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, but will do so in an 'advanced way'. As such, it revisits the basic features of the EU legal order, yet chooses a particular vantage point to do 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 (lectures 1 and 2), before questioning whether a specific hierarchy exists between different types of fundamental rights as recognised throughout the European Union (lectures 3 and 4). 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 (lectures 5 and 6) and the right to the protection of one's personal data (lectures 7, 8 and 9).

In addition to our class sessions, this course will have two written work requirements instead of an exam. On the one hand, you will be asked to write a case note on a CJEU judgment of your choice, which you must summarise and link with the theme of fundamental rights in the EU. This must allow you to improve your English writing skills. Individual (written, and if and when wanted, oral) feedback will be provided over the course of the semester in order to help you improve your writing. On the other hand, you will be expected to search for and find another judgment in line with the course theme, on which you will again have to write a case note, to be submitted before the end of the semester.

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 on Friday afternoon!

Pieter Van Cleynenbreugel

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COURSE SCHEDULE AND SETUP

Nine two-hour lecture sessions will be organised, which will take place during our regular time-slot on Fridays from 16.00 to 18.00.

The following classes will be organised. They will take place in the Marx classroom in the B31 building.

1. The emergence of fundamental rights in the European Union (6/2)
2. Fundamental rights in the European Union and beyond: the relationship between EU fundamental rights and other fundamental rights regimes (13/2)
3. Fundamental rights in the EU internal market (I): free movement rights as/and fundamental rights (20/2)
4. Fundamental rights in the EU internal market (III): fundamental rights applying horizontally? (27/2)
5. EU-specific fundamental rights: openness and transparency (I) (6/3)

Submission of written assignment (Tuesday 10/3, 16:00 via eCampus and on paper at I.E.J.E. secretariat, B33)

6. EU-specific fundamental rights: openness and transparency (II) (13/3)
7. EU-specific fundamental rights: data protection (I) (20/3)

Please send me your chosen judgment for the second case note via email (pieter.vancleynenbreugel@uliege.be) by 25 March, 16:00 at the latest – I will approve or suggest an alternative at the latest on 27 March

8. EU-specific fundamental rights: data protection (II) (27/3)
9. EU-specific fundamental rights: data protection (III) = Q&A (3/4)

Written feedback on first written assignment will be given at the latest in the week starting 30 March

Submission of your second case note on Friday 8 May, 16:00 at the latest – submission via eCampus and on paper at I.E.J.E. secretariat, B33)

Course materials consist in a reader containing course outlines, cases and materials, available at the Presses Universitaires and in pdf on eCampus. 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 as background to structure and animate the lecture sessions. Additional materials will be posted on e-Campus; you are free to print them.

The course will be taught mostly in an ex cathedra way. However, 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. I may at times invite you to participate in class discussions.

No particular textbook is assigned for this course (it being an Advanced course, focusing on judgments). For your information, I propose some suggestions regarding textbooks, which may help you in structuring and framing the materials covered in class:

- R. Schütze, *An introduction to European Law*, Cambridge, Cambridge University Press, 4th Edition, 2023, 400 p. (another clear introduction to EU law, both from institutional and substantive law perspectives)
- S. Peers and C. Barnard, *European Union law*, Oxford, Oxford Univeristy Press, 4th Edition, 2023, 1064 p. (a comprehensive and up-to-date textbook).
- K. Davies, *Understanding EU law*, Oxford, Routledge, 7h Edition, 2019, 201 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, 7th Edition, 2020, 1344 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).

Please bear in mind that this is a 6 ECTS course, which means that you will be expected to work above and beyond the 24 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.

c. Time slots

As mentioned above, the regular course time slot is Friday afternoon from **16.00 to 18.00**. During that time slot, 9 classes will be organised over the course of the semester. In addition, individual feedback on your assignment will be offered to you.

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 written assignments (assignment one counting for 8 points, assignment two for 12), replacing a more traditional exam. Your first case note will have to be on a CJEU judgment discussed or covered in lectures 3 to 4 (internal market law).

The second case note will have to be on a judgment not covered in class, but linked to the themes in lectures 5-6 (openness and transparency) or 7-9 (personal data protection). You are expected to look for a relevant judgment that is not featured in the course reader and to write a case note, in the same format as the first one, on that judgment. **Before beginning your work, please send me your chosen judgment for the second case note via email (pieter.vancleynenbreugel@uliege.be) by 25 March, 16:00 at the latest – I will approve or suggest an alternative at the latest on 27 March.**

The case notes have to be submitted via eCampus in pdf format only. A written copy has to be handed in at the EU Legal Studies secretariat, 2nd floor of B33, Sart-Tilman

For the first case note, the deadline is at 16:00 (4 PM) on Tuesday 10 March.

For the second case note, the deadline is at 16:00 (4 PM) on Friday 8 May. Please do remember to send me your chosen judgment for the second case note via email (pieter.vancleynenbreugel@uliege.be) by 25 March, 16:00 at the latest – I will approve or suggest an alternative at the latest on 27 March.

As part of each assignment, you will have to summarise the key points in a judgment. I will ask you to pick one of the judgments covered in class (or a judgment on a related matter) 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 – **please do not simply copy those questions in your case note, you are expected to deliver an independent analysis that may cover those items, but may involve other elements as well. Those questions are only meant to guide you, I expect you to come up with your own relevant sub-titles**:
    a. Did the Court follow its earlier case law or did it establish a new precedent?
    b. Did the Court consider 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, at least in terms of the kind of comments advanced by the authors. The examples on eCampus are nevertheless too long and you will have to ensure that you stick within the given page limits. 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. 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).

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;

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,* EU:C:1963:1.
- Court of Justice, 15 July 1964, Case 6/64, *Flaminio Costa v E.N.E.L.*, EU:C:1964:66.
- Court of Justice, 17 December 1970, Case 11-70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114.
- Court of Justice, 13 December 1979, Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz*, EU:C:1979:290.
- 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*, EU:C:2013:105.
- Court of Justice, 26 February 2013, Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, EU:C:2013:107.
- Court of Justice, 18 December 2014, Opinion 2/13, 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)*, EU:C:2017:936.

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.

The EU internal market is built on free movement rights construed as fundamental rights. Those rights enable above all commodities (goods and services) 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 product standards, 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, 12 June 2003, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, EU:C:2003:333.
- Court of Justice, 14 October 2004, Case 36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, EU:C:2004:614.
- 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*, 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*, EU:C:2007:809.

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-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 4: FUNDAMENTAL RIGHTS IN THE EU INTERNAL MARKET (III)/ FUNDAMENTAL RIGHTS APPLYING HORIZONTALLY?

The construction of free movement rights and related rights as fundamental rights forming part of the EU legal order has given rise to questions regarding their scope ratione personae. It is clear that those rights traditionally limited public authorities, both at EU and Member State level. Questions have nevertheless arisen to what extent the fundamental rights status of those rights also implies that they are applicable in horizontal legal relationships as well, i.e. in relationships between two private persons. Stated otherwise, questions emerge as to whether a private person could invoke against another person the violation of his fundamental rights under EU law. To the extent that free movement rights are fundamental rights, a person could thus state that a refusal to contract with him by a national of another Member State would be a (potential) violation of his free movement rights recognised under the EU Treaties.

For a long time, the Court of Justice of the European Union has refused to allow EU fundamental rights to be invoked as such between private persons in the context of free movement fundamental rights, without however explicitly excluding that this would never be possible. In cases relating to workers, the Court seemed to have made an opening, allowing for more horizontal application and invocation of those fundamental rights. That opening has become even clearer in the context of other fundamental rights extending beyond free movement rights, such as the right not to be discriminated. Both as a general principle of EU law and as a right enshrined in the Charter, horizontal application has been accepted. This is remarkable, most notably as rights that are not considered fundamental cannot always be invoked in the same manner, especially when embedded in Directives. The purpose of this lecture is to discuss the cases that gave rise to the horizontal application of EU fundamental rights and to contrast the fundamental rights approach with the lack of horizontal invocability of rights covered by Directives. This will allow us better to understand one of the characteristic features of (some) EU fundamental rights and the importance of this qualification in the EU legal order.

Materials to read:

- Court of Justice, 12 December 1974, Case 36/74, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, EU:C:1974:140.
- Court of Justice, 17 July 2008, Case C-94/07, *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV.*, EU:C:2008:425.
- Court of Justice, 22 November 2005, Case C-144/04, *Werner Mangold v Rüdiger Helm*, EU:C:2005:709.
- Court of Justice, 6 November 2018, Joined Cases C-569/16 and C-570/16, *Bauer et al.*, EU:C:2018:871.

