internet user making a search in respect of the person concerned and may play a decisive role in the dissemination of that information, it is liable to constitute a more significant interference with the data subject's fundamental right to privacy than the publication on the web page.

88 In the light of all the foregoing considerations, the answer to Question 2(c) and (d) is that Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, in order to comply with the rights laid down in those provisions and in so far as the conditions laid down by those provisions are in fact satisfied, the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.

*Question 3, concerning the scope of the data subject's rights guaranteed by Directive 95/46*

89 By Question 3, the referring court asks, in essence, whether Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as enabling the data subject to require the operator of a search engine to remove from the list of results displayed following a search made on the basis of his name links to web pages published lawfully by third parties and containing true information relating to him, on the ground that that information may be prejudicial to him or that he wishes it to be 'forgotten' after a certain time.

90 Google Spain, Google Inc., the Greek, Austrian and Polish Governments and the Commission consider that this question should be answered in the negative. Google Spain, Google Inc., the Polish Government and the Commission submit in this regard that Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 confer rights upon data subjects only if the processing in question is incompatible with the directive or on compelling legitimate grounds relating to their particular situation, and not merely because they consider that that processing may be prejudicial to them or they wish that the data being processed sink into oblivion. The Greek and Austrian Governments submit that the data subject must approach the publisher of the website concerned.

91 According to Mr Costeja González and the Spanish and Italian Governments, the data subject may oppose the indexing by a search engine of personal data relating to him where their dissemination through the search engine is prejudicial to him and his fundamental rights to the protection of those data and to privacy — which

encompass the 'right to be forgotten' — override the legitimate interests of the operator of the search engine and the general interest in freedom of information.

92 As regards Article 12(b) of Directive 95/46, the application of which is subject to the condition that the processing of personal data be incompatible with the directive, it should be recalled that, as has been noted in paragraph 72 of the present judgment, such incompatibility may result not only from the fact that such data are inaccurate but, in particular, also from the fact that they are inadequate, irrelevant or excessive in relation to the purposes of the processing, that they are not kept up to date, or that they are kept for longer than is necessary unless they are required to be kept for historical, statistical or scientific purposes.

93 It follows from those requirements, laid down in Article 6(1)(c) to (e) of Directive 95/46, that even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed. That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed.

94 Therefore, if it is found, following a request by the data subject pursuant to Article 12(b) of Directive 95/46, that the inclusion in the list of results displayed following a search made on the basis of his name of the links to web pages published lawfully by third parties and containing true information relating to him personally is, at this point in time, incompatible with Article 6(1)(c) to (e) of the directive because that information appears, having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine, the information and links concerned in the list of results must be erased.

95 So far as concerns requests as provided for by Article 12(b) of Directive 95/46 founded on alleged non-compliance with the conditions laid down in Article 7(f) of the directive and requests under subparagraph (a) of the first paragraph of Article 14 of the directive, it must be pointed out that in each case the processing of personal data must be authorised under Article 7 for the entire period during which it is carried out.

96 In the light of the foregoing, when appraising such requests made in order to oppose processing such as that at issue in the main proceedings, it should in particular be examined whether the data subject has a right that the information relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name. In this connection, it must be pointed out that it is not necessary in order to find such a right that the inclusion of the information in question in the list of results causes prejudice to the data subject.

97 As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public by its inclusion in such a list of results, it should be held, as follows in particular from paragraph 81 of the present judgment, that those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question.

98 As regards a situation such as that at issue in the main proceedings, which concerns the display, in the list of results that the internet user obtains by making a search by means of Google Search on the basis of the data subject's name, of links to pages of the on-line archives of a daily newspaper that contain announcements mentioning the data subject's name and relating to a real-estate auction connected with attachment proceedings for the recovery of social security debts, it should be held that, having regard to the sensitivity for the data subject's private life of the information contained in those announcements and to the fact that its initial publication had taken place 16 years earlier, the data subject establishes a right that that information should no longer be linked to his name by means of such a list. Accordingly, since in the case in point there do not appear to be particular reasons substantiating a preponderant interest of the public in having, in the context of such a search, access to that information, a matter which is, however, for the referring court to establish, the data subject may, by virtue of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46, require those links to be removed from the list of results.

99 It follows from the foregoing considerations that the answer to Question 3 is that Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, when appraising the conditions for the application of those provisions, it should inter alia be examined whether the data subject has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name, without it being necessary in order to find such a right that the inclusion of the information in question in that list causes prejudice to the data subject. As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.

**Costs**

100 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 2(b) and (d) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data are to be interpreted as meaning that, first, the activity of a search engine consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference must be classified as 'processing of personal data' within the meaning of Article 2(b) when that information contains personal data and, second, the operator of the search engine must be regarded as the 'controller' in respect of that processing, within the meaning of Article 2(d).**

2. **Article 4(1)(a) of Directive 95/46 is to be interpreted as meaning that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State.**

3. **Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, in order to comply with the rights laid down in those provisions and in so far as the conditions laid down by those provisions are in fact satisfied, the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.**

4. **Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, when appraising the conditions for the application of those provisions, it should inter alia be examined whether the data subject has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name, without it being necessary in order to find such a right that the inclusion of the information in question in that list causes prejudice to the data subject. As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is**

**justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.**

## Case C-398/15, *Salvatore Manni*

In Case C-398/15

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Court of Cassation, Italy), made by decision of 21 May 2015, received at the Court on 23 July 2015, in the proceedings

**Camera di Commercio,Industria, Artigianato e Agricoltura di Lecce**

v

**Salvatore Manni,**

THE COURT (Second Chamber),

[…]

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 3 of the First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ 1968 L 65, p. 8), as amended by Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 (OJ 2003 L 221, p. 13) ('Directive 68/151'), and Article 6(1)(e) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

2 The request has been made in proceedings between the Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce (Chamber of Commerce, Industry, Crafts and Agriculture of Lecce, Italy, 'the Chamber of Commerce of Lecce') and Salvatore Manni concerning its refusal to delete certain personal data relating to Mr Manni from the companies register.

**Legal context**

*EU law*

*Directive 68/151*

3 As stated in recital 3 of Directive 2003/58, the aim of the directive was, inter alia, to modernise Directive 68/151 so as to make 'company information more easily and rapidly accessible by interested parties, but should also simplify significantly the disclosure formalities imposed upon companies'.

4 The recitals of Directive 68/151 are worded as follows:

'Whereas the co-ordination provided for in Article 54(3)(g) [of the EEC Treaty] and in the General Programme for the abolition of restrictions on freedom of establishment is a matter of urgency, especially in regard to companies limited by shares or otherwise having limited liability, since the activities of such companies often extend beyond the frontiers of national territories;

Whereas the co-ordination of national provisions concerning disclosure, the validity of obligations entered into by, and the nullity of, such companies is of special importance, particularly for the purpose of protecting the interests of third parties;

Whereas in these matters Community provisions must be adopted in respect of such companies simultaneously, since the only safeguards they offer to third parties are their assets;

Whereas the basic documents of the company should be disclosed in order that third parties may be able to ascertain their contents and other information concerning the company, especially particulars of the persons who are authorised to bind the company;

Whereas the protection of third parties must be ensured by provisions which restrict to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid;

Whereas it is necessary, in order to ensure certainty in the law as regards relations between the company and third parties, and also between members, to limit the cases in which nullity can arise and the retroactive effect of a declaration of nullity, and to fix a short time limit within which third parties may enter objection to any such declaration'.

5 Pursuant to Article 1 of Directive 68/151, the coordination measures prescribed by that directive apply to the laws, regulations and administrative provisions of the Member States relating to the forms of companies listed in that provision, including, for the Italian Republic, the *società a responsabilità limitata* (limited liability company).

6 Article 2 of that directive, which is set out in Section I thereof, entitled 'Disclosure', states:

'1. Member States shall take the measures required to ensure compulsory disclosure by companies of at least the following documents and particulars:

…

(d) the appointment, termination of office and particulars of the persons who either as a body constituted pursuant to law or as members of any such body:

(i) are authorized to represent the company in dealings with third parties and in legal proceedings;

(ii) take part in the administration, supervision or control of the company.

…

(h) the winding-up of the company;

…

(j) The appointment of liquidators, particulars concerning them, and their respective powers, unless such powers are expressly and exclusively derived from law or from the statutes of the company;

(k) the termination of the liquidation and, in Member States where striking off the register entails legal consequences, the fact of any such striking off.'

7 Article 3 of that directive, which is also set out in that section, provides:

'1. In each Member State a file shall be opened in a central register, commercial register or companies register, for each of the companies registered therein.

2. All documents and particulars which must be disclosed in pursuance of Article 2 shall be kept in the file or entered in the register; the subject matter of the entries in the register must in every case appear in the file.

…

3. A copy of the whole or any part of the documents or particulars referred to in Article 2 must be obtainable on application. As from 1 January 2007 at the latest, applications may be submitted to the register by paper means or by electronic means as the applicant chooses.

As from a date to be chosen by each Member State, which shall be no later than 1 January 2007, copies as referred to in the first subparagraph must be obtainable from the register by paper means or by electronic means as the applicant chooses. This shall apply in the case of all documents and particulars, irrespective of whether they were filed before or after the chosen date. However, Member States may decide that all, or certain types of, documents and particulars filed by paper means on or before a date which may not be later than 31 December 2006 shall not be obtainable from the register by electronic means if a specified period has elapsed between the date of filing and the date of the application submitted to the register. Such specified period may not be less than 10 years.

…'

8 Directive 68/151 was repealed and replaced by Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent (OJ 2009 L 258, p. 11), as amended by Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 (OJ 2012 L 156, p. 1).

9 Directive 2012/17 introduced, inter alia, Article 7a into Directive 2009/101, which states:

'The processing of personal data carried out within the framework of this Directive shall be subject to Directive 95/46 ...'

10 However, bearing in mind the date of the facts, the main proceedings are still governed by Directive 68/151.

*Directive 95/46*

11 Directive 95/46, the object of which, according to Article 1, is to protect the fundamental rights and freedoms of natural persons, in particular their right to privacy with respect to the processing of personal data, and to remove obstacles to the free flow of personal data, states in recitals 10 and 25 thereof:

'(10) Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[, signed in Rome on 4 November 1950,] and in the general principles of Community law; whereas, for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community;

…

(25) Whereas the principles of protection must be reflected, on the one hand, in the obligations imposed on persons … responsible for processing, in particular regarding data quality, technical security, notification to the supervisory authority, and the circumstances under which processing can be carried out, and, on the other hand, in the right conferred on individuals, the data on whom are the subject of processing, to be informed that processing is taking place, to consult the data, to request corrections and even to object to processing in certain circumstances'.

12 Article 2 of Directive 95/46 provides:

'For the purpose of this Directive:

(a) "personal data" mean any information relating to an identified or identifiable natural person (data subject), whereby an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an

identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) "processing of personal data" ("processing") shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

…

(d) "controller" shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law;

…'

13 Article 3 of that directive, entitled 'Scope', states, in paragraph 1:

'This Directive applies to the processing of personal data wholly or partly by automated means, and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.'

14 In Section I (entitled 'Principles relating to data quality') of Chapter II of Directive 95/46, Article 6 is worded as follows:

'1. Member States shall provide that personal data must be:

(a) processed fairly and lawfully;

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes is not to be considered as incompatible provided that Member States provide appropriate safeguards.

(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States must lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.

2. It shall be for the controller to ensure that paragraph 1 is complied with.'

15 In Section II (entitled 'Criteria for making data processing legitimate') of Chapter II of Directive 95/46, Article 7 provides:

'Member States shall provide that personal data may be processed only if:

…

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

or

…

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed;

or

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1(1).'

16 Article 12 of that directive, entitled 'Rights of access', provides:

'Member States shall guarantee every data subject the right to obtain from the controller:

…

(b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;

…'

17 Article 14 of Directive 95/46, entitled 'The data subject's right to object', provides:

'Member States shall grant the data subject the right:

(a) at least in the cases referred to in Article 7(e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data;

…'

18 Article 28 of Directive 95/46 provides for the establishment by the Member States of a supervisory authority responsible for supervising the application of the provisions adopted pursuant to that directive.

*Italian law*

19 Article 2188 of the codice civil (Civil Code) provides:

'A companies register shall be established for entries in the register required by law.

The register shall be kept by the office of the companies register under the supervision of a judge appointed by the president of the court.

The register shall be publicly available.'

20 Article 8(1) and (2) of legge n. 580 — Riordinamento delle camere di commercio, industria, artigianato e agricoltura (Law No 580 on the reorganisation of the chambers of commerce, industry, craft trades and agriculture) of 29 December 1993 (Ordinary Supplement to GURI No 7 of 11 January 1994), provides that it is the responsibility of the chambers of commerce, industry, craft trades and agriculture to keep the register.

21 Decreto del Presidente della Repubblica n. 581 — Regolamento di attuazione dell'articolo 8 della legge 29 dicembre 1993, n. 580, in materia di istituzione del registro delle imprese di cui all'articolo 2188 del codice civile

(Decree No 581 of the President of the Republic, laying down implementing regulations for Article 8 of Law No 580, of 29 December 1993, concerning the establishment of the companies register referred to in Article 2188 of the Civil Code) of 7 December 1995 (GURI No 28 of 3 February 1996), governs certain details relating to the companies register.

22 Directive 95/46 has been transposed into Italian law by decreto legislativo n. 196 — Codice in materia di protezione dei dati personali (Legislative Decree No 196 on the personal data protection code) of 30 June 2003 (Ordinary Supplement to GURI No 174 of 29 July 2003).

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

23 Mr Manni is the sole director of Italiana Costruzioni Srl, a building company which was awarded a contract for the construction of a tourist complex.

24 By an action commenced on 12 December 2007, Mr Manni brought proceedings against the Lecce Chamber of Commerce, claiming that the properties in that complex were not selling because it was apparent from the companies register that he had been the sole director and liquidator of Immobiliare e Finanziaria Salentina Srl ('Immobiliare Salentina'), which had been declared insolvent in 1992 and struck off the companies register, following liquidation proceedings, on 7 July 2005.

25 In that action, Mr Manni alleged that the personal data concerning him, which appear in the companies register, had been processed by a company specialised in the collection and processing of market information and in risk assessment ('rating'), and that, notwithstanding a request to remove it from the register, the Lecce Chamber of Commerce has not done so.

26 Mr Manni therefore sought an order requiring the Lecce Chamber of Commerce to erase, anonymise or block the data linking him to the liquidation of Immobiliare Salentina, together with an order that that chamber compensate him for the damage he suffered by reason of the injury to his reputation.

27 By judgment of 1 August 2011, the Tribunale di Lecce (Court of Lecce, Italy) upheld that claim, ordering the Lecce Chamber of Commerce to anonymise the data linking Mr Manni to the liquidation of Immobiliare Salentina and to pay compensation for the damage suffered by him, assessed at EUR 2 000, together with interest and costs.

28 The Tribunale di Lecce (Court of Lecce) considered that 'it is not permissible for entries in the register which link the name of an individual to a critical phase in the life of the company (such as its liquidation) to be permanent, unless there is a specific general interest in their retention and disclosure'. In the absence of any provision in the Civil Code laying down a maximum period of registration, that court held that, 'after an appropriate period' from the conclusion of the liquidation, and after the company has been removed from the register, stating the name of the person who was sole director of that company at the time of the liquidation ceased to be necessary and useful, for the purposes of Legislative Decree No 196, and the public interest in a 'historical memory' of the existence of the company and the difficulties it experienced [could] to a great extent be just as well effected by means of anonymous data'.