Case 36/74, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*

Parties

IN CASE 36/74

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE ARRONDISSEMENTSRECHTBANK (DISTRICT COURT) UTRECHT, FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

1 . BRUNO NILS OLAF WALRAVE

2 . LONGINUS JOHANNES NORBERT KOCH

AND

1 . ASSOCIATION UNION CYCLISTE INTERNATIONALE

2 . KONINKLIJKE NEDERLANDSCHE WIELREN UNIE

3 . FEDERACION ESPANOLA CICLISMO

Subject of the case

ON THE INTERPRETATION OF ARTICLES 7, 48 AND 59 OF THE EEC TREATY AND THE PROVISIONS OF REGULATION (EEC) NO 1612/68 ON FREEDOM OF MOVEMENT FOR WORKERS WITHIN THE COMMUNITY (OJ L 257 OF 19 . 10 . 1968, P . 2),

Grounds

1 BY ORDER DATED 15 MAY 1974 FILED AT THE COURT REGISTRY ON 24 MAY 1974, THE ARRONDISSEMENTSRECHTBANK UTRECHT REFERRED UNDER ARTICLE 177 OF THE EEC TREATY VARIOUS QUESTIONS RELATING TO THE INTERPRETATION OF THE FIRST PARAGRAPH OF ARTICLE 7, ARTICLE 48 AND THE FIRST PARAGRAPH OF ARTICLE 59 OF THE EEC TREATY AND OF REGULATION NO 1612/68 OF THE COUNCIL OF 15 OCTOBER 1968 (OJ L 257, P . 2) ON FREEDOM OF MOVEMENT FOR WORKERS WITHIN THE COMMUNITY .

2 THE BASIC QUESTION IS WHETHER THESE ARTICLES AND REGULATION MUST BE INTERPRETED IN SUCH A WAY THAT THE PROVISION IN THE RULES OF THE UNION CYCLISTE INTERNATIONALE RELATING TO MEDIUM-DISTANCE WORLD CYCLING CHAMPIONSHIPS BEHIND MOTORCYCLES, ACCORDING TO WHICH " L' ENTRAINEUR DOIT ETRE DE LA NATIONALITE DE COUREUR " (THE PACEMAKER MUST BE OF THE SAME NATIONALITY AS THE STAYER) IS INCOMPATIBLE WITH THEM .

3 THESE QUESTIONS WERE RAISED IN AN ACTION DIRECTED AGAINST THE UNION CYCLISTE INTERNATIONALE AND THE DUTCH AND SPANISH CYCLING FEDERATIONS BY TWO DUTCH

NATIONALS WHO NORMALLY TAKE PART AS PACEMAKERS IN RACES OF THE SAID TYPE AND WHO REGARD THE AFOREMENTIONED PROVISION OF THE RULES OF UCI AS DISCRIMINATORY .

4 HAVING REGARD TO THE OBJECTIVES OF THE COMMUNITY, THE PRACTICE OF SPORT IS SUBJECT TO COMMUNITY LAW ONLY IN SO FAR AS IT CONSTITUTES AN ECONOMIC ACTIVITY WITHIN THE MEANING OF ARTICLE 2 OF THE TREATY .

5 WHEN SUCH ACTIVITY HAS THE CHARACTER OF GAINFUL EMPLOYMENT OR REMUNERATED SERVICE IT COMES MORE PARTICULARLY WITHIN THE SCOPE, ACCORDING TO THE CASE, OF ARTICLES 48 TO 51 OR 59 TO 66 OF THE TREATY .

6 THESE PROVISIONS, WHICH GIVE EFFECT TO THE GENERAL RULE OF ARTICLE 7 OF THE TREATY, PROHIBIT ANY DISCRIMINATION BASED ON NATIONALITY IN THE PERFORMANCE OF THE ACTIVITY TO WHICH THEY REFER .

7 IN THIS RESPECT THE EXACT NATURE OF THE LEGAL RELATIONSHIP UNDER WHICH SUCH SERVICES ARE PERFORMED IS OF NO IMPORTANCE SINCE THE RULE OF NON-DISCRIMINATION COVERS IN IDENTICAL TERMS ALL WORK OR SERVICES .

8 THIS PROHIBITION HOWEVER DOES NOT AFFECT THE COMPOSITION OF SPORT TEAMS, IN PARTICULAR NATIONAL TEAMS, THE FORMATION OF WHICH IS A QUESTION OF PURELY SPORTING INTEREST AND AS SUCH HAS NOTHING TO DO WITH ECONOMIC ACTIVITY .

9 THIS RESTRICTION ON THE SCOPE OF THE PROVISIONS IN QUESTION MUST HOWEVER REMAIN LIMITED TO ITS PROPER OBJECTIVE .

10 HAVING REGARD TO THE ABOVE, IT IS FOR THE NATIONAL COURT TO DETERMINE THE NATURE OF THE ACTIVITY SUBMITTED TO ITS JUDGMENT AND TO DECIDE IN PARTICULAR WHETHER IN THE SPORT IN QUESTION THE PACEMAKER AND STAYER DO OR DO NOT CONSTITUTE A TEAM .

11 THE ANSWERS ARE GIVEN WITHIN THE LIMITS DEFINED ABOVE OF THE SCOPE OF COMMUNITY LAW .

12 THE QUESTIONS RAISED RELATE TO THE INTERPRETATION OF ARTICLES 48 AND 59 AND TO A LESSER EXTENT OF ARTICLE 7 OF THE TREATY .

13 BASICALLY THEY RELATE TO THE APPLICABILITY OF THE SAID PROVISIONS TO LEGAL RELATIONSHIPS WHICH DO NOT COME UNDER PUBLIC LAW, THE DETERMINATION OF THEIR TERRITORIAL SCOPE IN THE LIGHT OF RULES OF SPORT EMANATING FROM A WORLD-WIDE FEDERATION AND THE DIRECT APPLICABILITY OF CERTAIN OF THOSE PROVISIONS .

14 THE MAIN QUESTION IN RESPECT OF ALL THE ARTICLES REFERRED TO IS WHETHER THE RULES OF AN INTERNATIONAL SPORTING FEDERATION CAN BE REGARDED AS INCOMPATIBLE WITH THE TREATY .

15 IT HAS BEEN ALLEGED THAT THE PROHIBITIONS IN THESE ARTICLES REFER ONLY TO RESTRICTIONS WHICH HAVE THEIR ORIGIN IN ACTS OF AN AUTHORITY AND NOT TO THOSE RESULTING FROM LEGAL ACTS OF PERSONS OR ASSOCIATIONS WHO DO NOT COME UNDER PUBLIC LAW .

16 ARTICLES 7, 48, 59 HAVE IN COMMON THE PROHIBITION, IN THEIR RESPECTIVE SPHERES OF APPLICATION, OF ANY DISCRIMINATION ON GROUNDS OF NATIONALITY .

17 PROHIBITION OF SUCH DISCRIMINATION DOES NOT ONLY APPLY TO THE ACTION OF PUBLIC AUTHORITIES BUT EXTENDS LIKEWISE TO RULES OF ANY OTHER NATURE AIMED AT REGULATING IN A COLLECTIVE MANNER GAINFUL EMPLOYMENT AND THE PROVISION OF SERVICES .

18 THE ABOLITION AS BETWEEN MEMBER STATES OF OBSTACLES TO FREEDOM OF MOVEMENT FOR PERSONS AND TO FREEDOM TO PROVIDE SERVICES, WHICH ARE FUNDAMENTAL OBJECTIVES OF THE COMMUNITY CONTAINED IN ARTICLE 3 (C) OF THE TREATY, WOULD BE COMPROMISED IF THE ABOLITION OF BARRIERS OF NATIONAL ORIGIN COULD BE NEUTRALIZED BY OBSTACLES RESULTING FROM THE EXERCISE OF THEIR LEGAL AUTONOMY BY ASSOCIATIONS OR ORGANIZATIONS WHICH DO NOT COME UNDER PUBLIC LAW .

19 SINCE, MOREOVER, WORKING CONDITIONS IN THE VARIOUS MEMBER STATES ARE GOVERNED SOMETIMES BY MEANS OF PROVISIONS LAID DOWN BY LAW OR REGULATION AND SOMETIMES BY AGREEMENTS AND OTHER ACTS CONCLUDED OR ADOPTED BY PRIVATE PERSONS, TO LIMIT THE PROHIBITIONS IN QUESTION TO ACTS OF A PUBLIC AUTHORITY WOULD RISK CREATING INEQUALITY IN THEIR APPLICATION .

20 ALTHOUGH THE THIRD PARAGRAPH OF ARTICLE 60, AND ARTICLES 62 AND 64, SPECIFICALLY RELATE, AS REGARDS THE PROVISION OF SERVICES, TO THE ABOLITION OF MEASURES BY THE STATE, THIS FACT DOES NOT DEFEAT THE GENERAL NATURE OF THE TERMS OF ARTICLE 59, WHICH MAKES NO DISTINCTION BETWEEN THE SOURCE OF THE RESTRICTIONS TO BE ABOLISHED .

21 IT IS ESTABLISHED, MOREOVER, THAT ARTICLE 48, RELATING TO THE ABOLITION OF ANY DISCRIMINATION BASED ON NATIONALITY AS REGARDS GAINFUL EMPLOYMENT, EXTENDS LIKEWISE TO AGREEMENTS AND RULES WHICH DO NOT EMANATE FROM PUBLIC AUTHORITIES .

22 ARTICLE 7 (4) OF REGULATION NO 1612/68 IN CONSEQUENCE PROVIDES THAT THE PROHIBITION ON DISCRIMINATION SHALL APPLY TO AGREEMENTS AND ANY OTHER COLLECTIVE REGULATIONS CONCERNING EMPLOYMENT .

23 THE ACTIVITIES REFERRED TO IN ARTICLE 59 ARE NOT TO BE DISTINGUISHED BY THEIR NATURE FROM THOSE IN ARTICLE 48, BUT ONLY BY THE FACT THAT THEY ARE PERFORMED OUTSIDE THE TIES OF A CONTRACT OF EMPLOYMENT .

24 THIS SINGLE DISTINCTION CANNOT JUSTIFY A MORE RESTRICTIVE INTERPRETATION OF THE SCOPE OF THE FREEDOM TO BE ENSURED .

25 IT FOLLOWS THAT THE PROVISIONS OF ARTICLES 7, 48 AND 59 OF THE TREATY MAY BE TAKEN INTO ACCOUNT BY THE NATIONAL COURT IN JUDGING THE VALIDITY OR THE EFFECTS OF A PROVISION INSERTED IN THE RULES OF A SPORTING ORGANIZATION .

26 THE NATIONAL COURT THEN RAISES THE QUESTION OF THE EXTENT TO WHICH THE RULE ON NON-DISCRIMINATION MAY BE APPLIED TO LEGAL RELATIONSHIPS ESTABLISHED IN THE CONTEXT OF THE ACTIVITIES OF A SPORTING FEDERATION OF WORLD-WIDE PROPORTIONS .

27 THE COURT IS ALSO INVITED TO SAY WHETHER THE LEGAL POSITION MAY DEPEND ON WHETHER THE SPORTING COMPETITION IS HELD WITHIN OR OUTSIDE THE COMMUNITY .

28 BY REASON OF THE FACT THAT IT IS IMPERATIVE, THE RULE ON NON-DISCRIMINATION APPLIES IN JUDGING ALL LEGAL RELATIONSHIPS IN SO FAR AS THESE RELATIONSHIPS, BY REASON EITHER OF THE PLACE WHERE THEY ARE ENTERED INTO OR OF THE PLACE WHERE THEY TAKE EFFECT, CAN BE LOCATED WITHIN THE TERRITORY OF THE COMMUNITY .

29 IT IS FOR THE NATIONAL JUDGE TO DECIDE WHETHER THEY CAN BE SO LOCATED, HAVING REGARD TO THE FACTS OF EACH PARTICULAR CASE, AND, AS REGARDS THE LEGAL EFFECT OF THESE RELATIONSHIPS, TO DRAW THE CONSEQUENCES OF ANY INFRINGEMENT OF THE RULE ON NON-DISCRIMINATION .

30 FINALLY, THE NATIONAL COURT HAS RAISED THE QUESTION WHETHER THE FIRST PARAGRAPH OF ARTICLE 59, AND POSSIBLY THE FIRST PARAGRAPH OF ARTICLE 7, OF THE TREATY HAVE DIRECT EFFECTS WITHIN THE LEGAL ORDERS OF THE MEMBER STATES .

31 AS HAS BEEN SHOWN ABOVE, THE OBJECTIVE OF ARTICLE 59 IS TO PROHIBIT IN THE SPHERE OF THE PROVISION OF SERVICES, INTER ALIA, ANY DISCRIMINATION ON THE GROUNDS OF THE NATIONALITY OF THE PERSON PROVIDING THE SERVICES .

32 IN THE SECTOR RELATING TO SERVICES, ARTICLE 59 CONSTITUTES THE IMPLEMENTATION OF THE NON-DISCRIMINATION RULE FORMULATED BY ARTICLE 7 FOR THE GENERAL APPLICATION OF THE TREATY AND BY ARTICLE 48 FOR GAINFUL EMPLOYMENT .

33 THUS, AS HAS ALREADY BEEN RULED (JUDGMENT OF 3 DECEMBER 1974 IN CASE 33/74, VAN BINSBERGEN) ARTICLE 59 COMPRISES, AS AT THE END OF THE TRANSITIONAL PERIOD, AN UNCONDITIONAL PROHIBITION PREVENTING, IN THE LEGAL ORDER OF EACH MEMBER STATE, AS REGARDS THE PROVISION OF SERVICES - AND IN SO FAR AS IT IS A QUESTION OF NATIONALS OF MEMBER STATES - THE IMPOSITION OF OBSTACLES OR LIMITATIONS BASED ON THE NATIONALITY OF THE PERSON PROVIDING THE SERVICES .

34 IT IS THEREFORE RIGHT TO REPLY TO THE QUESTION RAISED THAT AS FROM THE END OF THE TRANSITIONAL PERIOD THE FIRST PARAGRAPH OF ARTICLE 59, IN ANY EVENT IN SO FAR AS IT REFERS TO THE ABOLITION OF ANY DISCRIMINATION BASED ON NATIONALITY, CREATE INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT .

Decision on costs

35 THE COSTS INCURRED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES, WHICH HAS SUBMITTED OBSERVATIONS TO THE COURT, ARE NOT RECOVERABLE .

36 SINCE THESE PROCEEDINGS ARE, IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED, A STEP IN THE ACTION PENDING BEFORE THE NATIONAL COURT, COSTS ARE A MATTER FOR THAT COURT .

Operative part

ON THOSE GROUNDS,

THE COURT

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE ARRONDISSEMENTSRECHTBANK UTRECHT, HEREBY RULES :

1 . HAVING REGARD TO THE OBJECTIVES OF THE COMMUNITY, THE PRACTICE OF SPORT IS SUBJECT TO COMMUNITY LAW ONLY IN SO FAR AS IT CONSTITUTES AN ECONOMIC ACTIVITY WITHIN THE MEANING OF ARTICLE 2 OF THE TREATY .

2 . THE PROHIBITION ON DISCRIMINATION BASED ON NATIONALITY CONTAINED IN ARTICLES 7, 48 AND 59 OF THE TREATY DOES NOT AFFECT THE COMPOSITION OF SPORT TEAMS, IN PARTICULAR NATIONAL TEAMS, THE FORMATION OF WHICH IS A QUESTION OF PURELY SPORTING INTEREST AND AS SUCH HAS NOTHING TO DO WITH ECONOMIC ACTIVITY .

3 . PROHIBITION ON SUCH DISCRIMINATION DOES NOT ONLY APPLY TO THE ACTION OF PUBLIC AUTHORITIES BUT EXTENDS LIKEWISE TO RULES OF ANY OTHER NATURE AIMED AT COLLECTIVELY REGULATING GAINFUL EMPLOYMENT AND SERVICES .

4 . THE RULE ON NON-DISCRIMINATION APPLIES IN JUDGING ALL LEGAL RELATIONSHIPS IN SO FAR AS THESE RELATIONSHIPS, BY REASON EITHER OF THE PLACE WHERE THEY ARE ENTERED INTO OR

OF THE PLACE WHERE THEY TAKE EFFECT, CAN BE LOCATED WITHIN THE TERRITORY OF THE COMMUNITY .

5 . THE FIRST PARAGRAPH OF ARTICLE 59, IN ANY EVENT IN SO FAR AS IT REFERS TO THE ABOLITION OF ANY DISCRIMINATION BASED ON NATIONALITY, CREATES INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT .

Case C-94/07, *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV.*

In Case C-94/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Arbeitsgericht Bonn (Germany), made by decision of 4 November 2004, received at the Court on 20 February 2007, in the proceedings

Andrea Raccanelli

v

Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV,

THE COURT (Fifth Chamber),

[…]

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 39 EC and Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

2 The reference has been made in the course of proceedings between Mr Raccanelli and the Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV ('MPG') concerning an employment relationship which Mr Raccanelli claims that he entered into with the Max Planck Institute for Radio Astronomy in Bonn ('MPI'), which forms part of MPG.

Legal context

Community legislation

3 Article 1 of Regulation No 1612/68, which appears in Title I, headed 'Eligibility for employment', provides:

'1. Any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State.'

4 Article 7 of Regulation No 1612/68, which appears in Title II, headed 'Employment and equality of treatment', is worded as follows:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.

…

4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.'

National legislation

5 According to national legislation, 'BAT/2 employment contract' or 'BAT IIa half-time contract' means a contract entered into on the basis of the IIa grade of the pay scale, as applicable at the material time, of the federal collective agreement for public-sector workers (BAT), and under which the working hours correspond to 50% of a full-time post.

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

6 MPG is established under German private law in the form of an association operating in the public interest. It manages a number of scientific research institutes in Germany and other European States.

7 These research institutes, named 'Max Planck Institutes', conduct basic research in the general interest in the natural sciences, life sciences, the humanities and social sciences.

8 MPG operates two methods of advancement for junior researchers, enabling them, in particular, to prepare a thesis: a grant contract or an employment contract.