29 The Lecce Chamber of Commerce brought an appeal against that judgment before the Corte suprema di cassazione (Court of Cassation, Italy), which decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the principle of keeping personal data in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed, laid down in Article 6(1)(e) of Directive 95/46, transposed by Legislative Decree No 196 of 30 June 2003, take precedence over and, therefore, preclude the system of disclosure established by means of the companies register provided for by Directive 68/151 and by national law in Article 2188 of the Civil Code and Article 8 of Law No 580 of 29 December 1993, in so far as it is a requirement of that system that anyone may, at any time, obtain the data relating to individuals in those registers?

(2) Consequently, is it permissible under Article 3 of Directive 68/151, by way of derogation from the principles that there should be no time limit and that anyone may consult the data published in the companies register, for

the data no longer to be subject to "disclosure", in both those regards, but to be available for only a limited period and only to certain recipients, on the basis of a case-by-case assessment by the data manager?'

**Consideration of the questions referred**

30 By its questions, which should be considered together, the referring court asks, essentially, whether Article 3 of Directive 68/151 and Article 6(1)(e) of Directive 95/46 must be interpreted as meaning that Member States may, and indeed must, allow individuals, covered by Article 2(1)(d) and (j) of Directive 68/151, to request the authority responsible for maintaining the companies register to limit, after a certain period has elapsed from the dissolution of the company concerned and on the basis of a case-by-case assessment, access to personal data concerning them and entered in that register.

31 It should be noted at the outset that the case at issue in the main proceedings and the questions referred to the Court for a preliminary ruling do not concern the subsequent processing of the data at issue in this case by a specialised rating company, referred to in paragraph 25 of the present judgment, but rather the accessibility of such data held in the companies register by third parties.

32 In that regard, it must first be pointed out that, under Article 2(1)(d) of Directive 68/151, Member States must take the measures necessary to ensure compulsory disclosure by companies of at least the appointment, termination of office and particulars of the persons who either as a body constituted pursuant to law, or as members of any such body, are authorised to represent the company in dealings with third parties and in legal proceedings, or take part in the administration, supervision or control of that company. Moreover, according to Article 2(1)(j), the appointment of liquidators, particulars concerning them and, in principle, their respective powers must also be disclosed.

33 Pursuant to Article 3(1) to (3) of Directive 68/151, those particulars must be transcribed in each Member State either in a central register, commercial register or companies register (together, 'the register'), and a copy of the whole or any part of those particulars must be obtainable by application.

34 It must be held that the particulars concerning the identity of the persons referred to in Article 2(1)(d) and (j) of Directive 68/151 constitute, as information relating to identified or identifiable natural persons, 'personal data' within the meaning of Article 2(a) of Directive 95/46. It is apparent from the Court's case-law that the fact that that information was provided as part of a professional activity does not mean that it cannot be characterised as personal data (see judgment of 16 July 2015, *ClientEarth and PAN Europe* v *EFSA*, C-615/13 P, EU:C:2015:489, paragraph 30 and the case-law cited).

35 Furthermore, by transcribing and keeping that information in the register and communicating it, where appropriate, on request to third parties, the authority responsible for maintaining that register carries out 'processing of personal data' for which it is the 'controller', within the meaning of the definitions set out Article 2(b) and (d) of Directive 95/46.

36 The processing of personal data which is thus carried out in the implementation of Article 2(1)(d) and (j) and Article 3 of Directive 68/151 is subject to Directive 95/46, under Articles 1 and 3 thereof. This is now expressly provided for in Article 7a of Directive 2009/101, as amended by Directive 2012/17, which, however, is only declaratory in that regard. As the European Commission stated at the hearing, the EU legislature considered it useful to recall that fact in the context of the legislative changes introduced by Directive 2012/17 and aimed at ensuring interoperability of registers of the Member States, since those changes suggested an increase in the intensity of the processing of personal data.

37 With regard to Directive 95/46, it should be remembered that, as is apparent from Article 1 and recital 10, that directive seeks to ensure a high level of protection of the fundamental rights and freedoms of natural persons, in particular their right to privacy, with respect to the processing of personal data (see judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 66 and the case-law cited).

38 According to recital 25 of Directive 95/46, the principles of protection laid down by the directive are reflected, on the one hand, in the obligations imposed on persons responsible for processing data, in particular regarding data quality, technical security, notification to the supervisory authority and the circumstances under which processing can be carried out, and, on the other hand, in the rights conferred on individuals whose data are

the subject of processing to be informed that such processing is taking place, to consult the data, to request corrections and even to object to processing in certain circumstances.

39 The Court has already held that the provisions of Directive 95/46, in so far as they govern the processing of personal data liable to infringe fundamental freedoms and, in particular, the right to respect for private life, must necessarily be interpreted in the light of the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union ('the Charter') (see judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 38 and the case-law cited).

40 Article 7 of the Charter therefore guarantees the right to respect for private life, whilst Article 8 of the Charter expressly proclaims the right to the protection of personal data. Article 8(2) and (3) states that such data must be processed fairly, for specific purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law, that everyone has the right of access to data which has been collected concerning him or her and the right to have it rectified, and that compliance with those rules is to be subject to control by an independent authority. Those requirements are implemented inter alia in Articles 6, 7, 12, 14 and 28 of Directive 95/46.

41 With regard, in particular, to the general conditions of lawfulness imposed by Directive 95/46, it should be noted that, subject to the exceptions permitted under Article 13 of that directive, all processing of personal data must comply, first, with the principles relating to data quality set out in Article 6 of the directive and, secondly, with one of the criteria for making data processing legitimate listed in Article 7 of the directive (see, inter alia, judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 71 and the case-law cited).

42 In that regard, as the Advocate General pointed out in point 52 of his Opinion, it should be noted that the processing of personal data by the authority responsible for keeping the register pursuant to Article 2(1)(d) and (j) and Article 3 of Directive 68/151 satisfies several grounds for legitimation provided for in Article 7 of Directive 95/46, namely those set out in subparagraph (c) thereof, relating to compliance with a legal obligation, subparagraph (e), relating to the exercise of official authority or the performance of a task carried out in the public interest, and subparagraph (f) relating to the realisation of a legitimate interest pursued by the controller or by the third parties to whom the data are disclosed.

43 With regard, inter alia, to the ground for legitimation provided for in Article 7(e) of Directive 95/46, it should be noted that the Court of Justice has already held that the activity of a public authority consisting in the storing, in a database, of data which undertakings are obliged to report on the basis of statutory obligations, permitting interested persons to search for that data and providing them with print-outs thereof, falls within the exercise of public powers (see judgment of 12 July 2012, *Compass-Datenbank*, C-138/11, EU:C:2012:449, paragraphs 40 and 41). Moreover, such an activity also constitutes a task carried out in the public interest within the meaning of that provision.

44 In the present case, the parties to the main proceedings disagree as to whether the authority responsible for keeping the register should, after a certain period has elapsed since a company ceased to trade, and on the request of the data subject, either erase or anonymise that personal data, or limit their disclosure. In that context, the referring court asks in particular whether such an obligation flows from Article 6(1)(e) of Directive 95/46.

45 According to Article 6(1)(e) of Directive 95/46, Member States are to ensure that personal data are kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Where that data are stored for longer periods for historical, statistical or scientific use, Member States must lay down appropriate safeguards. Pursuant to paragraph 2 of that article, it is the responsibility of the controller to ensure compliance with those principles.

46 In the event of failure to comply with the condition laid down in Article 6(1)(e) of Directive 95/46, Member States guarantee the person concerned, pursuant to Article 12(b) thereof, the right to obtain from the controller, as appropriate, the erasure or blocking of the data concerned (see, to that effect, judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 70).

47 Moreover, under subparagraph (a) of the first paragraph of Article 14 of Directive 95/46, Member States are to grant the data subject the right, inter alia in the cases referred to in Article 7(e) and (f) of that directive, to

object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. The balancing to be carried out under subparagraph (a) of the first paragraph of Article 14 thus enables account to be taken in a more specific manner of all the circumstances surrounding the data subject's particular situation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data (see judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 76).

48 In order to determine whether Member States are required, under Article 6(1)(e) and Article 12(b), or under subsection (a) of the first subparagraph of Article 14 of Directive 95/46, to provide, for the natural persons referred to in Article 2(1)(d) and (j) of Directive 68/151, the right to apply to the authority responsible for keeping the register to erase or block the personal data entered in that register after a certain period of time, or to restrict access to it, it is first necessary to ascertain the purpose of that registration.

49 In that regard, it is apparent from the recitals and from the title of Directive 68/151 that the purpose of the disclosure provided for by that directive is to protect in particular the interests of third parties in relation to joint stock companies and limited liability companies, since the only safeguards they offer to third parties are their assets. To that end, the basic documents of the company concerned should be disclosed in order that third parties may be able to ascertain their contents and other information concerning the company, especially particulars of the persons who are authorised to bind the company.

50 The Court has already noted, moreover, that the purpose of Directive 68/151 is to guarantee legal certainty in relation to dealings between companies and third parties in view of the intensification of trade between Member States following the creation of the internal market and that, with that in mind, it is important that any person wishing to establish and develop trading relations with companies situated in other Member States should be able easily to obtain essential information relating to the constitution of trading companies and to the powers of persons authorised to represent them, which requires that all the relevant information should be expressly stated in the register (see, to that effect, judgment of 12 November 1974, *Haaga*, 32/74, EU:C:1974:116, paragraph 6).

51 Moreover, it is apparent from the case-law of the Court that the disclosure provided for in Article 3 of Directive 68/151 is intended to enable any interested third parties to inform themselves of these matters, without having to establish a right or an interest requiring to be protected. The Court noted, in that regard, that the very wording of Article 54(3)(g) of the EEC Treaty, on which that directive was based, refers to the need to protect the interests of third parties generally, without distinguishing or excluding any categories falling within the ambit of that term, and consequently the third parties referred to in that article cannot be limited in particular merely to creditors of the company concerned (see judgment of 4 December 1997, *Daihatsu Deutschland*, C-97/96, EU:C:1997:581, paragraphs 19, 20 and 22, and the order of 23 September 2004, *Springer*, C-435/02 and C-103/03, EU:C:2004:552, paragraphs 29 and 33).

52 Furthermore, as to whether, in order to achieve the aim referred to in Article 3 of Directive 68/151, it is in principle necessary for the personal data of natural persons referred to in Article 2(1)(d) and (j) of that directive to remain on the register and/or accessible to any third party upon request also after the activity has ceased and the company concerned has been dissolved, it should be pointed out that the directive makes no express provision in that regard.

53 However, as the Advocate General also pointed out in points 73 and 74 of his Opinion, it is common ground that even after the dissolution of a company, rights and legal relations relating to it continue to exist. Thus, in the event of a dispute, the data referred to in Article 2(1)(d) and (j) of Directive 68/151 may be necessary in order, inter alia, to assess the legality of an act carried out on behalf of that company during the period of its activity or so that third parties can bring an action against the members of the organs or against the liquidators of that company.

54 Moreover, depending in particular on the limitation periods applicable in the various Member States, questions requiring such data may arise for many years after a company has ceased to exist.

55 In view of the range of possible scenarios, which may involve actors in several Member States, and the considerable heterogeneity in the limitation periods provided for by the various national laws in the various areas of law, highlighted by the Commission, it seems impossible, at present, to identify a single time limit, as from the

dissolution of a company, at the end of which the inclusion of such data in the register and their disclosure would no longer be necessary.

56 In those circumstances, Member States cannot, pursuant to Article 6(1)(e) and Article 12(b) of Directive 95/46, guarantee that the natural persons referred to in Article 2(1)(d) and (j) of Directive 68/151 have the right to obtain, as a matter of principle, after a certain period of time from the dissolution of the company concerned, the erasure of personal data concerning them, which have been entered in the register pursuant to the latter provision, or the blocking of that data from the public.

57 That interpretation of Article 6(1)(e) and Article 12(b) of Directive 95/46 does not, moreover, result in disproportionate interference with the fundamental rights of the persons concerned, and particularly their right to respect for private life and their right to protection of personal data as guaranteed by Articles 7 and 8 of the Charter.

58 First, Article 2(1)(d) and (j) and Article 3 of Directive 68/151 require disclosure only for a limited number of personal data items, namely those relating to the identity and the respective functions of persons having the power to bind the company concerned to third parties and to represent it or take part in the administration, supervision or control of that company, or having been appointed as liquidator of that company.

59 Secondly, as pointed out in paragraph 49 of the present judgment, Directive 68/151 provides for disclosure of the data referred to in Article 2(1)(d) and (j) thereof, due, in particular, to the fact that the only safeguards that joint-stock companies and limited liability companies offer to third parties are their assets, which constitutes an increased economic risk for the latter. In view of this, it appears justified that natural persons who choose to participate in trade through such a company are required to disclose the data relating to their identity and functions within that company, especially since they are aware of that requirement when they decide to engage in such activity.

60 Finally, as regards subparagraph (a) of the first paragraph of Article 14 of Directive 95/46, it must be pointed out that, whereas it follows from the foregoing that, in the weighting to be carried out under that provision, in principle, the need to protect the interests of third parties in relation to joint-stock companies and limited liability companies and to ensure legal certainty, fair trading and thus the proper functioning of the internal market take precedence, it cannot be excluded, however, that there may be specific situations in which the overriding and legitimate reasons relating to the specific case of the person concerned justify exceptionally that access to personal data entered in the register is limited, upon expiry of a sufficiently long period after the dissolution of the company in question, to third parties who can demonstrate a specific interest in their consultation.

61 In that regard, however, it should be pointed out that, in so far as the application of subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 is subject to the proviso that national law does not lay down a provision to the contrary, the final decision as to whether the natural persons referred to in Article 2(1)(d) and (j) of Directive 68/151 may apply to the authority responsible for keeping the register for such limitation of access to personal data concerning them, on the basis of a case-by-case assessment, is a matter for the national legislatures.

62 It is for the referring court to determine the provisions of its national law in that regard.

63 Assuming that such an examination reveals that national law permits such applications, it will be for the national court to assess, having regard to all the relevant circumstances and taking into account the time elapsed since the dissolution of the company concerned, the possible existence of legitimate and overriding reasons which, as the case may be, exceptionally justify limiting third parties' access to the data concerning Mr Manni in the company register, from which it is apparent that he was the sole administrator and liquidator of Immobiliare Salentina. In that regard, it should be pointed out that the mere fact that, allegedly, the properties of a tourist complex built by Italiana Costruzioni, of which Mr Manni is currently the sole director, do not sell because of the fact that potential purchasers of those properties have access to that data in the company register, cannot be regarded as constituting such a reason, in particular in view of the legitimate interest of those purchasers in having that information.

64 In the light of all the foregoing considerations, the answer to the questions referred must be that Article 6(1)(e), Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46, read in

conjunction with Article 3 of Directive 68/151, must be interpreted as meaning that, as EU law currently stands, it is for the Member States to determine whether the natural persons referred to in Article 2(1)(d) and (j) of that directive may apply to the authority responsible for keeping the register to determine, on the basis of a case-by-case assessment, if it is exceptionally justified, on compelling legitimate grounds relating to their particular situation, to limit, on the expiry of a sufficiently long period after the dissolution of the company concerned, access to personal data relating to them, entered in that register, to third parties who can demonstrate a specific interest in consulting that data.

**Costs**

[…]

On those grounds, the Court (Second Chamber) hereby rules:

**Article 6(1)(e), Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, read in conjunction with Article 3 of the First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, as amended by Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003, must be interpreted as meaning that, as EU law currently stands, it is for the Member States to determine whether the natural persons referred to in Article 2(1)(d) and (j) of that directive may apply to the authority responsible for keeping, respectively, the central register, commercial register or companies register to determine, on the basis of a case-by-case assessment, if it is exceptionally justified, on compelling legitimate grounds relating to their particular situation, to limit, on the expiry of a sufficiently long period after the dissolution of the company concerned, access to personal data relating to them, entered in that register, to third parties who can demonstrate a specific interest in consulting that data.**

## Case C-210/16, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH*

In Case C-210/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Federal Administrative Court, Germany), made by decision of 25 February 2016, received at the Court on 14 April 2016, in the proceedings

**Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein**

v

**Wirtschaftsakademie Schleswig-Holstein GmbH,**

interveners:

**Facebook Ireland Ltd,**

**Vertreter des Bundesinteresses beim Bundesverwaltungsgericht,**

THE COURT (Grand Chamber),

[…]

after hearing the Opinion of the Advocate General at the sitting on 24 October 2017,

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

2 The request has been made in proceedings between the Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein (Independent Data Protection Centre for the *Land* of Schleswig-Holstein, Germany) ('the ULD') and Wirtschaftsakademie Schleswig-Holstein GmbH, a private-law company operating in the field of education ('Wirtschaftsakademie'), concerning the lawfulness of ULD's order to Wirtschaftsakademie to deactivate its fan page on the Facebook social network site ('Facebook').

**Legal context**

*EU law*

3 Recitals 10, 18, 19 and 26 of Directive 95/46 state:

'(10) Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of [EU] law; whereas, for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the [European Union];

...

(18) Whereas, in order to ensure that individuals are not deprived of the protection to which they are entitled under this Directive, any processing of personal data in the [European Union] must be carried out in accordance with the law of one of the Member States; whereas, in this connection, processing carried out under the responsibility of a controller who is established in a Member State should be governed by the law of that State;

(19) Whereas establishment on the territory of a Member State implies the effective and real exercise of activity through stable arrangements; whereas the legal form of such an establishment, whether simply branch or a subsidiary with a legal personality, is not the determining factor in this respect; whereas, when a single controller is established on the territory of several Member States, particularly by means of subsidiaries, he must ensure, in order to avoid any circumvention of national rules, that each of the establishments fulfils the obligations imposed by the national law applicable to its activities;

…

(26) Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable; …'

4 Article 1 of Directive 95/46, 'Object of the Directive', provides:

'1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.

2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.'

5 Article 2 of Directive 95/46, 'Definitions', reads as follows:

'For the purposes of this Directive:

…

(b) "processing of personal data" ("processing") shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

...

(d) "controller" shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or [EU] laws or regulations, the controller or the specific criteria for his nomination may be designated by national or [EU] law;

(e) "processor" shall mean a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller;

(f) "third party" shall mean any natural or legal person, public authority, agency or any other body other than the data subject, the controller, the processor and the persons who, under the direct authority of the controller or the processor, are authorised to process the data;

...'

6 Article 4 of that directive, 'National law applicable', provides in paragraph 1:

‘Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:

(a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;

(b) the controller is not established on the Member State’s territory, but in a place where its national law applies by virtue of international public law;

(c) the controller is not established on [EU] territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the [European Union].’

7 Article 17 of the directive, ‘Security of processing’, provides in paragraphs 1 and 2:

‘1. Member States shall provide that the controller must implement appropriate technical and organisational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.

Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.

2. The Member States shall provide that the controller must, where processing is carried out on his behalf, choose a processor providing sufficient guarantees in respect of the technical security measures and organisational measures governing the processing to be carried out, and must ensure compliance with those measures.’

8 Article 24 of the directive, ‘Sanctions’, provides:

‘The Member States shall adopt suitable measures to ensure the full implementation of the provisions of this Directive and shall in particular lay down the sanctions to be imposed in case of infringement of the provisions adopted pursuant to this Directive.’

9 Article 28 of the directive, ‘Supervisory authority’, reads as follows:

‘1. Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive.

These authorities shall act with complete independence in exercising the functions entrusted to them.

2. Each Member State shall provide that the supervisory authorities are consulted when drawing up administrative measures or regulations relating to the protection of individuals’ rights and freedoms with regard to the processing of personal data.

3. Each authority shall in particular be endowed with:

– investigative powers, such as powers of access to data forming the subject-matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties,

– effective powers of intervention, such as, for example, that of delivering opinions before processing operations are carried out, in accordance with Article 20, and ensuring appropriate publication of such opinions, of ordering the blocking, erasure or destruction of data, of imposing a temporary or definitive ban on processing, of warning or admonishing the controller, or that of referring the matter to national parliaments or other political institutions,

– the power to engage in legal proceedings where the national provisions adopted pursuant to this Directive have been violated or to bring these violations to the attention of the judicial authorities.

Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts.

...

6. Each supervisory authority is competent, whatever the national law applicable to the processing in question, to exercise, on the territory of its own Member State, the powers conferred on it in accordance with paragraph 3. Each authority may be requested to exercise its powers by an authority of another Member State.

The supervisory authorities shall cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information.

...'

*German law*

10 Paragraph 3(7) of the Bundesdatenschutzgesetz (Federal Law on data protection), in the version applicable to the main proceedings ('the BDSG'), reads as follows:

'A responsible entity is any person or entity which collects, processes or uses personal data on its own behalf, or commissions others to do this.'

11 Paragraph 11 of the BDSG, 'Collection, processing or use of personal data by entities commissioned', reads:

'(1) If personal data is collected, processed or used by other entities commissioned to do so, the commissioning entity is responsible for compliance with the provisions of this law and with other provisions on data protection. …

(2) The entity commissioned must be selected carefully with particular account being taken of the suitability of the technical and organisational measures taken by it. The commission must be given in writing, with the following in particular being determined in detail: …

The commissioning entity must satisfy itself, before the start of the data processing and regularly thereafter, that the technical and organisational measures taken by the entity commissioned are complied with. The results must be documented.

…'

12 Paragraph 38(5) of the BDSG provides:

'To ensure compliance with this law and with other provisions on data protection, the supervisory authority may order measures to eliminate breaches that have been ascertained in the collection, processing or use of personal data or technical or organisational defects. In the case of serious breaches or defects, in particular those which are associated with a particular threat to the right to protection of personality, it can prohibit the collection, processing or use or the application of specific procedures if the breaches or defects are not eliminated within a reasonable time, contrary to an order in accordance with the first sentence and despite the imposition of a penalty payment. It can require the data protection officer to be removed if he does not possess the expert knowledge and reliability needed to perform his duties.'

13 Paragraph 12 of the Telemediengesetz (Law on electronic media) of 26 February 2007 (BGBl. 2007 I, p. 179, 'the TMG') reads as follows:

'(1) The service provider may collect and use personal data for the provision of electronic media only where this law or another provision of law expressly relating to electronic media permits it or the user has consented.

...

(3) Except as provided otherwise, the provisions in force for the protection of personal data are to be applied even if the data is not processed automatically.'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

14 Wirtschaftsakademie offers educational services by means of a fan page hosted on Facebook.

15 Fan pages are user accounts that can be set up on Facebook by individuals or businesses. To do so, the author of the fan page, after registering with Facebook, can use the platform designed by Facebook to introduce himself to the users of that social network and to persons visiting the fan page, and to post any kind of communication in the media and opinion market. Administrators of fan pages can obtain anonymous statistical information on visitors to the fan pages via a function called 'Facebook Insights' which Facebook makes available to them free of charge under non-negotiable conditions of use. That information is collected by means of evidence files ('cookies'), each containing a unique user code, which are active for two years and are stored by Facebook on the hard disk of the computer or on other media of visitors to fan pages. The user code, which can be matched with the connection data of users registered on Facebook, is collected and processed when the fan pages are opened. According to the order for reference, neither Wirtschaftsakademie nor Facebook Ireland Ltd notified the storage and functioning of the cookie or the subsequent processing of the data, at least during the material period for the main proceedings.

16 By decision of 3 November 2011 ('the contested decision'), the ULD, as supervisory authority within the meaning of Article 28 of Directive 95/46, with the task of supervising the application in the *Land* of Schleswig-Holstein (Germany) of the provisions adopted by the Federal Republic of Germany pursuant to that directive, ordered Wirtschaftsakademie, in accordance with the first sentence of Paragraph 38(5) of the BDSG, to deactivate the fan page it had set up on Facebook at the address www.facebook.com/wirtschaftsakademie, on pain of a penalty payment if it failed to comply within the prescribed period, on the ground that neither Wirtschaftsakademie nor Facebook informed visitors to the fan page that Facebook, by means of cookies, collected personal data concerning them and then processed the data. Wirtschaftsakademie brought a complaint against that decision, arguing essentially that it was not responsible under data protection law for the processing of the data by Facebook or the cookies which Facebook installed.

17 By decision of 16 December 2011, the ULD dismissed the complaint, finding that Wirtschaftsakademie as a service provider was liable under Paragraph 3(3)(4) and Paragraph 12(1) of the TMG in conjunction with Paragraph 3(7) of the BDSG. The ULD stated that, by setting up its fan page, Wirtschaftsakademie had made an active and deliberate contribution to the collection by Facebook of personal data relating to visitors to the fan page, from which it profited by means of the statistics provided to it by Facebook.

18 Wirtschaftsakademie brought an action against that decision in the Verwaltungsgericht (Administrative Court, Germany), submitting that the processing of personal data by Facebook could not be attributed to it and that it had not commissioned Facebook within the meaning of Paragraph 11 of the BDSG to process data that it controlled or was able to influence. Wirtschaftsakademie concluded that the ULD should have acted directly against Facebook instead of adopting the contested decision against it.

19 By judgment of 9 October 2013, the Verwaltungsgericht (Administrative Court) annulled the contested decision, essentially on the ground that, since the administrator of a fan page on Facebook is not a responsible entity within the meaning of Paragraph 3(7) of the BDSG, Wirtschaftsakademie could not be the addressee of a measure taken under Paragraph 38(5) of the BDSG.

20 The Oberverwaltungsgericht (Higher Administrative Court, Germany) dismissed the ULD's appeal against that judgment as unfounded. It found essentially that the prohibition of the processing of data in the contested decision was unlawful, in that the second sentence of Paragraph 38(5) of the BDSG lays down a step-by-step procedure whose first step allows only the adoption of measures for the elimination of infringements that have been ascertained in the processing of data. An immediate prohibition of the processing of data comes into consideration only if a data processing procedure is unlawful in its entirety and the only possible remedy is to terminate it. According to the Oberverwaltungsgericht (Higher Administrative Court), that was not the case here, since it would have been possible for Facebook to put an end to the infringements alleged by the ULD.

21 The Oberverwaltungsgericht (Higher Administrative Court) further stated that the contested decision was also unlawful on the ground that an order under Paragraph 38(5) of the BDSG may only be made against the responsible entity within the meaning of Paragraph 3(7) of the BDSG, and that Wirtschaftsakademie was not such an entity in relation to the data collected by Facebook. Facebook alone decided on the purpose and means of collecting and processing personal data used for the Facebook Insights function, Wirtschaftsakademie receiving only anonymised statistical information.

22 The ULD appealed on a point of law to the Bundesverwaltungsgericht (Federal Administrative Court, Germany), relying inter alia on an infringement of Paragraph 38(5) of the BDSG and on a number of procedural errors vitiating the appellate court's decision. It considers that the infringement committed by Wirtschaftsakademie consisted in commissioning an inappropriate supplier — inappropriate because it did not comply with the applicable data protection law — namely Facebook Ireland, to create, host and maintain a website. The order to Wirtschaftsakademie to deactivate its fan page, imposed by the contested decision, was thus intended to remedy that breach, since it prohibited it from continuing to make use of Facebook infrastructure as the technical basis of its website.

23 Like the Oberverwaltungsgericht (Higher Administrative Court), the Bundesverwaltungsgericht (Federal Administrative Court) takes the view that Wirtschaftsakademie cannot itself be regarded as responsible for the data processing within the meaning Paragraph 3(7) of the BDSG or Article 2(d) of Directive 95/46. It considers nevertheless that the concept of controller should in principle be interpreted broadly, in the interests of effective protection of the right of privacy, as the Court has held in its recent case-law on the point. It further entertains doubts as to the powers of the ULD with respect to Facebook Germany in the present case, given that it is Facebook Ireland that is responsible, at EU level, for the collection and processing of personal data within the Facebook group. Finally, it is uncertain as to the effect, for the purpose of the exercise of the ULD's powers of intervention, of the assessments made by the supervisory authority to which Facebook Ireland is subject concerning the lawfulness of the processing of personal data at issue.

24 In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 2(d) of Directive [95/46] to be interpreted as definitively and exhaustively defining the liability and responsibility for data protection infringements, or does scope remain, under the "suitable measures" pursuant to Article 24 of Directive [95/46] and the "effective powers of intervention" pursuant to the second indent of Article 28(3) of Directive [95/46], in multi-tiered information provider relationships, for responsibility of an entity that does not control the data processing within the meaning of Article 2(d) of Directive [95/46] when it chooses the operator of its information offering?

(2) Does it follow *a contrario* from the obligation of Member States under Article 17(2) of Directive [95/46] to provide, where data processing is carried out on the controller's behalf, that the controller must "choose a processor providing sufficient guarantees in respect of the technical security measures and organisational measures governing the processing to be carried out", that, where there are other user relationships not linked to data processing on the controller's behalf within the meaning of Article 2(e) of Directive [95/46], there is no obligation to make a careful selection and no such obligation can be based on national law?

(3) In cases in which a parent company based outside the European Union has legally independent establishments (subsidiaries) in various Member States, is the supervisory authority of a Member State (in this case, Germany) entitled under Article 4 and Article 28(6) of Directive [95/46] to exercise the powers conferred under Article 28(3) of Directive [95/46] against the establishment located in its territory even when this establishment is responsible solely for promoting the sale of advertising and other marketing measures aimed at the inhabitants of that Member State, whereas the independent establishment (subsidiary) located in another Member State (in this case, Ireland) is exclusively responsible within the group's internal division of tasks for collecting and processing personal data throughout the entire territory of the European Union and hence in the other Member State as well (in this case, Germany), if the decision on the data processing is in fact taken by the parent company?

(4) Are Article 4(1)(a) and Article 28(3) of Directive [95/46] to be interpreted as meaning that, in cases in which the controller has an establishment in the territory of one Member State (in this case, Ireland) and there is another, legally independent establishment in the territory of another Member State (in this case, Germany), whose responsibilities include the sale of advertising space and whose activity is aimed at the inhabitants of that State,

the competent supervisory authority in this other Member State (in this case, Germany) may direct measures and orders implementing data protection legislation also against the other establishment (in this case, in Germany) not responsible for data processing under the group's internal division of tasks and responsibilities, or are measures and orders only possible by the supervisory body of the Member State (in this case, Ireland) in whose territory the entity with internal responsibility within the group has its registered office?

(5) Are Article 4(1)(a) and Article 28(3) and (6) of Directive [95/46] to be interpreted as meaning that, in cases in which the supervisory authority in one Member State (in this case, Germany) takes action against a person or entity in its territory pursuant to Article 28(3) of Directive [95/46] on the grounds of failure carefully to select a third party involved in the data processing process (in this case, Facebook), because that third party infringes data protection legislation, the active supervisory authority (in this case, Germany) is bound by the appraisal made under data protection legislation by the supervisory authority of the Member State in which the third party responsible for the data processing has its establishment (in this case, Ireland) meaning that it may not arrive at a different legal appraisal, or may the active supervisory authority (in this case, Germany) conduct its own examination of the lawfulness of the data processing by the third party established in another Member State (in this case, Ireland) as a preliminary question prior to its own action?

(6) If the possibility of conducting an independent examination is available to the active supervisory authority (in this case, Germany), is the second sentence of Article 28(6) of Directive [95/46] to be interpreted as meaning that this supervisory authority may exercise the effective powers of intervention conferred on it under Article 28(3) of Directive [95/46] against a person or entity established in its territory on the grounds of their joint responsibility for data protection infringements by a third party established in another Member State only if and not until it has first requested the supervisory authority in this other Member State (in this case, Ireland) to exercise its powers?'