9 The main difference between the two means of support for doctoral students is that:

– the recipient of a grant is under no obligation to work for the institute in question, and instead may devote himself entirely to work relating to his thesis, whereas

– the holder of a BAT IIa half-time contract is under an obligation to work for the institute which employs him and may use its facilities for the purposes of his thesis only outside his working hours.

10 Moreover, the two types of contract may also be distinguished from the point of view of the contracting parties' tax obligations and their affiliation to the social security system.

11 Thus, grant recipients are exempt from income tax and are not affiliated to the social security system. By contrast, researchers holding BAT IIa half-time posts are liable to income tax and must pay social security contributions in respect of their employment.

12 In the period from 7 February 2000 to 31 July 2003, Mr Raccanelli, an Italian national, worked at MPI in connection with the preparation of his doctoral thesis. His activities were based on a letter from MPI of 7 February 2000, which was signed by him.

13 By that letter, MPI awarded him a monthly grant for the period from 7 February 2000 to 6 February 2002 to enable him to prepare his doctorate in Germany and abroad on the subject of the 'development of a bolometer camera for wavelengths below 300 μm'.

14 The letter was worded as follows:

'Acceptance of the grant obliges you to dedicate yourself wholly to the objective of the grant. Other activities require the prior consent of the institute's management.

The grant is paid as a contribution to living costs but not as consideration for your scientific work.

Acceptance of the grant does not oblige you to undertake any work as an employee of the Max-Planck-Gesellschaft. Therefore the grant is exempt from income tax under Paragraph 3(44) of the Einkommensteuergesetz [(Law on income tax)] and exempt from tax on wages under Paragraph 6(22) of the Lohnsteuerdurchführungsverordnung [(Implementing regulation on tax on wages)] and consequently also exempt from social security contributions.'

15 By a supplementary contract dated 29 November 2001, Mr Raccanelli's 'doctoral student contract' was extended to 6 August 2002, and, subsequently, to 6 May 2003. In respect of the period from 7 May 2003 to 31 July 2003, the parties concluded an agreement on 19 May 2003 which was worded as follows:

'In the period from 7 May 2003 to 31 July 2003 Mr Raccanelli will be here as a guest of our institute. The institute will make an appropriate work place available to him and its operatives will supervise him.

Other facilities are available to him within the limits of the institute's regulations and the applicable provisions; he undertakes to comply with these provisions.

His stay as a guest does not establish any employment relationship and no allowance shall be paid.

...'

16 Mr Raccanelli brought an action before the Arbeitsgericht Bonn (Labour Court, Bonn), primarily for a declaration that there was an employment relationship between him and MPG during the period from 7 February 2000 to 31 July 2003.

17 Mr Raccanelli claims that, during that period, he was treated in the same way as German doctoral students employed under BAT IIa half-time contracts, for whom such contracts (according to Mr Raccanelli) – involving, in particular, the benefit of social-security affiliation – were reserved.

18 MPG rejects those claims.

19 Without ruling on the factual aspect of the contractual relationship between the two parties during the period in question, the referring court proceeds on the basis that the degree of Mr Raccanelli's personal dependency on MPI is not sufficient for there to have been an employment relationship between them.

20 The referring court queries whether, in view of MPG's status as a private-law association, MPG is bound by the principle of non-discrimination as if it were a public-law body.

21 In those circumstances, the Arbeitsgericht Bonn decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Should the applicant be regarded as a worker within the meaning of the Community concept of "worker" if he is not called upon to provide any more work-related services than are doctoral students with an employment contract concluded pursuant to the Bundesangestelltentarifvertrag (federal collective agreement for public-sector workers, "BAT/2")?

(2) In the event that the answer to Question 1 is in the negative: must Article 7 of Regulation … No 1612/68 … be interpreted as meaning that there is no discrimination only if the applicant was at least granted the right to choose between an employment contract and a grant before his period of doctoral study with the defendant began?

(3) In the event that the answer to Question 2 is that the applicant should have been granted the opportunity to conclude an employment contract, the question must be asked:

What are the consequences in law in the event of discrimination against foreign nationals?'

The questions referred for a preliminary ruling

Admissibility of the reference for a preliminary ruling

22 MPG submits in its written observations that the reference for a preliminary ruling must be dismissed as inadmissible.

23 According to MPG, the referring court has not established the facts of the dispute between the parties to the main proceedings, and has failed to give reasons to justify the questions raised. Therefore, it argues, the Court does not have the information necessary in order to enable it to reply usefully to those questions.

24 It must be observed in that regard that, according to settled case-law of the Court, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (Case C-134/03 *Viacom Outdoor*[2005] ECR I-1167, paragraph 22, and Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 26).

25 Moreover, the information provided in orders for reference must not only be such as to enable the Court to reply usefully but must also enable the governments of the Member States and other interested parties to submit observations pursuant to Article 20 of the Statute of the Court of Justice (order in Case C-422/98 *Colonia Versicherung and Others* [1999] ECR I-1279, paragraph 5, and Case C-20/05 *Schwibbert* [2007] ECR I-0000, paragraph 21).

26 In order to ascertain whether the information supplied by the Arbeitsgericht Bonn satisfies those requirements, the nature and scope of the questions raised have to be taken into consideration (see, to that effect, *Confederación Española de Empresarios de Estaciones de Servicio*, paragraph 29).

27 In that regard, it must be noted that the first question referred for a preliminary ruling is stated in very general terms, in that it seeks to obtain an interpretation of the Community concept of 'worker', as referred to in Article 39 EC and Article 7 of Regulation No 1612/68.

28 The questions raised by the Arbeitsgericht Bonn in the alternative concern the principle of non-discrimination under Article 12 EC.

29 However, while there may be gaps in the reference for a preliminary ruling, both in relation to the presentation of the facts of the main proceedings and the grounds for the reference, the Court none the less has sufficient information to enable it to determine the scope of the questions raised and to interpret the Community provisions at issue so as to reply usefully to those questions.

30 Moreover, both the Commission of the European Communities and, to a certain extent, MPG took the view that it was possible to submit written observations to the Court of Justice on the basis of the information provided by the national court.

31 In those circumstances, the reference for a preliminary ruling must be held to be admissible.

Substance

Question 1

32 By its first question, the referring court asks, in essence, whether a researcher in a similar situation to that of the applicant in the main proceedings, that is a researcher preparing a doctoral thesis on the basis of a grant contract concluded with MPG, must be regarded as a worker within the meaning of Article 39 EC if he is called upon to perform as much work as a researcher preparing a doctoral thesis on the basis of a BAT/2 employment contract with MPG.

33 In that regard, it must be noted that the Court has consistently held that the concept of 'worker' within the meaning of Article 39 EC has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be

regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, in particular, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17; Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 26; and Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 15).

34 The applicant in the main proceedings can therefore be acknowledged to have the status of worker only if the referring court, which alone is competent to assess the facts of the case in the main proceedings, were to establish the existence in that case of the constituent elements of any paid employment relationship, namely subordination and the payment of remuneration.

35 Consequently, since the referring court is required to verify the existence of the criteria set out in paragraph 33 of the present judgment, it follows that its examination should cover, inter alia, the substance of the doctoral student contract and of the supplementary contract, and the arrangements for giving effect to those documents.

36 While it must be concluded from the foregoing that Mr Raccanelli's status as a worker, within the meaning of Article 39 EC, must be determined objectively in accordance with the criteria set out in paragraph 33 of the present judgment, it is, by contrast, not possible to draw any conclusion with regard to that status from a comparison of the work of the applicant in the main proceedings and the work carried out or to be carried out by a researcher preparing a doctoral thesis on the basis of a BAT/2 employment contract concluded with MPG.

37 Accordingly, the answer to the first question must be that a researcher in a similar situation to that of the applicant in the main proceedings, that is, a researcher preparing a doctoral thesis on the basis of a grant contract concluded with MPG, must be regarded as a worker within the meaning of Article 39 EC only if his activities are performed for a certain period of time under the direction of an institute forming part of that association and if, in return for those activities, he receives remuneration. It is for the referring court to undertake the necessary verification of the facts in order to establish whether such is the case in the dispute before it.

Question 2

38 By its second question, the referring court asks, in essence, whether there is no discrimination only if the applicant in the main proceedings was at least granted the right to choose between an employment contract and a grant before beginning his period of doctoral study with MPG.

39 As a preliminary point, it must be noted that the question whether Mr Raccanelli would have had the right, by virtue of MPG's practice, to choose between a grant contract and a BAT/2 employment contract if he did not have the status of worker within the meaning of Article 39 EC and Article 7 of Regulation No 1612/68 is a question of national law which it is not for the Court to address.

40 However, it follows from Part II of the grounds for the order for reference that, by its second question, the Arbeitsgericht Bonn is asking, in essence, whether MPG is bound – notwithstanding its establishment as a private-law association – by the principle of non-discrimination as if it had the status of a public-law body, and whether MPG is therefore obliged to accord Mr Raccanelli the right to choose between a grant contract and an employment contract.