**Consideration of the questions referred**

*Questions 1 and 2*

25 By its first and second questions, which should be considered together, the referring court essentially wishes to know whether Article 2(d), Article 17(2), Article 24 and the second indent of Article 28(3) of Directive 95/46 must be interpreted as allowing an entity to be held liable in its capacity as administrator of a fan page on a social network where the rules on the protection of personal data are infringed, because it has chosen to make use of that social network to distribute the information it offers.

26 To answer those questions, it must be recalled that, as is apparent from Article 1(1) and recital 10 of Directive 95/46, the directive aims to ensure a high level of protection of the fundamental rights and freedoms of natural persons, in particular their right to privacy, with respect to the processing of personal data (judgment of 11 December 2014, *Ryneš*, C-212/13, EU:C:2014:2428, paragraph 27 and the case-law cited).

27 In accordance with that aim, Article 2(d) of the directive defines the concept of 'controller' broadly as the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data.

28 As the Court has previously held, the objective of that provision is to ensure, through a broad definition of the concept of 'controller', effective and complete protection of the persons concerned (judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 34).

29 Furthermore, since, as Article 2(d) of Directive 95/46 expressly provides, the concept of 'controller' relates to the entity which 'alone or jointly with others' determines the purposes and means of the processing of personal data, that concept does not necessarily refer to a single entity and may concern several actors taking part in that processing, with each of them then being subject to the applicable data protection provisions.

30 In the present case, Facebook Inc. and, for the European Union, Facebook Ireland must be regarded as primarily determining the purposes and means of processing the personal data of users of Facebook and persons visiting the fan pages hosted on Facebook, and therefore fall within the concept of 'controller' within the meaning of Article 2(d) of Directive 95/46, which is not challenged in the present case.

31 That being so, and in order to answer the questions referred, it must be examined whether and to what extent the administrator of a fan page hosted on Facebook, such as Wirtschaftsakademie, contributes in the context of that fan page to determining, jointly with Facebook Ireland and Facebook Inc., the purposes and means of processing the personal data of the visitors to the fan page and may therefore also be regarded as a 'controller' within the meaning of Article 2(d) of Directive 95/46.

32 It appears that any person wishing to create a fan page on Facebook concludes a specific contract with Facebook Ireland for the opening of such a page, and thereby subscribes to the conditions of use of the page, including the policy on cookies, which is for the national court to ascertain.

33 According to the documents before the Court, the data processing at issue in the main proceedings is essentially carried out by Facebook placing cookies on the computer or other device of persons visiting the fan page, whose purpose is to store information on the browsers, those cookies remaining active for two years if not deleted. It also appears that in practice Facebook receives, registers and processes the information stored in the cookies in particular when a person visits 'the Facebook services, services provided by other members of the Facebook family of companies, and services provided by other companies that use the Facebook services'. Moreover, other entities such as Facebook partners or even third parties 'may use cookies on the Facebook services to provide services [directly to that social network] and the businesses that advertise on Facebook'.

34 That processing of personal data is intended in particular to enable Facebook to improve its system of advertising transmitted via its network, and to enable the fan page administrator to obtain statistics produced by Facebook from the visits to the page, for the purposes of managing the promotion of its activity, making it aware, for example, of the profile of the visitors who like its fan page or use its applications, so that it can offer them more relevant content and develop functionalities likely to be of more interest to them.

35 While the mere fact of making use of a social network such as Facebook does not make a Facebook user a controller jointly responsible for the processing of personal data by that network, it must be stated, on the other hand, that the administrator of a fan page hosted on Facebook, by creating such a page, gives Facebook the opportunity to place cookies on the computer or other device of a person visiting its fan page, whether or not that person has a Facebook account.

36 In this context, according to the submissions made to the Court, the creation of a fan page on Facebook involves the definition of parameters by the administrator, depending inter alia on the target audience and the objectives of managing and promoting its activities, which has an influence on the processing of personal data for the purpose of producing statistics based on visits to the fan page. The administrator may, with the help of filters made available by Facebook, define the criteria in accordance with which the statistics are to be drawn up and even designate the categories of persons whose personal data is to be made use of by Facebook. Consequently, the administrator of a fan page hosted on Facebook contributes to the processing of the personal data of visitors to its page.

37 In particular, the administrator of the fan page can ask for — and thereby request the processing of — demographic data relating to its target audience, including trends in terms of age, sex, relationship and occupation, information on the lifestyles and centres of interest of the target audience and information on the purchases and online purchasing habits of visitors to its page, the categories of goods and services that appeal the most, and geographical data which tell the fan page administrator where to make special offers and where to organise events, and more generally enable it to target best the information it offers.

38 While the audience statistics compiled by Facebook are indeed transmitted to the fan page administrator only in anonymised form, it remains the case that the production of those statistics is based on the prior collection, by means of cookies installed by Facebook on the computers or other devices of visitors to that page, and the processing of the personal data of those visitors for such statistical purposes. In any event, Directive 95/46 does not, where several operators are jointly responsible for the same processing, require each of them to have access to the personal data concerned.

39 In those circumstances, the administrator of a fan page hosted on Facebook, such as Wirtschaftsakademie, must be regarded as taking part, by its definition of parameters depending in particular on its target audience and the objectives of managing and promoting its activities, in the determination of the purposes and means of processing the personal data of the visitors to its fan page. The administrator must therefore be categorised, in the

present case, as a controller responsible for that processing within the European Union, jointly with Facebook Ireland, within the meaning of Article 2(d) of Directive 95/46.

40 The fact that an administrator of a fan page uses the platform provided by Facebook in order to benefit from the associated services cannot exempt it from compliance with its obligations concerning the protection of personal data.

41 It must be emphasised, moreover, that fan pages hosted on Facebook can also be visited by persons who are not Facebook users and so do not have a user account on that social network. In that case, the fan page administrator's responsibility for the processing of the personal data of those persons appears to be even greater, as the mere consultation of the home page by visitors automatically starts the processing of their personal data.

42 In those circumstances, the recognition of joint responsibility of the operator of the social network and the administrator of a fan page hosted on that network in relation to the processing of the personal data of visitors to that page contributes to ensuring more complete protection of the rights of persons visiting a fan page, in accordance with the requirements of Directive 95/46.

43 However, it should be pointed out, as the Advocate General observes in points 75 and 76 of his Opinion, that the existence of joint responsibility does not necessarily imply equal responsibility of the various operators involved in the processing of personal data. On the contrary, those operators may be involved at different stages of that processing of personal data and to different degrees, so that the level of responsibility of each of them must be assessed with regard to all the relevant circumstances of the particular case.

44 In the light of the above considerations, the answer to Questions 1 and 2 is that Article 2(d) of Directive 95/46 must be interpreted as meaning that the concept of 'controller' within the meaning of that provision encompasses the administrator of a fan page hosted on a social network.

*Questions 3 and 4*

45 By its third and fourth questions, which should be considered together, the referring court essentially wishes to know whether Articles 4 and 28 of Directive 95/46 must be interpreted as meaning that, where an undertaking established outside the European Union has several establishments in different Member States, the supervisory authority of a Member State is entitled to exercise the powers conferred on it by Article 28(3) of that directive with respect to an establishment situated in the territory of that Member State even if, as a result of the division of tasks within the group, first, that establishment is responsible solely for the sale of advertising space and other marketing activities in the territory of that Member State and, second, exclusive responsibility for collecting and processing personal data belongs, for the entire territory of the European Union, to an establishment situated in another Member State, or whether it is for the supervisory authority of that other Member State to exercise those powers with respect to the second establishment.

46 The ULD and the Italian Government express doubts as to the admissibility of those questions, on the ground that they are not relevant to the outcome of the main proceedings. They submit that the contested decision is addressed to Wirtschaftsakademie and does not therefore concern Facebook Inc. or any of its subsidiaries established in EU territory.

47 On this point, it must be recalled that, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (judgment of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, paragraph 19 and the case-law cited).

48 In the present case, it should be noted that the referring court states that an answer by the Court to its third and fourth questions is necessary for it to rule on the main proceedings. It explains that, should it be found in the light of that answer that the ULD could remedy the alleged infringements of the right to protection of personal data by taking a measure against Facebook Germany, such a finding could indicate that the contested decision was vitiated by an error of assessment, in that it was wrongly taken against Wirtschaftsakademie.

49 In those circumstances, Questions 3 and 4 are admissible.

50 To answer those questions, it must be recalled as a preliminary point that, in accordance with Article 28(1) and (3) of Directive 95/46, each supervisory authority is to exercise all the powers conferred on it by national law in the territory of its own Member State, in order to ensure compliance with the data protection rules in that territory (see, to that effect, judgment of 1 October 2015, *Weltimmo*, C-230/14, EU:C:2015:639, paragraph 51).

51 The question of which national law applies to the processing of personal data is governed by Article 4 of Directive 95/46. As stated in Article 4(1)(a), each Member State is to apply the national provisions it adopts pursuant to the directive to the processing of personal data, where the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State. That provision states that, where the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of those establishments complies with the obligations laid down by the national law applicable.

52 It thus follows from a reading of that provision in conjunction with Article 28(1) and (3) of Directive 95/46 that, where the national law of the Member State of the supervisory authority is applicable under Article 4(1)(a) of the directive because the processing in question is carried out in the context of the activities of an establishment of the controller in the territory of that Member State, that supervisory authority can exercise all the powers conferred on it by that law in respect of that establishment, regardless of whether the controller also has establishments in other Member States.

53 In order, therefore, to determine whether, in circumstances such as those of the main proceedings, a supervisory authority is entitled to exercise the powers conferred on it by national law against an establishment situated in the territory of its own Member State, it must be ascertained whether the two conditions laid down by Article 4(1)(a) of Directive 95/46 are satisfied, in other words, whether there is an 'establishment of the controller' within the meaning of that provision and whether the processing is carried out 'in the context of the activities' of the establishment, also within the meaning of that provision.

54 As regards, first, the condition that the controller responsible for the processing of personal data must have an establishment in the territory of the Member State of the supervisory authority, it must be recalled that, according to recital 19 of Directive 95/46, establishment in the territory of a Member State implies the effective and real exercise of activity through stable arrangements, and the legal form of such an establishment, whether simply a branch or a subsidiary with a legal personality, is not the determining factor (judgment of 1 October 2015, *Weltimmo*, C-230/14, EU:C:2015:639, paragraph 28 and the case-law cited).

55 In the present case, it is common ground that Facebook Inc., as controller jointly responsible with Facebook Ireland for processing personal data, has a permanent establishment in Germany, namely Facebook Germany, situated in Hamburg, and that Facebook Germany effectively and genuinely exercises activities in that Member State. It is therefore an establishment within the meaning of Article 4(1)(a) of Directive 95/46.

56 As regards, second, the condition that the processing of personal data must be carried out 'in the context of the activities' of the establishment in question, it must be recalled, to begin with, that in view of the objective pursued by Directive 95/46 of ensuring effective and complete protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data, the expression 'in the context of the activities of an establishment' cannot be interpreted restrictively (judgment of 1 October 2015, *Weltimmo*, C-230/14, EU:C:2015:639, paragraph 25 and the case-law cited).

57 Next, it must be pointed out that Article 4(1)(a) of Directive 95/46 does not require that such processing be carried out 'by' the establishment concerned itself, but only that it be carried out 'in the context of the activities of' the establishment (judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 52).

58 In the present case, the order for reference and the written observations submitted by Facebook Ireland show that Facebook Germany is responsible for promoting and selling advertising space and carries on activities addressed to persons residing in Germany.

59 As noted in paragraphs 33 and 34 above, the processing of personal data at issue in the main proceedings, carried out by Facebook Inc. jointly with Facebook Ireland, consisting in collecting personal data by means of cookies installed on the computers or other devices of visitors to fan pages hosted on Facebook, is intended, in particular, to enable Facebook to improve its system of advertising, in order better to target its communications.

60 As the Advocate General observes in point 94 of his Opinion, given that a social network such as Facebook generates a substantial part of its income from advertisements posted on the web pages set up and accessed by users, and given that Facebook's establishment in Germany is intended to ensure the promotion and sale in Germany of advertising space that makes Facebook's services profitable, the activities of that establishment must be regarded as inextricably linked to the processing of personal data at issue in the main proceedings, for which Facebook Inc. is jointly responsible with Facebook Ireland. Consequently, such treatment must be regarded as being carried out in the context of the activities of an establishment of the controller within the meaning of Article 4(1)(a) of Directive 95/46 (see, to that effect, judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraphs 55 and 56).

61 It follows that, since German law is applicable to the processing of personal data at issue in the main proceedings in accordance with Article 4(1)(a) of Directive 95/46, the German supervisory authority was competent under Article 28(1) of that directive to apply that law to that processing.

62 That supervisory authority was therefore competent, for the purpose of ensuring compliance in German territory with the rules on the protection of personal data, to exercise with respect to Facebook Germany all the powers conferred on it under the national provisions transposing Article 28(3) of Directive 95/46.

63 It should also be stated that the circumstance, emphasised by the referring court in its third question, that the strategic decisions on the collection and processing of personal data relating to persons resident in EU territory are taken by a parent company established in a third country, such as Facebook Inc. in the present case, is not capable of calling in question the competence of the supervisory authority operating under the law of a Member State with respect to an establishment in the territory of that State belonging to the controller responsible for the processing of that data.

64 In the light of the foregoing, the answer to Questions 3 and 4 is that Articles 4 and 28 of Directive 95/46 must be interpreted as meaning that, where an undertaking established outside the European Union has several establishments in different Member States, the supervisory authority of a Member State is entitled to exercise the powers conferred on it by Article 28(3) of that directive with respect to an establishment of that undertaking situated in the territory of that Member State even if, as a result of the division of tasks within the group, first, that establishment is responsible solely for the sale of advertising space and other marketing activities in the territory of that Member State and, second, exclusive responsibility for collecting and processing personal data belongs, for the entire territory of the European Union, to an establishment situated in another Member State.

*Questions 5 and 6*

65 By its fifth and sixth questions, which should be considered together, the referring court asks essentially whether Article 4(1)(a) and Article 28(3) and (6) of Directive 95/46 must be interpreted as meaning that, where the supervisory authority of a Member State intends to exercise with respect to an entity established in the territory of that Member State the powers of intervention referred to in Article 28(3) of that directive, on the ground of infringements of the rules on the protection of personal data committed by a third party responsible for the processing of that data whose seat is in another Member State, that supervisory authority is competent to assess, independently of the supervisory authority of the other Member State, the lawfulness of such data processing and may exercise its powers of intervention with respect to the entity established in its territory without first calling on the supervisory authority of the other Member State to intervene.

66 To answer those questions, it must be recalled, as may be seen from the answer to the first and second questions referred for a preliminary ruling, that Article 2(d) of Directive 95/46 must be interpreted as allowing, in circumstances such as those of the main proceedings, an entity such as Wirtschaftsakademie to be held responsible, as the administrator of a fan page hosted on Facebook, in the event of an infringement of the rules on the protection of personal data.

67 It follows that, by virtue of Article 4(1)(a) and Article 28(1) and (3) of Directive 95/46, the supervisory authority of the Member State in whose territory that entity is established is competent to apply its national law, and thus to make use against that entity of all the powers conferred on it by its national law, in accordance with Article 28(3) of that directive.

68 As provided for by the second subparagraph of Article 28(1) of that directive, the supervisory authorities whose task it is to supervise the application, in the territory of their own Member States, of the provisions adopted by those States pursuant to the directive are to act with complete independence in exercising the functions entrusted to them. That requirement also follows from EU primary law, in particular Article 8(3) of the Charter of Fundamental Rights of the European Union and Article 16(2) TFEU (see, to that effect, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 40).