41 In that regard, it must be borne in mind that, under Article 39 EC, freedom of movement for workers within the European Community entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment (Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 29).

42 Moreover, it must be noted that the principle of non-discrimination laid down by Article 39 EC is worded in general terms and is not addressed specifically to the Member States or to bodies governed by public law.

43 Thus, the Court has held that the prohibition of discrimination based on nationality applies not only to the actions of public authorities but also to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17, and *Angonese*, paragraph 31).

44 The Court has held that the abolition, as between Member States, of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law (see *Walrave and Koch*, paragraph 18, and Case C-415/93 *Bosman*[1995] ECR I-4921, paragraph 83).

45 The Court has thus held, with regard to Article 39 EC, which lays down a fundamental freedom and which constitutes a specific application of the general prohibition of discrimination contained in Article 12 EC, that the prohibition of discrimination applies equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals (see Case 43/75 *Defrenne* [1976] ECR 455, paragraph 39, and *Angonese*, paragraphs 34 and 35).

46 It must be held, therefore, that the prohibition of discrimination based on nationality laid down by Article 39 EC applies equally to private-law associations such as MPG.

47 As to the question whether MPG was, in consequence, obliged to accord Mr Raccanelli the right to choose between a grant contract and an employment contract, the answer must be that the Court has consistently held that discrimination consists in the application of different rules to comparable situations or in the application of the same rule to different situations (see, to that effect, Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 26). It is for the referring court to establish whether, by reason of the application of different rules to comparable situations in circumstances such as those of the case in the main proceedings, the potential withholding of that choice resulted in inequality in the treatment of domestic and foreign doctoral students.

48 In those circumstances, the answer to the second question must be that a private-law association, such as MPG, must observe the principle of non-discrimination in relation to workers within the meaning of Article 39 EC. It is for the referring court to establish whether, in circumstances such as those of the case in the main proceedings, there has been inequality in the treatment of domestic and foreign doctoral students.

Question 3

49 By its third question, the referring court asks what the consequences in law are in the event that discrimination against a foreign doctoral student arises from the fact that the latter did not have the opportunity to conclude an employment contract with MPG.

50 In that regard, it must be held that neither Article 39 EC nor Regulation No 1612/68 prescribes a specific measure to be taken by the Member States or associations such as MPG in the event of a breach of the prohibition of discrimination, but leaves them free to choose between the different solutions suitable for achieving the objective of those respective provisions, depending on the different situations which may arise (see, to that effect, Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraph 18, and Case C-460/06 *Paquay* [2007] ECR I-8511, paragraph 44).

51 Consequently, as the Commission indicates in its written observations, it is for the referring court to assess, in the light of the national legislation applicable in relation to non-contractual liability, the nature of the compensation which the applicant in the main proceedings would be entitled to claim.

52 In those circumstances, the answer to the third question must be that, in the event that the applicant in the main proceedings is justified in relying on damage caused by the discrimination to which he has been subject, it is for the referring court to assess, in the light of the national legislation applicable in relation to non-contractual liability, the nature of the compensation which he would be entitled to claim.

Costs […]

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

1. **A researcher in a similar situation to that of the applicant in the main proceedings, that is, a researcher preparing a doctoral thesis on the basis of a grant contract concluded with the Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV, must be regarded as a worker within the meaning of Article 39 EC only if his activities are performed for a certain period of time under the direction of an institute forming part of that association and if, in return for those activities, he receives remuneration. It is for the referring**

court to undertake the necessary verification of the facts in order to establish whether such is the case in the dispute before it.

2. **A private-law association, such as the Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV, must observe the principle of non-discrimination in relation to workers within the meaning of Article 39 EC. It is for the referring court to establish whether, in circumstances such as those of the case in the main proceedings, there has been inequality in the treatment of domestic and foreign doctoral students.**

3. **In the event that the applicant in the main proceedings is justified in relying on damage caused by the discrimination to which he has been subject, it is for the referring court to assess, in the light of the national legislation applicable in relation to non-contractual liability, the nature of the compensation which he would be entitled to claim.**

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.

Joined Cases C-569/16 and C-570/16, *Bauer et al*

In Joined Cases C-569/16 and C-570/16,

REQUESTS for a preliminary ruling under Article 267 TFEU made by the Bundesarbeitsgericht (Federal Labour Court, Germany), by decisions of 18 October 2016, received at the Court on 10 November 2016, in the proceedings

Stadt Wuppertal

v

Maria Elisabeth Bauer (C-569/16) and

and

Volker Willmeroth, in his capacity as owner of TWI Technische Wartung und Instandsetzung Volker Willmeroth e.K.

v

Martina Broßonn (C-570/16),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, J.-C. Bonichot, A. Prechal (Rapporteur), M. Vilaras, T. von Danwitz, F. Biltgen, K. Jürimäe, and C. Lycourgos, Presidents of Chambers, M. Ilešič, J. Malenovský, E. Levits, L. Bay Larsen and S. Rodin, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Stadt Wuppertal, by T. Herbert, Rechtsanwalt,

– Mrs Broßonn, by O. Teubler, Rechtsanwalt,

– the European Commission, by M. van Beek and T.S. Bohr, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 May 2018,

gives the following

Judgment

1 The present requests for a preliminary ruling concern the interpretation of Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9) and of Article 31(2) of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The requests have been made in two sets of proceedings between, in Case C-569/16, Stadt Wuppertal (town of Wuppertal, Germany) and Mrs Maria Elisabeth Bauer and, in Case C-570/16, Mr Volker Willmeroth, in his capacity as owner of TWI Technische Wartung und Instandsetzung Volker Willmeroth e.K., and Mrs Martina Broßonn, concerning the refusal by Stadt Wuppertal and Mr Willmeroth, respectively, in their capacity as former employers of the late husbands of Mrs Bauer and Mrs Broßonn, to pay Mrs Bauer and Mrs Broßonn an allowance in lieu of the paid annual leave not taken by their spouses before their death.

Legal context

European Union law

3 The fourth recital of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), stated:

'Whereas the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council held at Strasbourg on 9 December 1989 by the Heads of State or of Government of 11 Member States, and in particular … [point] 8 … thereof, declared that:

"…

8. Every worker in the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be progressively harmonised in accordance with national practices.

..."'

4 As is apparent from recital 1, Directive 2003/88, which repealed Directive 93/104, codified the provisions of the latter.

5 According to recitals 4 to 6 of Directive 2003/88:

'(4) The improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.

(5) All workers should have adequate rest periods. The concept of "rest" must be expressed in units of time, i.e. in days, hours and/or fractions thereof. [European Union] workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. …

(6) Account should be taken of the principles of the International Labour Organisation with regard to the organisation of working time, including those relating to night work.'

6 Article 7 of Directive 2003/88, which is identical to Article 7 of Directive 93/104, is worded as follows:

'1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

7 Article 17 of Directive 2003/88 provides that Member States may derogate from certain provisions of that directive. However, no derogation is permitted in respect of Article 7 of the directive.

German law

8 Paragraph 7(4) of the Bundesurlaubsgesetz (Federal Law on leave), of 8 January 1963 (BGBl. 1963, p. 2), in its version of 7 May 2002 (BGBl. 2002 I, p. 1529) ('the BUrlG'), provides:

‘If, because of the termination of the employment relationship, leave can no longer be granted in whole or in part, an allowance shall be paid in lieu.’

9 Paragraph 1922(1) of the Bürgerliches Gesetzbuch (Civil Code) (‘the BGB’) provides, under the heading ‘Universal Succession’:

‘Upon the death of a person (devolution of an inheritance), that person’s property (estate) passes as a whole to one or several other persons (heirs).’

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

10 Mrs Bauer is the sole legal heir of her husband, who died on 20 December 2010, and who was employed by Stadt Wuppertal. The latter rejected Mrs Bauer’s request for an allowance in the amount of EUR 5 857.75, corresponding to the 25 days of outstanding paid annual leave which her husband had not taken at the time of his death.

11 Mrs Broßonn is the sole legal heir of her husband, who had been employed by Mr Willmeroth since 2003 and had died on 4 January 2013, having been unable to work since July 2012 due to illness. Mr Willmeroth rejected Mrs Broßonn’s request for an allowance in the amount of EUR 3 702.72, corresponding to the 32 days of outstanding paid annual leave which her husband had not taken at the time of his death.

12 Mrs Bauer and Mrs Broßonn both brought an action before the Arbeitsgericht (Labour Court, Germany) having jurisdiction, seeking payment of those allowances. Those actions were upheld, and the appeals brought, respectively, by Stadt Wuppertal and by Mr Willmeroth against the judgments delivered at first instance were dismissed by the Landesarbeitsgericht (Higher Labour Court, Germany) having jurisdiction. Stadt Wuppertal and Mr Willmeroth thereupon appealed to the referring court, the Bundesarbeitsgericht (Federal Labour Court, Germany), on a point of law against those decisions.