69 Furthermore, while under the second subparagraph of Article 28(6) of Directive 95/46 the supervisory authorities are to cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information, that directive does not lay down any criterion of priority governing the intervention of one supervisory authority as against another, nor does it lay down an obligation for a supervisory authority of one Member State to comply with a position which may have been expressed by the supervisory authority of another Member State.

70 A supervisory authority which is competent under its national law is not therefore obliged to adopt the conclusion reached by another supervisory authority in an analogous situation.

71 It must be recalled that, as the national supervisory authorities are responsible, in accordance with Article 8(3) of the Charter of Fundamental Rights and Article 28 of Directive 95/46, for monitoring compliance with the EU rules concerning the protection of individuals with regard to the processing of personal data, each of them is therefore vested with the power to check whether the processing of personal data in the territory of its own Member State complies with the requirements laid down by Directive 95/46 (see, to that effect, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 47).

72 Since Article 28 of Directive 95/46 applies by its very nature to any processing of personal data, even where there is a decision of a supervisory authority of another Member State, a supervisory authority hearing a claim lodged by a person concerning the protection of his rights and freedoms with regard to the processing of personal data relating to him must examine, with complete independence, whether the processing of that data complies with the requirements laid down by that directive (see, to that effect, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 57).

73 It follows that, in the present case, under the system established by Directive 95/46, the ULD was entitled to assess, independently of the assessments made by the Irish supervisory authority, the lawfulness of the data processing at issue in the main proceedings.

74 Consequently, the answer to Questions 5 and 6 is that Article 4(1)(a) and Article 28(3) and (6) of Directive 95/46 must be interpreted as meaning that, where the supervisory authority of a Member State intends to exercise with respect to an entity established in the territory of that Member State the powers of intervention referred to in Article 28(3) of that directive, on the ground of infringements of the rules on the protection of personal data committed by a third party responsible for the processing of that data whose seat is in another Member State, that supervisory authority is competent to assess, independently of the supervisory authority of the other Member State, the lawfulness of such data processing and may exercise its powers of intervention with respect to the entity established in its territory without first calling on the supervisory authority of the other Member State to intervene.

**Costs**

[…]

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 2(d) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement**

**of such data must be interpreted as meaning that the concept of 'controller' within the meaning of that provision encompasses the administrator of a fan page hosted on a social network.**

2. **Articles 4 and 28 of Directive 95/46 must be interpreted as meaning that, where an undertaking established outside the European Union has several establishments in different Member States, the supervisory authority of a Member State is entitled to exercise the powers conferred on it by Article 28(3) of that directive with respect to an establishment of that undertaking situated in the territory of that Member State even if, as a result of the division of tasks within the group, first, that establishment is responsible solely for the sale of advertising space and other marketing activities in the territory of that Member State and, second, exclusive responsibility for collecting and processing personal data belongs, for the entire territory of the European Union, to an establishment situated in another Member State.**

3. **Article 4(1)(a) and Article 28(3) and (6) of Directive 95/46 must be interpreted as meaning that, where the supervisory authority of a Member State intends to exercise with respect to an entity established in the territory of that Member State the powers of intervention referred to in Article 28(3) of that directive, on the ground of infringements of the rules on the protection of personal data committed by a third party responsible for the processing of that data whose seat is in another Member State, that supervisory authority is competent to assess, independently of the supervisory authority of the other Member State, the lawfulness of such data processing and may exercise its powers of intervention with respect to the entity established in its territory without first calling on the supervisory authority of the other Member State to intervene.**

LECTURE 10: EU-SPECIFIC FUNDAMENTAL RIGHTS: DATA PROTECTION (III)

In this lecture, we will focus on the territorial scope of the right to data protection. Individuals can only benefit from EU data protection rules to the extent that they fall within the scope of EU law. In the same way, data can only be transferred to a territory outside of the European Union to the extent that an equivalent protection can be guaranteed there. Both elements of territorial application will be discussed in this lecture.

*Materials to read*:

- Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (see last weeks).
- Court of Justice, 6 October 2015, Case C-362/14, *Schrems,* ECLI:EU:C:2015:650.
- Irish High Court, 3 October 2017, *The Data Protection Commissioner and Facebook Ireland Ltd. and Maximilian Schrems* (via eCampus)

## Case C-362/14, *Schrems*

In Case C-362/14,

[…]

1 This request for a preliminary ruling relates to the interpretation, in the light of Articles 7, 8 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), of Articles 25(6) and 28 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1) ('Directive 95/46'), and, in essence, to the validity of Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46 on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (OJ 2000 L 215, p. 7).

2 The request has been made in proceedings between Mr Schrems and the Data Protection Commissioner ('the Commissioner') concerning the latter's refusal to investigate a complaint made by Mr Schrems regarding the fact that Facebook Ireland Ltd ('Facebook Ireland') transfers the personal data of its users to the United States of America and keeps it on servers located in that country.

**Legal context**

*Directive 95/46*

3 Recitals 2, 10, 56, 57, 60, 62 and 63 in the preamble to Directive 95/46 are worded as follows:

'(2) ... data-processing systems are designed to serve man; … they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to … the well-being of individuals;

…

(10) … the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[, signed in Rome on 4 November 1950,] and in the general principles of Community law; …, for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community;

…

(56) … cross-border flows of personal data are necessary to the expansion of international trade; … the protection of individuals guaranteed in the Community by this Directive does not stand in the way of transfers of personal data to third countries which ensure an adequate level of protection; … the adequacy of the level of protection afforded by a third country must be assessed in the light of all the circumstances surrounding the transfer operation or set of transfer operations;

(57) … on the other hand, the transfer of personal data to a third country which does not ensure an adequate level of protection must be prohibited;

…

(60) … in any event, transfers to third countries may be effected only in full compliance with the provisions adopted by the Member States pursuant to this Directive, and in particular Article 8 thereof;

…

(62) … the establishment in Member States of supervisory authorities, exercising their functions with complete independence, is an essential component of the protection of individuals with regard to the processing of personal data;

(63) … such authorities must have the necessary means to perform their duties, including powers of investigation and intervention, particularly in cases of complaints from individuals, and powers to engage in legal proceedings; ...'

4 Articles 1, 2, 25, 26, 28 and 31 of Directive 95/46 provide:

'*Article 1*

Object of the Directive

1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.

...

*Article 2*

Definitions

For the purposes of this Directive:

(a) "personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) "processing of personal data" ("processing") shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

...

(d) "controller" shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law;

...

*Article 25*

Principles

1. The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection.

2. The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country.

3. The Member States and the Commission shall inform each other of cases where they consider that a third country does not ensure an adequate level of protection within the meaning of paragraph 2.

4. Where the Commission finds, under the procedure provided for in Article 31(2), that a third country does not ensure an adequate level of protection within the meaning of paragraph 2 of this Article, Member States shall take the measures necessary to prevent any transfer of data of the same type to the third country in question.

5. At the appropriate time, the Commission shall enter into negotiations with a view to remedying the situation resulting from the finding made pursuant to paragraph 4.

6. The Commission may find, in accordance with the procedure referred to in Article 31(2), that a third country ensures an adequate level of protection within the meaning of paragraph 2 of this Article, by reason of its domestic law or of the international commitments it has entered into, particularly upon conclusion of the negotiations referred to in paragraph 5, for the protection of the private lives and basic freedoms and rights of individuals.

Member States shall take the measures necessary to comply with the Commission's decision.

*Article 26*

Derogations

1. By way of derogation from Article 25 and save where otherwise provided by domestic law governing particular cases, Member States shall provide that a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25(2) may take place on condition that:

(a) the data subject has given his consent unambiguously to the proposed transfer; or

(b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of precontractual measures taken in response to the data subject's request; or

(c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and a third party; or

(d) the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims; or

(e) the transfer is necessary in order to protect the vital interests of the data subject; or

(f) the transfer is made from a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate legitimate interest, to the extent that the conditions laid down in law for consultation are fulfilled in the particular case.

2. Without prejudice to paragraph 1, a Member State may authorise a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25(2), where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights; such safeguards may in particular result from appropriate contractual clauses.

3. The Member State shall inform the Commission and the other Member States of the authorisations it grants pursuant to paragraph 2.

If a Member State or the Commission objects on justified grounds involving the protection of the privacy and fundamental rights and freedoms of individuals, the Commission shall take appropriate measures in accordance with the procedure laid down in Article 31(2).

Member States shall take the necessary measures to comply with the Commission's decision.

...

*Article 28*

Supervisory authority

1. Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive.

These authorities shall act with complete independence in exercising the functions entrusted to them.

2. Each Member State shall provide that the supervisory authorities are consulted when drawing up administrative measures or regulations relating to the protection of individuals' rights and freedoms with regard to the processing of personal data.

3. Each authority shall in particular be endowed with:

– investigative powers, such as powers of access to data forming the subject-matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties,

– effective powers of intervention, such as, for example, that of delivering opinions before processing operations are carried out, in accordance with Article 20, and ensuring appropriate publication of such opinions, of ordering the blocking, erasure or destruction of data, of imposing a temporary or definitive ban on processing, of warning or admonishing the controller, or that of referring the matter to national parliaments or other political institutions,

– the power to engage in legal proceedings where the national provisions adopted pursuant to this Directive have been violated or to bring these violations to the attention of the judicial authorities.

Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts.

4. Each supervisory authority shall hear claims lodged by any person, or by an association representing that person, concerning the protection of his rights and freedoms in regard to the processing of personal data. The person concerned shall be informed of the outcome of the claim.

Each supervisory authority shall, in particular, hear claims for checks on the lawfulness of data processing lodged by any person when the national provisions adopted pursuant to Article 13 of this Directive apply. The person shall at any rate be informed that a check has taken place.

...

6. Each supervisory authority is competent, whatever the national law applicable to the processing in question, to exercise, on the territory of its own Member State, the powers conferred on it in accordance with paragraph 3. Each authority may be requested to exercise its powers by an authority of another Member State.

...

*Article 31*

...

2. Where reference is made to this Article, Articles 4 and 7 of [Council] Decision 1999/468/EC [of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23)] shall apply, having regard to the provisions of Article 8 thereof.

...'

*Decision 2000/520*

5 Decision 2000/520 was adopted by the Commission on the basis of Article 25(6) of Directive 95/46.

6 Recitals 2, 5 and 8 in the preamble to that decision are worded as follows:

'(2) The Commission may find that a third country ensures an adequate level of protection. In that case personal data may be transferred from the Member States without additional guarantees being necessary.

…

(5) The adequate level of protection for the transfer of data from the Community to the United States recognised by this Decision, should be attained if organisations comply with the safe harbour privacy principles for the protection of personal data transferred from a Member State to the United States (hereinafter "the Principles") and the frequently asked questions (hereinafter "the FAQs") providing guidance for the implementation of the Principles issued by the Government of the United States on 21 July 2000. Furthermore the organisations should publicly disclose their privacy policies and be subject to the jurisdiction of the Federal Trade Commission (FTC) under Section 5 of the Federal Trade Commission Act which prohibits unfair or deceptive acts or practices in or affecting commerce, or that of another statutory body that will effectively ensure compliance with the Principles implemented in accordance with the FAQs.

…

(8) In the interests of transparency and in order to safeguard the ability of the competent authorities in the Member States to ensure the protection of individuals as regards the processing of their personal data, it is necessary to specify in this Decision the exceptional circumstances in which the suspension of specific data flows should be justified, notwithstanding the finding of adequate protection.'

7 Articles 1 to 4 of Decision 2000/520 provide:

'*Article 1*

1. For the purposes of Article 25(2) of Directive 95/46/EC, for all the activities falling within the scope of that Directive, the "Safe Harbour Privacy Principles" (hereinafter "the Principles"), as set out in Annex I to this Decision, implemented in accordance with the guidance provided by the frequently asked questions (hereinafter "the FAQs") issued by the US Department of Commerce on 21 July 2000 as set out in Annex II to this Decision are considered to ensure an adequate level of protection for personal data transferred from the Community to organisations established in the United States, having regard to the following documents issued by the US Department of Commerce:

(a) the safe harbour enforcement overview set out in Annex III;

(b) a memorandum on damages for breaches of privacy and explicit authorisations in US law set out in Annex IV;

(c) a letter from the Federal Trade Commission set out in Annex V;

(d) a letter from the US Department of Transportation set out in Annex VI.

2. In relation to each transfer of data the following conditions shall be met:

(a) the organisation receiving the data has unambiguously and publicly disclosed its commitment to comply with the Principles implemented in accordance with the FAQs; and

(b) the organisation is subject to the statutory powers of a government body in the United States listed in Annex VII to this Decision which is empowered to investigate complaints and to obtain relief against unfair or deceptive practices as well as redress for individuals, irrespective of their country of residence or nationality, in case of non-compliance with the Principles implemented in accordance with the FAQs.

3. The conditions set out in paragraph 2 are considered to be met for each organisation that self-certifies its adherence to the Principles implemented in accordance with the FAQs from the date on which the organisation notifies to the US Department of Commerce (or its designee) the public disclosure of the commitment referred to in paragraph 2(a) and the identity of the government body referred to in paragraph 2(b).

*Article 2*

This Decision concerns only the adequacy of protection provided in the United States under the Principles implemented in accordance with the FAQs with a view to meeting the requirements of Article 25(1) of Directive 95/46/EC and does not affect the application of other provisions of that Directive that pertain to the processing of personal data within the Member States, in particular Article 4 thereof.

*Article 3*

1. Without prejudice to their powers to take action to ensure compliance with national provisions adopted pursuant to provisions other than Article 25 of Directive 95/46/EC, the competent authorities in Member States may exercise their existing powers to suspend data flows to an organisation that has self-certified its adherence to the Principles implemented in accordance with the FAQs in order to protect individuals with regard to the processing of their personal data in cases where:

(a) the government body in the United States referred to in Annex VII to this Decision or an independent recourse mechanism within the meaning of letter (a) of the Enforcement Principle set out in Annex I to this Decision has determined that the organisation is violating the Principles implemented in accordance with the FAQs; or

(b) there is a substantial likelihood that the Principles are being violated; there is a reasonable basis for believing that the enforcement mechanism concerned is not taking or will not take adequate and timely steps to settle the case at issue; the continuing transfer would create an imminent risk of grave harm to data subjects; and the competent authorities in the Member State have made reasonable efforts under the circumstances to provide the organisation with notice and an opportunity to respond.

The suspension shall cease as soon as compliance with the Principles implemented in accordance with the FAQs is assured and the competent authorities concerned in the Community are notified thereof.

2. Member States shall inform the Commission without delay when measures are adopted on the basis of paragraph 1.

3. The Member States and the Commission shall also inform each other of cases where the action of bodies responsible for ensuring compliance with the Principles implemented in accordance with the FAQs in the United States fails to secure such compliance.

4. If the information collected under paragraphs 1, 2 and 3 provides evidence that any body responsible for ensuring compliance with the Principles implemented in accordance with the FAQs in the United States is not effectively fulfilling its role, the Commission shall inform the US Department of Commerce and, if necessary,

present draft measures in accordance with the procedure referred to in Article 31 of Directive 95/46/EC with a view to reversing or suspending the present Decision or limiting its scope.

*Article 4*

1. This Decision may be adapted at any time in the light of experience with its implementation and/or if the level of protection provided by the Principles and the FAQs is overtaken by the requirements of US legislation.

The Commission shall in any case evaluate the implementation of the present Decision on the basis of available information three years after its notification to the Member States and report any pertinent findings to the Committee established under Article 31 of Directive 95/46/EC, including any evidence that could affect the evaluation that the provisions set out in Article 1 of this Decision provide adequate protection within the meaning of Article 25 of Directive 95/46/EC and any evidence that the present Decision is being implemented in a discriminatory way.

2. The Commission shall, if necessary, present draft measures in accordance with the procedure referred to in Article 31 of Directive 95/46/EC.'