13 In the orders for reference in each of those two cases, the referring court points out that the Court has already held, in its judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755), that Article 7 of Directive 2003/88 must be interpreted as precluding national legislation or practice which provides that the entitlement to paid annual leave is lost without conferring entitlement to an allowance in lieu of outstanding paid annual leave, where the employment relationship is terminated by the death of the worker.

14 The referring court asks, however, whether the same applies where national law precludes an allowance in lieu from forming part of the estate of the deceased.

15 In that regard, that court states that, read together, Paragraph 7(4) of the BUrlG and Paragraph 1922(1) of the BGB lead to the right to paid annual leave lapsing upon the worker’s death, as a result of which it cannot be converted into an entitlement to an allowance in lieu or be part of the estate. It states, furthermore, that any other interpretation of those provisions would be *contra legem* and cannot therefore be accepted.

16 First, the referring court recalls that the Court held, in the judgment of 22 November 2011, *KHS* (C-214/10, EU:C:2011:761), that the right to paid annual leave could lapse after 15 months from the end of the reference year, since it had not yet satisfied the purpose of the leave, which was to enable the worker to rest and to enjoy a period of relaxation and leisure. Moreover, noting that that objective does not appear capable of being attained where the worker dies, the referring court asks whether the loss of the right to paid annual leave and to an allowance in lieu of paid annual leave not taken may also be accepted in the latter case. According to that court, to hold otherwise would suggest that the minimum paid annual leave guaranteed by Directive 2003/88 and the Charter is also intended to provide cover for the heirs of the deceased worker.

17 In that context, the referring court is also uncertain whether Article 7 of Directive 2003/88 or Article 31(2) of the Charter may have the effect of requiring the employer to pay an allowance in lieu of paid annual leave not taken to the worker’s heirs, notwithstanding the fact that, in the present case, the provisions of national law mentioned in paragraph 15 of the present judgment preclude such a possibility.

18 Finally, in Case C-570/16, the referring court, which observes that the dispute in the main proceedings is between two individuals, asks whether those provisions of EU law are capable of producing direct effect in such a context.

19 It is in those circumstances that the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling, the first of those questions being asked in identical terms in respect of Cases C-569/16 and C-570/16, and the second only in respect of Case C-570/16:

'(1) Does Article 7 of Directive [2003/88] or Article 31(2) of the [Charter] grant the heir of a worker who died while in an employment relationship a right to financial compensation for the worker's minimum annual leave prior to his death, which is precluded by Paragraph 7(4) of the [BUrlG], read in conjunction with Paragraph 1922(1) of the [BGB]?

(2) If the first question is answered in the affirmative: Does this also apply where the employment relationship is between two private persons?'

Consideration of the questions referred

Admissibility

20 Mrs Broßonn casts doubt on the admissibility of the requests for a preliminary ruling on the ground, first, that the Court has already held, in its judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755), that Article 7 of Directive 2003/88 precludes national legislation or practices, such as that at issue in the main proceedings, under which, in the event of the death of the worker, the right to paid annual leave lapses without giving rise to an entitlement to an allowance in lieu of paid annual leave not taken. To hold that that provision does not preclude the national legislation at issue, in so far as it prevents the allowance from being passed on to the heirs, would render ineffective the guidance resulting from the judgment of the Court. Moreover, many national courts and academic legal writings take the view that it is possible to interpret the national legislation at issue in a manner consistent with that guidance.

21 In that regard, however, it should first be recalled that, even when there is case-law of the Court resolving the point of law at issue, national courts remain entirely at liberty to bring a matter before the Court if they consider it appropriate to do so; the fact that the provisions whose interpretation is sought have already been interpreted by the Court does not deprive the Court of jurisdiction to give a further ruling (judgment of 17 July 2014, *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 32 and the case-law cited).

22 It follows that the fact that the Court, in the judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755), has already interpreted Article 7 of Directive 2003/88 in the light of the same national legislation as that at issue in the main proceedings, cannot lead to the inadmissibility of the questions referred in the present cases.

23 Secondly, it is settled case-law 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 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. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 42 and the case-law cited).

24 The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, 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 (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 43 and the case-law cited).

25 In that regard, and in respect of Mrs Broßonn's submission that the national legislation at issue in the main proceedings could be interpreted in such a way as to ensure its compliance with Article 7 of Directive 2003/88,

as interpreted by the Court in the judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755), it is admittedly true that the question whether a national provision must be disapplied inasmuch as it conflicts with EU law arises only if no compatible interpretation of that provision proves possible (see, to that effect, judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 23).

26 However, it should also be recalled that the principle that national law must be interpreted in conformity with EU law has certain limits. Thus the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law *contra legem* (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 25 and the case-law cited).

27 In the case in the main proceedings, and as is apparent from paragraph 15 of the present judgment, the referring court states that it is faced with precisely such a limitation. In its view, Paragraph 7(4) of the BUrlG, read in conjunction with Paragraph 1922(1) of the BGB is not open to an interpretation which is compatible with Article 7 of Directive 2003/88, as interpreted by the Court in the judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755).

28 In those circumstances, the requests for a preliminary ruling cannot be held inadmissible in that the questions referred concern the issue of whether the provisions of EU law to which they relate can, where it is not possible to interpret national law in a manner consistent with EU law, result in the national court being obliged, where necessary, to disapply that national legislation, in particular in the context of a dispute between two individuals.

29 In the light of the foregoing, the requests for a preliminary ruling must be regarded as admissible.

Substance

Preliminary observations

30 It should be noted that, as is apparent from the grounds of the orders for reference set out in paragraphs 13 to 17 of the present judgment and in the light of which the question in Case C-569/16 and the first question in Case C-570/16 must be read, those questions include two separate parts.

31 First, the referring court asks, in essence, whether Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding legislation such as that at issue in the main proceedings, and whether the Court's interpretation in its judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755) should be reconsidered or qualified in that regard.

32 Secondly, and assuming that the Court upholds that interpretation, the referring court asks whether those provisions of EU law must be interpreted as meaning that they have direct effect, as a result of which the national court is required to set aside that national legislation in so far as it cannot be interpreted in a manner consistent with the requirements deriving from those provisions.

33 Finally, by its second question in Case C-570/16, the referring court wishes to know whether any such exclusionary effect in respect of the national legislation at issue is also applicable in a dispute between two private parties.

34 In those circumstances, it is appropriate to examine, first, the first part of the question referred in Case C-569/16 and the first part of the first question in Case C-570/16 and, secondly, and in the light of the connection between them, the second part of those questions and the second question referred in Case C-570/16.

The first part of the question in Case C-569/16 and the first part of the first question in Case C-570/16

35 By the first part of its question in Case C-569/16 which is identical to the first part of its first question in Case C-570/16, the referring court asks, in essence, whether Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, where the employment relationship is terminated by the death of the worker, the right to paid annual

leave acquired under those provisions, and not taken by the worker before his death, lapses without being able to give rise to an entitlement to an allowance in lieu of that leave which may be passed on to the worker's legal heirs by inheritance.

36 As regards, first, Article 7 of Directive 2003/88, it should be recalled that, as the referring court observes, in the judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755), in a case involving a similar factual context to that of the present joined cases and relating to the same national legislation as that at issue in the main proceedings, the Court held, in paragraph 30 of that judgment, that that provision of EU law must be interpreted as meaning that it precludes national legislation or practices which provide that the right to paid annual leave lapses without conferring any right to an allowance in lieu of leave not taken where the employment relationship is terminated by the death of the worker.

37 As is apparent from the orders for reference and from paragraphs 14 to 16 of the present judgment, the referring court, however, has doubts concerning the interpretation adopted by the Court, on the ground, essentially, that the purpose of the right to paid annual leave, which is to enable the worker to rest and to enjoy a period of relaxation and leisure, no longer appears to that court to be capable of being met once the person concerned has died.

38 In that regard, it should be recalled at the outset that, according to the settled case-law of the Court, every worker's right to paid annual leave must be regarded as a particularly important principle of EU social law from which there may be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Directive 2003/88 (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 15 and the case-law cited). Similarly, and in order to ensure respect for that fundamental right affirmed in EU law, Article 7 of Directive 2003/88 may not be interpreted restrictively at the expense of the rights that workers derive from it (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 22 and the case-law cited).

39 It is settled case-law that the right to annual leave constitutes only one of two aspects of the right to paid annual leave as an essential principle of EU social law, that right also including the entitlement to payment. The expression 'paid annual leave', used, inter alia, by the EU legislature in Article 7 of Directive 2003/88, means that, for the duration of the annual leave within the meaning of that directive, the worker's remuneration must be maintained. In other words, workers must continue to receive their normal remuneration throughout that period of rest and relaxation (judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraphs 20 and 21 and the case-law cited).

40 The holiday pay required by Article 7(1) of Directive 2003/88 is intended to enable the worker actually to take the leave to which he is entitled (judgment of 16 March 2006, *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177, paragraph 49).

41 According to the settled case-law of the Court, the right to annual leave laid down in Article 7 of Directive 2003/88 is intended to enable the worker to rest from carrying out the work he is required to do under his contract of employment and to enjoy a period of relaxation and leisure (judgment of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 34 and the case-law cited).