8 Annex I to Decision 2000/520 is worded as follows:

'Safe Harbour Privacy Principles

issued by the US Department of Commerce on 21 July 2000

... the Department of Commerce is issuing this document and Frequently Asked Questions ("the Principles") under its statutory authority to foster, promote, and develop international commerce. The Principles were developed in consultation with industry and the general public to facilitate trade and commerce between the United States and European Union. They are intended for use solely by US organisations receiving personal data from the European Union for the purpose of qualifying for the safe harbour and the presumption of "adequacy" it creates. Because the Principles were solely designed to serve this specific purpose, their adoption for other purposes may be inappropriate. …

Decisions by organisations to qualify for the safe harbour are entirely voluntary, and organisations may qualify for the safe harbour in different ways. ...

Adherence to these Principles may be limited: (a) to the extent necessary to meet national security, public interest, or law enforcement requirements; (b) by statute, government regulation, or case-law that create conflicting obligations or explicit authorisations, provided that, in exercising any such authorisation, an organisation can demonstrate that its non-compliance with the Principles is limited to the extent necessary to meet the overriding legitimate interests furthered by such authorisation; or (c) if the effect of the Directive [or] Member State law is to allow exceptions or derogations, provided such exceptions or derogations are applied in comparable contexts. Consistent with the goal of enhancing privacy protection, organisations should strive to implement these Principles fully and transparently, including indicating in their privacy policies where exceptions to the Principles permitted by (b) above will apply on a regular basis. For the same reason, where the option is allowable under the Principles and/or US law, organisations are expected to opt for the higher protection where possible.

...'

9 Annex II to Decision 2000/520 reads as follows:

'Frequently Asked Questions (FAQs)

...

FAQ 6 — Self-Certification

Q: *How does an organisation self-certify that it adheres to the Safe Harbour Principles?*

A: Safe harbour benefits are assured from the date on which an organisation self-certifies to the Department of Commerce (or its designee) its adherence to the Principles in accordance with the guidance set forth below.

To self-certify for the safe harbour, organisations can provide to the Department of Commerce (or its designee) a letter, signed by a corporate officer on behalf of the organisation that is joining the safe harbour, that contains at least the following information:

1. name of organisation, mailing address, e-mail address, telephone and fax numbers;

2. description of the activities of the organisation with respect to personal information received from the [European Union]; and

3. description of the organisation's privacy policy for such personal information, including: (a) where the privacy policy is available for viewing by the public, (b) its effective date of implementation, (c) a contact office for the handling of complaints, access requests, and any other issues arising under the safe harbour, (d) the specific statutory body that has jurisdiction to hear any claims against the organisation regarding possible unfair or deceptive practices and violations of laws or regulations governing privacy (and that is listed in the annex to the Principles), (e) name of any privacy programmes in which the organisation is a member, (f) method of verification (e.g. in-house, third party) …, and (g) the independent recourse mechanism that is available to investigate unresolved complaints.

Where the organisation wishes its safe harbour benefits to cover human resources information transferred from the [European Union] for use in the context of the employment relationship, it may do so where there is a statutory body with jurisdiction to hear claims against the organisation arising out of human resources information that is listed in the annex to the Principles. ...

The Department (or its designee) will maintain a list of all organisations that file such letters, thereby assuring the availability of safe harbour benefits, and will update such list on the basis of annual letters and notifications received pursuant to FAQ 11. ...

...

FAQ 11 — Dispute Resolution and Enforcement

Q: *How should the dispute resolution requirements of the Enforcement Principle be implemented, and how will an organisation's persistent failure to comply with the Principles be handled?*

A: The Enforcement Principle sets out the requirements for safe harbour enforcement. How to meet the requirements of point (b) of the Principle is set out in the FAQ on verification (FAQ 7). This FAQ 11 addresses points (a) and (c), both of which require independent recourse mechanisms. These mechanisms may take different forms, but they must meet the Enforcement Principle's requirements. Organisations may satisfy the requirements through the following: (1) compliance with private sector developed privacy programmes that incorporate the Safe Harbour Principles into their rules and that include effective enforcement mechanisms of the type described in the Enforcement Principle; (2) compliance with legal or regulatory supervisory authorities that provide for handling of individual complaints and dispute resolution; or (3) commitment to cooperate with data protection authorities located in the European Union or their authorised representatives. This list is intended to be illustrative and not limiting. The private sector may design other mechanisms to provide enforcement, so long as they meet the requirements of the Enforcement Principle and the FAQs. Please note that the Enforcement Principle's requirements are additional to the requirements set forth in paragraph 3 of the introduction to the Principles that self-regulatory efforts must be enforceable under Article 5 of the Federal Trade Commission Act or similar statute.

Recourse Mechanisms

Consumers should be encouraged to raise any complaints they may have with the relevant organisation before proceeding to independent recourse mechanisms. ...

...

FTC Action

The FTC has committed to reviewing on a priority basis referrals received from privacy self-regulatory organisations, such as BBBOnline and TRUSTe, and EU Member States alleging non-compliance with the Safe Harbour Principles to determine whether Section 5 of the FTC Act prohibiting unfair or deceptive acts or practices in commerce has been violated. ...

…'

10 Annex IV to Decision 2000/520 states:

'Damages for Breaches of Privacy, Legal Authorisations and Mergers and Takeovers in US Law

This responds to the request by the European Commission for clarification of US law with respect to (a) claims for damages for breaches of privacy, (b) "explicit authorisations" in US law for the use of personal information in a manner inconsistent with the safe harbour principles, and (c) the effect of mergers and takeovers on obligations undertaken pursuant to the safe harbour principles.

...

B. Explicit Legal Authorisations

The safe harbour principles contain an exception where statute, regulation or case-law create "conflicting obligations or explicit authorisations, provided that, in exercising any such authorisation, an organisation can demonstrate that its non-compliance with the principles is limited to the extent necessary to meet the overriding legitimate interests further[ed] by such authorisation". Clearly, where US law imposes a conflicting obligation, US organisations whether in the safe harbour or not must comply with the law. As for explicit authorisations, while the safe harbour principles are intended to bridge the differences between the US and European regimes for privacy protection, we owe deference to the legislative prerogatives of our elected lawmakers. The limited exception from strict adherence to the safe harbour principles seeks to strike a balance to accommodate the legitimate interests on each side.

The exception is limited to cases where there is an explicit authorisation. Therefore, as a threshold matter, the relevant statute, regulation or court decision must affirmatively authorise the particular conduct by safe harbour organisations ... In other words, the exception would not apply where the law is silent. In addition, the exception would apply only if the explicit authorisation conflicts with adherence to the safe harbour principles. Even then, the exception "is limited to the extent necessary to meet the overriding legitimate interests furthered by such authorisation". By way of illustration, where the law simply authorises a company to provide personal information to government authorities, the exception would not apply. Conversely, where the law specifically authorises the company to provide personal information to government agencies without the individual's consent, this would constitute an "explicit authorisation" to act in a manner that conflicts with the safe harbour principles. Alternatively, specific exceptions from affirmative requirements to provide notice and consent would fall within the exception (since it would be the equivalent of a specific authorisation to disclose the information without notice and consent). For example, a statute which authorises doctors to provide their patients' medical records to health officials without the patients' prior consent might permit an exception from the notice and choice principles. This authorisation would not permit a doctor to provide the same medical records to health maintenance organisations or commercial pharmaceutical research laboratories, which would be beyond the scope of the purposes authorised by the law and therefore beyond the scope of the exception ... The legal authority in question can be a "stand alone" authorisation to do specific things with personal information, but, as the examples below illustrate, it is likely to be an exception to a broader law which proscribes the collection, use, or disclosure of personal information.

...'

*Communication COM(2013) 846 final*

11 On 27 November 2013 the Commission adopted the communication to the European Parliament and the Council entitled 'Rebuilding Trust in EU-US Data Flows' (COM(2013) 846 final) ('Communication

COM(2013) 846 final'). The communication was accompanied by the 'Report on the Findings by the EU Co-chairs of the ad hoc EU-US Working Group on Data Protection', also dated 27 November 2013. That report was drawn up, as stated in point 1 thereof, in cooperation with the United States after the existence in that country of a number of surveillance programmes involving the large-scale collection and processing of personal data had been revealed. The report contained inter alia a detailed analysis of United States law as regards, in particular, the legal bases authorising the existence of surveillance programmes and the collection and processing of personal data by United States authorities.

12 In point 1 of Communication COM(2013) 846 final, the Commission stated that '[c]ommercial exchanges are addressed by Decision [2000/520]', adding that '[t]his Decision provides a legal basis for transfers of personal data from the [European Union] to companies established in the [United States] which have adhered to the Safe Harbour Privacy Principles'. In addition, the Commission underlined in point 1 the increasing relevance of personal data flows, owing in particular to the development of the digital economy which has indeed 'led to exponential growth in the quantity, quality, diversity and nature of data processing activities'.

13 In point 2 of that communication, the Commission observed that 'concerns about the level of protection of personal data of [Union] citizens transferred to the [United States] under the Safe Harbour scheme have grown' and that '[t]he voluntary and declaratory nature of the scheme has sharpened focus on its transparency and enforcement'.

14 It further stated in point 2 that '[t]he personal data of [Union] citizens sent to the [United States] under the Safe Harbour may be accessed and further processed by US authorities in a way incompatible with the grounds on which the data was originally collected in the [European Union] and the purposes for which it was transferred to the [United States]' and that '[a] majority of the US internet companies that appear to be more directly concerned by [the surveillance] programmes are certified under the Safe Harbour scheme'.

15 In point 3.2 of Communication COM(2013) 846 final, the Commission noted a number of weaknesses in the application of Decision 2000/520. It stated, first, that some certified United States companies did not comply with the principles referred to in Article 1(1) of Decision 2000/520 ('the safe harbour principles') and that improvements had to be made to that decision regarding 'structural shortcomings related to transparency and enforcement, the substantive Safe Harbour principles and the operation of the national security exception'. It observed, secondly, that 'Safe Harbour also acts as a conduit for the transfer of the personal data of EU citizens from the [European Union] to the [United States] by companies required to surrender data to US intelligence agencies under the US intelligence collection programmes'.

16 The Commission concluded in point 3.2 that whilst, '[g]iven the weaknesses identified, the current implementation of Safe Harbour cannot be maintained, ... its revocation would[, however,] adversely affect the interests of member companies in the [European Union] and in the [United States]'. Finally, the Commission added in that point that it would 'engage with the US authorities to discuss the shortcomings identified'.

*Communication COM(2013) 847 final*

17 On the same date, 27 November 2013, the Commission adopted the communication to the European Parliament and the Council on the Functioning of the Safe Harbour from the Perspective of EU Citizens and Companies Established in the [European Union] (COM(2013) 847 final) ('Communication COM(2013) 847 final'). As is clear from point 1 thereof, that communication was based inter alia on information received in the ad hoc EU-US Working Group and followed two Commission assessment reports published in 2002 and 2004 respectively.

18 Point 1 of Communication COM(2013) 847 final explains that the functioning of Decision 2000/520 'relies on commitments and self-certification of adhering companies', adding that '[s]igning up to these arrangements is voluntary, but the rules are binding for those who sign up'.

19 In addition, it is apparent from point 2.2 of Communication COM(2013) 847 final that, as at 26 September 2013, 3 246 companies, falling within many industry and services sectors, were certified. Those companies mainly provided services in the EU internal market, in particular in the internet sector, and some of them were EU companies which had subsidiaries in the United States. Some of those companies processed the data of their employees in Europe which was transferred to the United States for human resource purposes.

20 The Commission stated in point 2.2 that '[a]ny gap in transparency or in enforcement on the US side results in responsibility being shifted to European data protection authorities and to the companies which use the scheme'.

21 It is apparent, in particular, from points 3 to 5 and 8 of Communication COM(2013) 847 final that, in practice, a significant number of certified companies did not comply, or did not comply fully, with the safe harbour principles.

22 In addition, the Commission stated in point 7 of Communication COM(2013) 847 final that 'all companies involved in the PRISM programme [a large-scale intelligence collection programme], and which grant access to US authorities to data stored and processed in the [United States], appear to be Safe Harbour certified' and that '[t]his has made the Safe Harbour scheme one of the conduits through which access is given to US intelligence authorities to collecting personal data initially processed in the [European Union]'. In that regard, the Commission noted in point 7.1 of that communication that 'a number of legal bases under US law allow large-scale collection and processing of personal data that is stored or otherwise processed [by] companies based in the [United States]' and that '[t]he large-scale nature of these programmes may result in data transferred under Safe Harbour being accessed and further processed by US authorities beyond what is strictly necessary and proportionate to the protection of national security as foreseen under the exception provided in [Decision 2000/520]'.

23 In point 7.2 of Communication COM(2013) 847 final, headed 'Limitations and redress possibilities', the Commission noted that 'safeguards that are provided under US law are mostly available to US citizens or legal residents' and that, '[m]oreover, there are no opportunities for either EU or US data subjects to obtain access, rectification or erasure of data, or administrative or judicial redress with regard to collection and further processing of their personal data taking place under the US surveillance programmes'.

24 According to point 8 of Communication COM(2013) 847 final, the certified companies included '[w]eb companies such as Google, Facebook, Microsoft, Apple, Yahoo', which had 'hundreds of millions of clients in Europe' and transferred personal data to the United States for processing.

25 The Commission concluded in point 8 that 'the large-scale access by intelligence agencies to data transferred to the [United States] by Safe Harbour certified companies raises additional serious questions regarding the continuity of data protection rights of Europeans when their data is transferred to the [United States]'.

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

26 Mr Schrems, an Austrian national residing in Austria, has been a user of the Facebook social network ('Facebook') since 2008.

27 Any person residing in the European Union who wishes to use Facebook is required to conclude, at the time of his registration, a contract with Facebook Ireland, a subsidiary of Facebook Inc. which is itself established in the United States. Some or all of the personal data of Facebook Ireland's users who reside in the European Union is transferred to servers belonging to Facebook Inc. that are located in the United States, where it undergoes processing.

28 On 25 June 2013 Mr Schrems made a complaint to the Commissioner by which he in essence asked the latter to exercise his statutory powers by prohibiting Facebook Ireland from transferring his personal data to the United States. He contended in his complaint that the law and practice in force in that country did not ensure adequate protection of the personal data held in its territory against the surveillance activities that were engaged in there by the public authorities. Mr Schrems referred in this regard to the revelations made by Edward Snowden concerning the activities of the United States intelligence services, in particular those of the National Security Agency ('the NSA').

29 Since the Commissioner took the view that he was not required to investigate the matters raised by Mr Schrems in the complaint, he rejected it as unfounded. The Commissioner considered that there was no evidence that Mr Schrems' personal data had been accessed by the NSA. He added that the allegations raised by Mr Schrems in his complaint could not be profitably put forward since any question of the adequacy of data protection in the United States had to be determined in accordance with Decision 2000/520 and the Commission had found in that decision that the United States ensured an adequate level of protection.

30 Mr Schrems brought an action before the High Court challenging the decision at issue in the main proceedings. After considering the evidence adduced by the parties to the main proceedings, the High Court found that the electronic surveillance and interception of personal data transferred from the European Union to the United States serve necessary and indispensable objectives in the public interest. However, it added that the revelations made by Edward Snowden had demonstrated a 'significant over-reach' on the part of the NSA and other federal agencies.

31 According to the High Court, Union citizens have no effective right to be heard. Oversight of the intelligence services' actions is carried out within the framework of an *ex parte* and secret procedure. Once the personal data has been transferred to the United States, it is capable of being accessed by the NSA and other federal agencies, such as the Federal Bureau of Investigation (FBI), in the course of the indiscriminate surveillance and interception carried out by them on a large scale.