42 Thus, by providing that the minimum period of paid annual leave may not be replaced by an allowance in lieu, except in the event of termination of the employment relationship, Article 7(2) of Directive 2003/88 aims in particular to ensure that workers are entitled to actual rest, with a view to ensuring effective protection of their health and safety (see, to that effect, judgment of 16 March 2006, *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177, paragraph 60 and the case-law cited).

43 Upon termination of the employment relationship, the actual taking of paid annual leave to which a worker was entitled is no longer possible. It is in order to prevent this impossibility from leading to a situation in which the worker loses all enjoyment of that right, even in pecuniary form, that Article 7(2) of Directive 2003/88 provides that the worker is entitled to an allowance in lieu for the days of annual leave not taken (see, to that effect, judgments of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 56; of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 17; and of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 27).

44 That provision lays down no condition for entitlement to an allowance in lieu other than that relating to the fact, first, that the employment relationship has ended and, secondly, that the worker has not taken all the annual leave to which he was entitled on the date that that relationship ended (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 23).

45 Thus, the reason for which the employment relationship is terminated is not relevant as regards the entitlement to an allowance in lieu provided for in Article 7(2) of Directive 2003/88 (see, to that effect, judgment of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 28).

46 As noted by the referring court, while the worker's death admittedly has the inevitable consequence of depriving him of any effective possibility of enjoying the period of rest and relaxation attaching to the right to paid annual leave to which he was entitled at the time of his death, it cannot be accepted that his death retroactively entails the total loss of the right thus acquired which, as recalled in paragraph 39 of the present judgment, includes a second aspect of equal importance, namely the entitlement to a payment (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 25).

47 In that regard, it should also be noted that the Court has already held that Article 7(2) of Directive 2003/88 must be interpreted as meaning that a worker is entitled, upon retirement, to an allowance in lieu of paid annual leave not taken due, for example, to the fact that he has not performed his duties because of illness (see judgment of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraphs 31 and 32 and the case-law cited). Nor is such a worker able to enjoy leave as a period intended to allow him to rest and relax with a view to the future pursuit of his occupational activity, since he has, in principle, entered a period of occupational inactivity and is thus, in essence, able to benefit only from the financial aspect of paid annual leave.

48 Moreover, from a financial perspective, the right to paid annual leave acquired by a worker is purely pecuniary in nature and, as such, is therefore intended to become part of the relevant person's assets, as a result of which the latter's death cannot retrospectively deprive his estate and, accordingly, those to whom it is to be transferred by way of inheritance, from the effective enjoyment of the financial aspect of the right to paid annual leave.

49 The loss of a worker's acquired right to paid annual leave or his corresponding right to payment of an allowance in lieu of leave not taken upon termination of the employment relationship, without the worker having actually had the opportunity to exercise that right to paid annual leave, would undermine the very substance of that right (see, to that effect, judgment of 19 September 2013, *Review of Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 32).

50 Thus, receipt of financial compensation if the employment relationship is terminated by reason of the worker's death is essential to ensure the effectiveness of the entitlement to paid annual leave granted to the worker (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 24).

51 Secondly, it must be recalled that the right to paid annual leave, as a principle of EU social law, is not only particularly important, but is also expressly laid down in Article 31(2) of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties (judgment of 30 June 2016, *Sobczyszyn*, C-178/15, EU:C:2016:502, paragraph 20 and the case-law cited).

52 The fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law (judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 42 and the case-law cited).

53 Since the national legislation at issue in the main proceedings is an implementation of Directive 2003/88, it follows that Article 31(2) of the Charter is intended to apply to the cases in the main proceedings (see, by analogy, judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 43).

54 In that regard, it follows, first, from the wording of Article 31(2) of the Charter that that provision enshrines the 'right' of all workers to an 'annual period of paid leave'.

55 Next, according to the explanations relating to Article 31 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, must be taken into consideration for the

interpretation of the Charter, Article 31(2) of the Charter is based on Directive 93/104 and on Article 2 of the European Social Charter, signed in Turin on 18 October 1961 and revised in Strasbourg on 3 May 1996, and on point 8 of the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council in Strasbourg on 9 December 1989 (judgment of 19 September 2013, *Review of Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 27).

56 As is apparent from the first recital of Directive 2003/88, that directive codified Directive 93/104. Article 7 of Directive 2003/88 concerning the right to paid annual leave reproduces the terms of Article 7 of Directive 93/104 exactly (judgment of 19 September 2013, *Review of Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 28).

57 In that context, it is important, finally, to recall that the Court has already held that the expression 'paid annual leave' in Article 7(1) of Directive 2003/88, which should be given the same meaning as that of 'annual period of paid leave' in Article 31(2) of the Charter, means that, for the duration of annual leave within the meaning of those provisions, remuneration must be maintained and, in other words, workers must receive their normal remuneration for that period of rest (see, to that effect, judgment of 15 September 2011, *Williams and Others*, C-155/10, EU:C:2011:588, paragraphs 18 and 19).

58 As was recalled in paragraph 39 of the present judgment, the right to annual leave constitutes only one of two aspects of the right to paid annual leave as an essential principle of EU social law reflected in Article 7 of Directive 93/104 and Article 7 of Directive 2003/88, now expressly enshrined as a fundamental right in Article 31(2) of the Charter. As well as an entitlement to a payment, that fundamental right also includes, as a right which is consubstantial with the right to 'paid' annual leave, the right to an allowance in lieu of annual leave not taken upon termination of the employment relationship.

59 In that regard, limitations may be imposed on that right only under the strict conditions laid down in Article 52(1) of the Charter and, in particular, of the essential content of that right. Thus, Member States may not derogate from the rule laid down in Article 7 of Directive 2003/88, read in the light of Article 31(2) of the Charter, that the right to paid annual leave acquired cannot be lost at the end of the leave year and/or of a carry-over period fixed by national law, when the worker has been unable to take his leave (see, to that effect, judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 56).

60 As was recalled in paragraph 46 of the present judgment, Member States are similarly precluded from deciding that termination of the employment relationship caused by death leads retroactively to the complete loss of the right to paid annual leave acquired by the worker, since such a right, aside from the right to leave as such, includes a second aspect of equal importance, namely the entitlement to a payment, justifying the payment to the person concerned or his legal heirs of an allowance in lieu of annual leave not taken upon termination of the employment relationship.

61 Therefore, in relation to situations falling within the scope of Article 31(2) of the Charter, that provision has the effect, in particular, that it is not open to Member States to adopt legislation pursuant to which the death of a worker retroactively deprives him of the right to paid annual leave acquired before his death, and, accordingly, his legal heirs of the allowance in lieu thereof by way of the financial settlement of those rights.

62 In the light of the foregoing, and in view of what has been stated in paragraphs 38 to 50 of the present judgment, it must be held that, where an employment relationship is terminated by the death of the worker, it follows not only from Article 7(2) of Directive 2003/88 but also from Article 31(2) of the Charter that, in order to prevent the fundamental right to paid annual leave acquired by that worker from being retroactively lost, including the financial aspect of those rights, the right of the person concerned to an allowance in lieu of leave which has not been taken may be passed on by inheritance to his legal heirs.

63 It follows that the answer to the first part of the question in Case C-569/16 and to the first part of the first question in Case C-570/16 is that Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, upon termination of the employment relationship because of the worker's death, the right to paid annual leave acquired under those provisions and not taken by the worker before his death lapses without being able to give rise to a right to an allowance in lieu of that leave which is transferable to the employee's legal heirs by inheritance.

The second part of the question in Case C-569/16 and the second part of the first question and the second question in Case C-570/16

64 By the second part of its question in Case C-569/16 and by the second part of its first question in Case C-570/16, the referring court asks, in essence, whether, in the event that it is impossible to interpret a national rule such as that at issue in the main proceedings in such a way as to ensure compliance with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, the provisions of EU law must be interpreted as meaning that they entail that such national legislation must be disapplied by the national court and that the legal heir of the deceased worker must be granted, by the former employer, an allowance in lieu of paid annual leave acquired under those provisions and not taken by that worker. By its second question in Case C-570/16, the referring court asks whether such an interpretation of those provisions of EU law must, in the present case, also prevail in the context of a dispute between the legal heir of a deceased worker and his former employer where the employer is a private individual.

65 As a preliminary point, it should be recalled that the question whether a national provision must be disapplied in as much as it conflicts with EU law arises only if no interpretation of that provision which is compatible with EU law proves possible.

66 In that regard, it should be noted that, when national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive, and consequently comply with the third paragraph of Article 288 TFEU (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 24 and the case-law cited).

67 It should further be noted that the principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the directive in question is fully effective and to achieving an outcome consistent with the objective pursued by it (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 27 and the case-law cited).

68 As has been held by the Court, the requirement to interpret national law in conformity with EU law entails, in particular, the obligation for national courts to change established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive. Consequently, a national court cannot, in particular, validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraphs 72 and 73 and the case-law cited).