32 The High Court stated that Irish law precludes the transfer of personal data outside national territory save where the third country ensures an adequate level of protection for privacy and fundamental rights and freedoms. The importance of the rights to privacy and to inviolability of the dwelling, which are guaranteed by the Irish Constitution, requires that any interference with those rights be proportionate and in accordance with the law.

33 The High Court held that the mass and undifferentiated accessing of personal data is clearly contrary to the principle of proportionality and the fundamental values protected by the Irish Constitution. In order for interception of electronic communications to be regarded as consistent with the Irish Constitution, it would be necessary to demonstrate that the interception is targeted, that the surveillance of certain persons or groups of persons is objectively justified in the interests of national security or the suppression of crime and that there are appropriate and verifiable safeguards. Thus, according to the High Court, if the main proceedings were to be disposed of on the basis of Irish law alone, it would then have to be found that, given the existence of a serious doubt as to whether the United States ensures an adequate level of protection of personal data, the Commissioner should have proceeded to investigate the matters raised by Mr Schrems in his complaint and that the Commissioner was wrong in rejecting the complaint.

34 However, the High Court considers that this case concerns the implementation of EU law as referred to in Article 51 of the Charter and that the legality of the decision at issue in the main proceedings must therefore be assessed in the light of EU law. According to the High Court, Decision 2000/520 does not satisfy the requirements flowing both from Articles 7 and 8 of the Charter and from the principles set out by the Court of Justice in the judgment in *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238). The right to respect for private life, guaranteed by Article 7 of the Charter and by the core values common to the traditions of the Member States, would be rendered meaningless if the State authorities were authorised to access electronic communications on a casual and generalised basis without any objective justification based on considerations of national security or the prevention of crime that are specific to the individual concerned and without those practices being accompanied by appropriate and verifiable safeguards.

35 The High Court further observes that in his action Mr Schrems in reality raises the legality of the safe harbour regime which was established by Decision 2000/520 and gives rise to the decision at issue in the main proceedings. Thus, even though Mr Schrems has not formally contested the validity of either Directive 95/46 or Decision 2000/520, the question is raised, according to the High Court, as to whether, on account of Article 25(6) of Directive 95/46, the Commissioner was bound by the Commission's finding in Decision 2000/520 that the United States ensures an adequate level of protection or whether Article 8 of the Charter authorised the Commissioner to break free, if appropriate, from such a finding.

36 In those circumstances the High Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Whether in the course of determining a complaint which has been made to an independent office holder who has been vested by statute with the functions of administering and enforcing data protection legislation that personal data is being transferred to another third country (in this case, the United States of America) the laws and practices of which, it is claimed, do not contain adequate protections for the data subject, that office holder is absolutely bound by the Community finding to the contrary contained in [Decision 2000/520] having regard to Article 7, Article 8 and Article 47 of [the Charter], the provisions of Article 25(6) of Directive [95/46] notwithstanding?

(2) Or, alternatively, may and/or must the office holder conduct his or her own investigation of the matter in the light of factual developments in the meantime since that Commission decision was first published?'

**Consideration of the questions referred**

37 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether and to what extent Article 25(6) of Directive 95/46, read in the light of Articles 7, 8 and 47 of the Charter, must be interpreted as meaning that a decision adopted pursuant to that provision, such as Decision 2000/520, by which the Commission finds that a third country ensures an adequate level of protection, prevents a supervisory authority of a Member State, within the meaning of Article 28 of that directive, from being able to examine the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which has been transferred from a Member State to that third country when that person contends that the law and practices in force in the third country do not ensure an adequate level of protection.

*The powers of the national supervisory authorities, within the meaning of Article 28 of Directive 95/46, when the Commission has adopted a decision pursuant to Article 25(6) of that directive*

38 It should be recalled first of all that the provisions of Directive 95/46, inasmuch as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to respect for private life, must necessarily be interpreted in the light of the fundamental rights guaranteed by the Charter (see judgments in *Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 68; *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 68; and *Ryneš*, C-212/13, EU:C:2014:2428, paragraph 29).

39 It is apparent from Article 1 of Directive 95/46 and recitals 2 and 10 in its preamble that that directive seeks to ensure not only effective and complete protection of the fundamental rights and freedoms of natural persons, in particular the fundamental right to respect for private life with regard to the processing of personal data, but also a high level of protection of those fundamental rights and freedoms. The importance of both the fundamental right to respect for private life, guaranteed by Article 7 of the Charter, and the fundamental right to the protection of personal data, guaranteed by Article 8 thereof, is, moreover, emphasised in the case-law of the Court (see judgments in *Rijkeboer*, C-553/07, EU:C:2009:293, paragraph 47; *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 53; and *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraphs, 53, 66, 74 and the case-law cited).

40 As regards the powers available to the national supervisory authorities in respect of transfers of personal data to third countries, it should be noted that Article 28(1) of Directive 95/46 requires Member States to set up one or more public authorities responsible for monitoring, with complete independence, compliance with EU rules on the protection of individuals with regard to the processing of such data. In addition, that requirement derives from the primary law of the European Union, in particular Article 8(3) of the Charter and Article 16(2) TFEU (see, to this effect, judgments in *Commission* v *Austria*, C-614/10, EU:C:2012:631, paragraph 36, and *Commission* v *Hungary*, C-288/12, EU:C:2014:237, paragraph 47).

41 The guarantee of the independence of national supervisory authorities is intended to ensure the effectiveness and reliability of the monitoring of compliance with the provisions concerning protection of individuals with regard to the processing of personal data and must be interpreted in the light of that aim. It was established in order to strengthen the protection of individuals and bodies affected by the decisions of those authorities. The establishment in Member States of independent supervisory authorities is therefore, as stated in recital 62 in the preamble to Directive 95/46, an essential component of the protection of individuals with regard to the processing of personal data (see judgments in *Commission* v *Germany*, C-518/07, EU:C:2010:125, paragraph 25, and *Commission* v *Hungary*, C-288/12, EU:C:2014:237, paragraph 48 and the case-law cited).

42 In order to guarantee that protection, the national supervisory authorities must, in particular, ensure a fair balance between, on the one hand, observance of the fundamental right to privacy and, on the other hand, the interests requiring free movement of personal data (see, to this effect, judgments in *Commission* v *Germany*, C-518/07, EU:C:2010:125, paragraph 24, and *Commission* v *Hungary*, C-288/12, EU:C:2014:237, paragraph 51).

43 The national supervisory authorities have a wide range of powers for that purpose. Those powers, listed on a non-exhaustive basis in Article 28(3) of Directive 95/46, constitute necessary means to perform their duties, as

stated in recital 63 in the preamble to the directive. Thus, those authorities possess, in particular, investigative powers, such as the power to collect all the information necessary for the performance of their supervisory duties, effective powers of intervention, such as that of imposing a temporary or definitive ban on processing of data, and the power to engage in legal proceedings.

44 It is, admittedly, apparent from Article 28(1) and (6) of Directive 95/46 that the powers of the national supervisory authorities concern processing of personal data carried out on the territory of their own Member State, so that they do not have powers on the basis of Article 28 in respect of processing of such data carried out in a third country.

45 However, the operation consisting in having personal data transferred from a Member State to a third country constitutes, in itself, processing of personal data within the meaning of Article 2(b) of Directive 95/46 (see, to this effect, judgment in *Parliament* v *Council and Commission*, C-317/04 and C-318/04, EU:C:2006:346, paragraph 56) carried out in a Member State. That provision defines 'processing of personal data' as 'any operation or set of operations which is performed upon personal data, whether or not by automatic means' and mentions, by way of example, 'disclosure by transmission, dissemination or otherwise making available'.

46 Recital 60 in the preamble to Directive 95/46 states that transfers of personal data to third countries may be effected only in full compliance with the provisions adopted by the Member States pursuant to the directive. In that regard, Chapter IV of the directive, in which Articles 25 and 26 appear, has set up a regime intended to ensure that the Member States oversee transfers of personal data to third countries. That regime is complementary to the general regime set up by Chapter II of the directive laying down the general rules on the lawfulness of the processing of personal data (see, to this effect, judgment in *Lindqvist*, C-101/01, EU:C:2003:596, paragraph 63).

47 As, in accordance with Article 8(3) of the Charter and Article 28 of Directive 95/46, the national supervisory authorities are responsible for monitoring compliance with the EU rules concerning the protection of individuals with regard to the processing of personal data, each of them is therefore vested with the power to check whether a transfer of personal data from its own Member State to a third country complies with the requirements laid down by Directive 95/46.

48 Whilst acknowledging, in recital 56 in its preamble, that transfers of personal data from the Member States to third countries are necessary for the expansion of international trade, Directive 95/46 lays down as a principle, in Article 25(1), that such transfers may take place only if the third country ensures an adequate level of protection.

49 Furthermore, recital 57 states that transfers of personal data to third countries not ensuring an adequate level of protection must be prohibited.

50 In order to control transfers of personal data to third countries according to the level of protection accorded to it in each of those countries, Article 25 of Directive 95/46 imposes a series of obligations on the Member States and the Commission. It is apparent, in particular, from that article that the finding that a third country does or does not ensure an adequate level of protection may, as the Advocate General has observed in point 86 of his Opinion, be made either by the Member States or by the Commission.

51 The Commission may adopt, on the basis of Article 25(6) of Directive 95/46, a decision finding that a third country ensures an adequate level of protection. In accordance with the second subparagraph of that provision, such a decision is addressed to the Member States, who must take the measures necessary to comply with it. Pursuant to the fourth paragraph of Article 288 TFEU, it is binding on all the Member States to which it is addressed and is therefore binding on all their organs (see, to this effect, judgments in *Albako Margarinefabrik*, 249/85, EU:C:1987:245, paragraph 17, and *Mediaset*, C-69/13, EU:C:2014:71, paragraph 23) in so far as it has the effect of authorising transfers of personal data from the Member States to the third country covered by it.

52 Thus, until such time as the Commission decision is declared invalid by the Court, the Member States and their organs, which include their independent supervisory authorities, admittedly cannot adopt measures contrary to that decision, such as acts intended to determine with binding effect that the third country covered by it does not ensure an adequate level of protection. Measures of the EU institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality (judgment in *Commission* v *Greece*, C-475/01, EU:C:2004:585, paragraph 18 and the case-law cited).

53 However, a Commission decision adopted pursuant to Article 25(6) of Directive 95/46, such as Decision 2000/520, cannot prevent persons whose personal data has been or could be transferred to a third country from lodging with the national supervisory authorities a claim, within the meaning of Article 28(4) of that directive, concerning the protection of their rights and freedoms in regard to the processing of that data. Likewise, as the Advocate General has observed in particular in points 61, 93 and 116 of his Opinion, a decision of that nature cannot eliminate or reduce the powers expressly accorded to the national supervisory authorities by Article 8(3) of the Charter and Article 28 of the directive.

54 Neither Article 8(3) of the Charter nor Article 28 of Directive 95/46 excludes from the national supervisory authorities' sphere of competence the oversight of transfers of personal data to third countries which have been the subject of a Commission decision pursuant to Article 25(6) of Directive 95/46.

55 In particular, the first subparagraph of Article 28(4) of Directive 95/46, under which the national supervisory authorities are to hear 'claims lodged by any person … concerning the protection of his rights and freedoms in regard to the processing of personal data', does not provide for any exception in this regard where the Commission has adopted a decision pursuant to Article 25(6) of that directive.

56 Furthermore, it would be contrary to the system set up by Directive 95/46 and to the objective of Articles 25 and 28 thereof for a Commission decision adopted pursuant to Article 25(6) to have the effect of preventing a national supervisory authority from examining a person's claim concerning the protection of his rights and freedoms in regard to the processing of his personal data which has been or could be transferred from a Member State to the third country covered by that decision.

57 On the contrary, Article 28 of Directive 95/46 applies, by its very nature, to any processing of personal data. Thus, even if the Commission has adopted a decision pursuant to Article 25(6) of that directive, the national supervisory authorities, when hearing a claim lodged by a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him, must be able to examine, with complete independence, whether the transfer of that data complies with the requirements laid down by the directive.

58 If that were not so, persons whose personal data has been or could be transferred to the third country concerned would be denied the right, guaranteed by Article 8(1) and (3) of the Charter, to lodge with the national supervisory authorities a claim for the purpose of protecting their fundamental rights (see, by analogy, judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 68).

59 A claim, within the meaning of Article 28(4) of Directive 95/46, by which a person whose personal data has been or could be transferred to a third country contends, as in the main proceedings, that, notwithstanding what the Commission has found in a decision adopted pursuant to Article 25(6) of that directive, the law and practices of that country do not ensure an adequate level of protection must be understood as concerning, in essence, whether that decision is compatible with the protection of the privacy and of the fundamental rights and freedoms of individuals.

60 In this connection, the Court's settled case-law should be recalled according to which the European Union is a union based on the rule of law in which all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights (see, to this effect, judgments in *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 66; *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 91; and *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraph 56). Commission decisions adopted pursuant to Article 25(6) of Directive 95/46 cannot therefore escape such review.

61 That said, the Court alone has jurisdiction to declare that an EU act, such as a Commission decision adopted pursuant to Article 25(6) of Directive 95/46, is invalid, the exclusivity of that jurisdiction having the purpose of guaranteeing legal certainty by ensuring that EU law is applied uniformly (see judgments in *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 54, and *CIVAD*, C-533/10, EU:C:2012:347, paragraph 40).

62 Whilst the national courts are admittedly entitled to consider the validity of an EU act, such as a Commission decision adopted pursuant to Article 25(6) of Directive 95/46, they are not, however, endowed with the power to declare such an act invalid themselves (see, to this effect, judgments in *Foto-Frost*, 314/85, EU:C:1987:452, paragraphs 15 to 20, and *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 27). A fortiori, when the national

supervisory authorities examine a claim, within the meaning of Article 28(4) of that directive, concerning the compatibility of a Commission decision adopted pursuant to Article 25(6) of the directive with the protection of the privacy and of the fundamental rights and freedoms of individuals, they are not entitled to declare that decision invalid themselves.

63 Having regard to those considerations, where a person whose personal data has been or could be transferred to a third country which has been the subject of a Commission decision pursuant to Article 25(6) of Directive 95/46 lodges with a national supervisory authority a claim concerning the protection of his rights and freedoms in regard to the processing of that data and contests, in bringing the claim, as in the main proceedings, the compatibility of that decision with the protection of the privacy and of the fundamental rights and freedoms of individuals, it is incumbent upon the national supervisory authority to examine the claim with all due diligence.

64 In a situation where the national supervisory authority comes to the conclusion that the arguments put forward in support of such a claim are unfounded and therefore rejects it, the person who lodged the claim must, as is apparent from the second subparagraph of Article 28(3) of Directive 95/46, read in the light of Article 47 of the Charter, have access to judicial remedies enabling him to challenge such a decision adversely affecting him before the national courts. Having regard to the case-law cited in paragraphs 61 and 62 of the present judgment, those courts must stay proceedings and make a reference to the Court for a preliminary ruling on validity where they consider that one or more grounds for invalidity put forward by the parties or, as the case may be, raised by them of their own motion are well founded (see, to this effect, judgment in *T & L Sugars and Sidul Açúcares* v *Commission*, C-456/13 P, EU:C:2015:284, paragraph 48 and the case-law cited).

65 In the converse situation, where the national supervisory authority considers that the objections advanced by the person who has lodged with it a claim concerning the protection of his rights and freedoms in regard to the processing of his personal data are well founded, that authority must, in accordance with the third indent of the first subparagraph of Article 28(3) of Directive 95/46, read in the light in particular of Article 8(3) of the Charter, be able to engage in legal proceedings. It is incumbent upon the national legislature to provide for legal remedies enabling the national supervisory authority concerned to put forward the objections which it considers well founded before the national courts in order for them, if they share its doubts as to the validity of the Commission decision, to make a reference for a preliminary ruling for the purpose of examination of the decision's validity.

66 Having regard to the foregoing considerations, the answer to the questions referred is that Article 25(6) of Directive 95/46, read in the light of Articles 7, 8 and 47 of the Charter, must be interpreted as meaning that a decision adopted pursuant to that provision, such as Decision 2000/520, by which the Commission finds that a third country ensures an adequate level of protection, does not prevent a supervisory authority of a Member State, within the meaning of Article 28 of that directive, from examining the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which has been transferred from a Member State to that third country when that person contends that the law and practices in force in the third country do not ensure an adequate level of protection.

*The validity of Decision 2000/520*

67 As is apparent from the referring court's explanations relating to the questions submitted, Mr Schrems contends in the main proceedings that United States law and practice do not ensure an adequate level of protection within the meaning of Article 25 of Directive 95/46. As the Advocate General has observed in points 123 and 124 of his Opinion, Mr Schrems expresses doubts, which the referring court indeed seems essentially to share, concerning the validity of Decision 2000/520. In such circumstances, having regard to what has been held in paragraphs 60 to 63 of the present judgment and in order to give the referring court a full answer, it should be examined whether that decision complies with the requirements stemming from Directive 95/46 read in the light of the Charter.

The requirements stemming from Article 25(6) of Directive 95/46

68 As has already been pointed out in paragraphs 48 and 49 of the present judgment, Article 25(1) of Directive 95/46 prohibits transfers of personal data to a third country not ensuring an adequate level of protection.

69 However, for the purpose of overseeing such transfers, the first subparagraph of Article 25(6) of Directive 95/46 provides that the Commission 'may find … that a third country ensures an adequate level of protection

within the meaning of paragraph 2 of this Article, by reason of its domestic law or of the international commitments it has entered into …, for the protection of the private lives and basic freedoms and rights of individuals'.

70 It is true that neither Article 25(2) of Directive 95/46 nor any other provision of the directive contains a definition of the concept of an adequate level of protection. In particular, Article 25(2) does no more than state that the adequacy of the level of protection afforded by a third country 'shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations' and lists, on a non-exhaustive basis, the circumstances to which consideration must be given when carrying out such an assessment.

71 However, first, as is apparent from the very wording of Article 25(6) of Directive 95/46, that provision requires that a third country 'ensures' an adequate level of protection by reason of its domestic law or its international commitments. Secondly, according to the same provision, the adequacy of the protection ensured by the third country is assessed 'for the protection of the private lives and basic freedoms and rights of individuals'.

72 Thus, Article 25(6) of Directive 95/46 implements the express obligation laid down in Article 8(1) of the Charter to protect personal data and, as the Advocate General has observed in point 139 of his Opinion, is intended to ensure that the high level of that protection continues where personal data is transferred to a third country.

73 The word 'adequate' in Article 25(6) of Directive 95/46 admittedly signifies that a third country cannot be required to ensure a level of protection identical to that guaranteed in the EU legal order. However, as the Advocate General has observed in point 141 of his Opinion, the term 'adequate level of protection' must be understood as requiring the third country in fact to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union by virtue of Directive 95/46 read in the light of the Charter. If there were no such requirement, the objective referred to in the previous paragraph of the present judgment would be disregarded. Furthermore, the high level of protection guaranteed by Directive 95/46 read in the light of the Charter could easily be circumvented by transfers of personal data from the European Union to third countries for the purpose of being processed in those countries.

74 It is clear from the express wording of Article 25(6) of Directive 95/46 that it is the legal order of the third country covered by the Commission decision that must ensure an adequate level of protection. Even though the means to which that third country has recourse, in this connection, for the purpose of ensuring such a level of protection may differ from those employed within the European Union in order to ensure that the requirements stemming from Directive 95/46 read in the light of the Charter are complied with, those means must nevertheless prove, in practice, effective in order to ensure protection essentially equivalent to that guaranteed within the European Union.

75 Accordingly, when examining the level of protection afforded by a third country, the Commission is obliged to assess the content of the applicable rules in that country resulting from its domestic law or international commitments and the practice designed to ensure compliance with those rules, since it must, under Article 25(2) of Directive 95/46, take account of all the circumstances surrounding a transfer of personal data to a third country.

76 Also, in the light of the fact that the level of protection ensured by a third country is liable to change, it is incumbent upon the Commission, after it has adopted a decision pursuant to Article 25(6) of Directive 95/46, to check periodically whether the finding relating to the adequacy of the level of protection ensured by the third country in question is still factually and legally justified. Such a check is required, in any event, when evidence gives rise to a doubt in that regard.

77 Moreover, as the Advocate General has stated in points 134 and 135 of his Opinion, when the validity of a Commission decision adopted pursuant to Article 25(6) of Directive 95/46 is examined, account must also be taken of the circumstances that have arisen after that decision's adoption.

78 In this regard, it must be stated that, in view of, first, the important role played by the protection of personal data in the light of the fundamental right to respect for private life and, secondly, the large number of persons whose fundamental rights are liable to be infringed where personal data is transferred to a third country not ensuring an adequate level of protection, the Commission's discretion as to the adequacy of the level of protection ensured by a third country is reduced, with the result that review of the requirements stemming from Article 25

of Directive 95/46, read in the light of the Charter, should be strict (see, by analogy, judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 47 and 48).

Article 1 of Decision 2000/520

79 The Commission found in Article 1(1) of Decision 2000/520 that the principles set out in Annex I thereto, implemented in accordance with the guidance provided by the FAQs set out in Annex II, ensure an adequate level of protection for personal data transferred from the European Union to organisations established in the United States. It is apparent from that provision that both those principles and the FAQs were issued by the United States Department of Commerce.

80 An organisation adheres to the safe harbour principles on the basis of a system of self-certification, as is apparent from Article 1(2) and (3) of Decision 2000/520, read in conjunction with FAQ 6 set out in Annex II thereto.

81 Whilst recourse by a third country to a system of self-certification is not in itself contrary to the requirement laid down in Article 25(6) of Directive 95/46 that the third country concerned must ensure an adequate level of protection 'by reason of its domestic law or … international commitments', the reliability of such a system, in the light of that requirement, is founded essentially on the establishment of effective detection and supervision mechanisms enabling any infringements of the rules ensuring the protection of fundamental rights, in particular the right to respect for private life and the right to protection of personal data, to be identified and punished in practice.

82 In the present instance, by virtue of the second paragraph of Annex I to Decision 2000/520, the safe harbour principles are 'intended for use solely by US organisations receiving personal data from the European Union for the purpose of qualifying for the safe harbour and the presumption of "adequacy" it creates'. Those principles are therefore applicable solely to self-certified United States organisations receiving personal data from the European Union, and United States public authorities are not required to comply with them.

83 Moreover, Decision 2000/520, pursuant to Article 2 thereof, 'concerns only the adequacy of protection provided in the United States under the [safe harbour principles] implemented in accordance with the FAQs with a view to meeting the requirements of Article 25(1) of Directive [95/46]', without, however, containing sufficient findings regarding the measures by which the United States ensures an adequate level of protection, within the meaning of Article 25(6) of that directive, by reason of its domestic law or its international commitments.

84 In addition, under the fourth paragraph of Annex I to Decision 2000/520, the applicability of the safe harbour principles may be limited, in particular, 'to the extent necessary to meet national security, public interest, or law enforcement requirements' and 'by statute, government regulation, or case-law that create conflicting obligations or explicit authorisations, provided that, in exercising any such authorisation, an organisation can demonstrate that its non-compliance with the Principles is limited to the extent necessary to meet the overriding legitimate interests furthered by such authorisation'.

85 In this connection, Decision 2000/520 states in Part B of Annex IV, with regard to the limits to which the safe harbour principles' applicability is subject, that, '[c]learly, where US law imposes a conflicting obligation, US organisations whether in the safe harbour or not must comply with the law'.

86 Thus, Decision 2000/520 lays down that 'national security, public interest, or law enforcement requirements' have primacy over the safe harbour principles, primacy pursuant to which self-certified United States organisations receiving personal data from the European Union are bound to disregard those principles without limitation where they conflict with those requirements and therefore prove incompatible with them.

87 In the light of the general nature of the derogation set out in the fourth paragraph of Annex I to Decision 2000/520, that decision thus enables interference, founded on national security and public interest requirements or on domestic legislation of the United States, with the fundamental rights of the persons whose personal data is or could be transferred from the European Union to the United States. To establish the existence of an interference with the fundamental right to respect for private life, it does not matter whether the information in question relating to private life is sensitive or whether the persons concerned have suffered any adverse consequences on account

of that interference (judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 33 and the case-law cited).

88 In addition, Decision 2000/520 does not contain any finding regarding the existence, in the United States, of rules adopted by the State intended to limit any interference with the fundamental rights of the persons whose data is transferred from the European Union to the United States, interference which the State entities of that country would be authorised to engage in when they pursue legitimate objectives, such as national security.

89 Nor does Decision 2000/520 refer to the existence of effective legal protection against interference of that kind. As the Advocate General has observed in points 204 to 206 of his Opinion, procedures before the Federal Trade Commission — the powers of which, described in particular in FAQ 11 set out in Annex II to that decision, are limited to commercial disputes — and the private dispute resolution mechanisms concern compliance by the United States undertakings with the safe harbour principles and cannot be applied in disputes relating to the legality of interference with fundamental rights that results from measures originating from the State.

90 Moreover, the foregoing analysis of Decision 2000/520 is borne out by the Commission's own assessment of the situation resulting from the implementation of that decision. Particularly in points 2 and 3.2 of Communication COM(2013) 846 final and in points 7.1, 7.2 and 8 of Communication COM(2013) 847 final, the content of which is set out in paragraphs 13 to 16 and paragraphs 22, 23 and 25 of the present judgment respectively, the Commission found that the United States authorities were able to access the personal data transferred from the Member States to the United States and process it in a way incompatible, in particular, with the purposes for which it was transferred, beyond what was strictly necessary and proportionate to the protection of national security. Also, the Commission noted that the data subjects had no administrative or judicial means of redress enabling, in particular, the data relating to them to be accessed and, as the case may be, rectified or erased.

91 As regards the level of protection of fundamental rights and freedoms that is guaranteed within the European Union, EU legislation involving interference with the fundamental rights guaranteed by Articles 7 and 8 of the Charter must, according to the Court's settled case-law, lay down clear and precise rules governing the scope and application of a measure and imposing minimum safeguards, so that the persons whose personal data is concerned have sufficient guarantees enabling their data to be effectively protected against the risk of abuse and against any unlawful access and use of that data. The need for such safeguards is all the greater where personal data is subjected to automatic processing and where there is a significant risk of unlawful access to that data (judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 54 and 55 and the case-law cited).

92 Furthermore and above all, protection of the fundamental right to respect for private life at EU level requires derogations and limitations in relation to the protection of personal data to apply only in so far as is strictly necessary (judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 52 and the case-law cited).

93 Legislation is not limited to what is strictly necessary where it authorises, on a generalised basis, storage of all the personal data of all the persons whose data has been transferred from the European Union to the United States without any differentiation, limitation or exception being made in the light of the objective pursued and without an objective criterion being laid down by which to determine the limits of the access of the public authorities to the data, and of its subsequent use, for purposes which are specific, strictly restricted and capable of justifying the interference which both access to that data and its use entail (see, to this effect, concerning Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54), judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 57 to 61).

94 In particular, legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter (see, to this effect, judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 39).

95 Likewise, legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect

the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter. The first paragraph of Article 47 of the Charter requires everyone whose rights and freedoms guaranteed by the law of the European Union are violated to have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law (see, to this effect, judgments in *Les Verts* v *Parliament*, 294/83, EU:C:1986:166, paragraph 23; *Johnston*, 222/84, EU:C:1986:206, paragraphs 18 and 19; *Heylens and Others*, 222/86, EU:C:1987:442, paragraph 14; and *UGT-Rioja and Others*, C-428/06 to C-434/06, EU:C:2008:488, paragraph 80).

96 As has been found in particular in paragraphs 71, 73 and 74 of the present judgment, in order for the Commission to adopt a decision pursuant to Article 25(6) of Directive 95/46, it must find, duly stating reasons, that the third country concerned in fact ensures, by reason of its domestic law or its international commitments, a level of protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order, a level that is apparent in particular from the preceding paragraphs of the present judgment.

97 However, the Commission did not state, in Decision 2000/520, that the United States in fact 'ensures' an adequate level of protection by reason of its domestic law or its international commitments.

98 Consequently, without there being any need to examine the content of the safe harbour principles, it is to be concluded that Article 1 of Decision 2000/520 fails to comply with the requirements laid down in Article 25(6) of Directive 95/46, read in the light of the Charter, and that it is accordingly invalid.

Article 3 of Decision 2000/520

99 It is apparent from the considerations set out in paragraphs 53, 57 and 63 of the present judgment that, under Article 28 of Directive 95/46, read in the light in particular of Article 8 of the Charter, the national supervisory authorities must be able to examine, with complete independence, any claim concerning the protection of a person's rights and freedoms in regard to the processing of personal data relating to him. That is in particular the case where, in bringing such a claim, that person raises questions regarding the compatibility of a Commission decision adopted pursuant to Article 25(6) of that directive with the protection of the privacy and of the fundamental rights and freedoms of individuals.

100 However, the first subparagraph of Article 3(1) of Decision 2000/520 lays down specific rules regarding the powers available to the national supervisory authorities in the light of a Commission finding relating to an adequate level of protection, within the meaning of Article 25 of Directive 95/46.

101 Under that provision, the national supervisory authorities may, '[w]ithout prejudice to their powers to take action to ensure compliance with national provisions adopted pursuant to provisions other than Article 25 of Directive [95/46], … suspend data flows to an organisation that has self-certified its adherence to the [principles of Decision 2000/520]', under restrictive conditions establishing a high threshold for intervention. Whilst that provision is without prejudice to the powers of those authorities to take action to ensure compliance with national provisions adopted pursuant to Directive 95/46, it excludes, on the other hand, the possibility of them taking action to ensure compliance with Article 25 of that directive.

102 The first subparagraph of Article 3(1) of Decision 2000/520 must therefore be understood as denying the national supervisory authorities the powers which they derive from Article 28 of Directive 95/46, where a person, in bringing a claim under that provision, puts forward matters that may call into question whether a Commission decision that has found, on the basis of Article 25(6) of the directive, that a third country ensures an adequate level of protection is compatible with the protection of the privacy and of the fundamental rights and freedoms of individuals.

103 The implementing power granted by the EU legislature to the Commission in Article 25(6) of Directive 95/46 does not confer upon it competence to restrict the national supervisory authorities' powers referred to in the previous paragraph of the present judgment.

104 That being so, it must be held that, in adopting Article 3 of Decision 2000/520, the Commission exceeded the power which is conferred upon it in Article 25(6) of Directive 95/46, read in the light of the Charter, and that Article 3 of the decision is therefore invalid.

105 As Articles 1 and 3 of Decision 2000/520 are inseparable from Articles 2 and 4 of that decision and the annexes thereto, their invalidity affects the validity of the decision in its entirety.

106 Having regard to all the foregoing considerations, it is to be concluded that Decision 2000/520 is invalid.

**Costs**

[…]

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 25(6) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003, read in the light of Articles 7, 8 and 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a decision adopted pursuant to that provision, such as Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46 on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, by which the European Commission finds that a third country ensures an adequate level of protection, does not prevent a supervisory authority of a Member State, within the meaning of Article 28 of that directive as amended, from examining the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which has been transferred from a Member State to that third country when that person contends that the law and practices in force in the third country do not ensure an adequate level of protection.**

2. **Decision 2000/520 is invalid.**