69 It is, in the present case, for the referring court to fulfil its obligation under EU law to check, in the light of the principles set out in the three preceding paragraphs of the present judgment, if an interpretation which is consistent with EU law is possible.

70 That being so, and as regards, first, the possible direct effect that it may be appropriate to acknowledge Article 7 of Directive 2003/88 as producing, it is clear from the settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 33 and the case-law cited). In addition, where a person involved in legal proceedings is able to rely on a directive against a State, he may do so regardless of the capacity in which the latter is acting, whether as an employer or as a public authority. In either case, it is necessary to prevent the State from taking advantage of its own failure to comply with EU law (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 38 and the case-law cited).

71 On the basis of those considerations, the Court has held that provisions of a directive that are unconditional and sufficiently precise may be relied upon by individuals, in particular against a Member State and all the organs of its administration, including decentralised authorities (see, to that effect, judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 45 and the case-law cited).

72 The Court has already held that Article 7(1) of Directive 2003/88 satisfies those criteria of unconditionality and sufficient precision, as it imposes on Member States, in unequivocal terms, a precise obligation as to the result to be achieved that is not coupled with any condition regarding application of the rule laid down by it, which gives every worker entitlement to at least four weeks' paid annual leave. That article thus fulfils the conditions required to produce direct effect (see, to that effect, judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraphs 34 to 36).

73 As regards Article 7(2) of that directive, as recalled in paragraph 44 of the present judgment, that provision does not lay down any condition for entitlement to an allowance in lieu other than that relating to the fact, first, that the employment relationship has ended and, secondly, that the worker has not taken all the annual leave to which he was entitled on the date that that relationship ended. That right is conferred directly by the directive and does not depend on conditions other than those which are explicitly provided for (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 28). Article 7(2) thus fulfils all the conditions necessary for it to have direct effect.

74 In the present case, as regards Case C-569/16, it is not disputed, first, that Mr Bauer had not, at the time of his death which caused the employment relationship with Stadt Wuppertal to be terminated, taken all paid annual leave to which he was entitled on that date, and, second, that the status of the employer is that of a decentralised public authority.

75 Since Article 7 of Directive 2003/88 fulfils, as is apparent from paragraphs 72 and 73 of the present judgment, the conditions required to produce direct effect, it follows that Mr Bauer, or in the light of his death, his legal heir, has, as is clear from the case-law of the Court referred to in paragraphs 70 and 71 of this judgment, the right to obtain, from Stadt Wuppertal, an allowance in lieu of paid annual leave acquired under that provision and not taken by the individual, national courts being, in that regard, required to disapply national legislation which, like that at issue in the main proceedings, precludes the award of such an allowance.

76 However, as regards the dispute in the main proceedings in Case C-570/16 between Ms Broßonn, as the legal heir of her late husband, and his former employer, Mr Willmeroth, it should be recalled that, according to the Court's settled case-law, a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. If the possibility of relying on a provision of a directive that has not been transposed, or has been incorrectly transposed, were to be extended to the sphere of relations between individuals, that would amount to recognising a power in the European Union to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations (judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 42 and the case-law cited).

77 Thus, even a clear, precise and unconditional provision of a directive seeking to confer rights on or impose obligations on individuals cannot of itself apply in a dispute exclusively between private persons (judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 43 and the case-law cited).

78 As the Court has already held, Article 7 of Directive 2003/88 cannot therefore be invoked in a dispute between individuals in order to ensure the full effect of the right to paid annual leave and to set aside any contrary provision of national law (judgment of 26 March 2015, *Fenoll*, C-316/13, EU:C:2015:200, paragraph 48).

79 In the light of the foregoing, it is necessary, secondly, to examine the scope of Article 31(2) of the Charter, in order to determine whether that provision, for which it has been established, in paragraphs 52 to 63 of the present judgment, that it is intended to apply to situations such as those in the main proceedings and must be interpreted as meaning that it precludes legislation such as that at issue in the main proceedings, may be invoked in a dispute between individuals, such as that arising in Case C-570/16, in order to require that the national court sets aside that national legislation and grants the deceased worker's legal heirs an allowance, payable by the former employer, in lieu of paid annual leave not taken to which that worker was entitled under EU law at the time of his death.

80 In that regard, it should be recalled that the right to paid annual leave constitutes an essential principle of EU social law.

81 That principle is itself mainly derived both from instruments drawn up by the Member States at EU level, such as the Community Charter of the Fundamental Social Rights of Workers, which is moreover mentioned in

Article 151 TFEU, and from international instruments on which the Member States have cooperated or to which they are party. Among them is the European Social Charter, to which all Member States are parties in so far as they ratified it in its original version, its revised version or both versions, also referred to in Article 151 TFEU. Mention should also be made of Convention No 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay (revised) which, as the Court noted in paragraphs 37 and 38 of the judgment of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18), sets out certain principles of that organisation which recital 6 of Directive 2003/88 states must be taken into account.

82 In that regard, the fourth recital of Directive 93/104 states, in particular, that paragraph 8 of the Community Charter of the Fundamental Social Rights of Workers provides that every worker in the Union has a right, inter alia, to paid annual leave, the duration of which must be progressively harmonised in accordance with national practices (see, to that effect, judgment of 26 June 2001, *BECTU*, C-173/99, EU:C:2001:356, paragraph 39).

83 Article 7 of Directive 93/104 and Article 7 of Directive 2003/88 did not, therefore, themselves establish the right to paid annual leave, which is based in particular on various international instruments (see, by analogy, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 75) and is, as an essential principle of EU social law, mandatory in nature (see, to that effect, judgment of 16 March 2006, *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177, paragraphs 48 and 68), that essential principle including, as noted in paragraph 58 of the present judgment, the right to 'paid' annual leave as such and the right, inherent in the former, to an allowance in lieu of annual leave not taken upon termination of the employment relationship.

84 By providing in mandatory terms that 'every worker' has 'the right' 'to an annual period of paid leave' without referring in particular in that regard — like, for example, Article 27 of the Charter which led to the judgment of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2) — to 'the cases and … conditions provided for by Union law and national laws and practices', Article 31(2) of the Charter reflects the essential principle of EU social law from which there may be derogations only in compliance with the strict conditions laid down in Article 52(1) of the Charter and, in particular, the fundamental right to paid annual leave.

85 The right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is thus, as regards its very existence, both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right. It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter (see, by analogy, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 76).

86 Article 31(2) of the Charter therefore entails, in particular, as regards the situations falling within the scope thereof, first, that the national court must disapply national legislation such as that at issue in the main proceedings pursuant to which the death of a worker retroactively deprives him of his entitlement to paid annual leave acquired before his death, and, accordingly, his legal heirs of the entitlement to the allowance in lieu thereof by way of the financial settlement of those rights, and, second, that employers cannot rely on that national legislation in order to avoid payment of the allowance in lieu which they are required to pay pursuant to the fundamental right guaranteed by that provision.

87 With respect to the effect of Article 31(2) of the Charter on an employer who is a private individual, it should be noted that, although Article 51(1) of the Charter states that the provisions thereof are addressed to the institutions, bodies, offices and agencies of the European Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law, Article 51(1) does not, however, address the question whether those individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility.

88 First of all, as noted by the Advocate General in point 78 of his Opinion, the fact that certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between individuals (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 77).

89 Next, the Court has, in particular, already held that the prohibition 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 a dispute with another individual (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 76), without, therefore, Article 51(1) of the Charter preventing it.

90 Finally, as regards, more specifically, Article 31(2) of the Charter, it must be noted that the right of every worker to paid annual leave entails, by its very nature, a corresponding obligation on the employer, which is to grant such periods of paid leave.

91 In the event that the referring court is unable to interpret the national legislation at issue in a manner ensuring its compliance with Article 31(2) of the Charter, it will therefore be required, in a situation such as that in the particular legal context of Case C-570/16, to ensure, within its jurisdiction, the judicial protection for individuals flowing from that provision and to guarantee the full effectiveness thereof by disapplying if need be that national legislation (see, by analogy, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 79).

92 In the light of all the foregoing considerations, the answer to the second part of the question in Case C-569/16 and the second part of the first question and the second question in Case C-570/16 is that, where it is impossible to interpret a national rule such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, the national court, before which a dispute between the legal heir of a deceased worker and the former employer of that worker has been brought, must disapply that national legislation and ensure that the legal heir receives payment from the employer of an allowance in lieu of paid annual leave acquired under those provisions and not taken by the worker before his death. That obligation on the national court is dictated by Article 7 of Directive 2003/88 and Article 31(2) of the Charter where the dispute is between the legal heir and an employer which has the status of a public authority, and under the second of those provisions where the dispute is between the legal heir and an employer who is a private individual.

Costs

93 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 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time and of Article 31(2) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national legislation such as that at issue in the main proceedings, under which, where the employment relationship is terminated by the death of the worker, the right to paid annual leave acquired under those provisions and not taken by the worker before his death lapses without being able to give rise to a right to an allowance in lieu of that leave which is transferable to the employee's legal heirs by inheritance.**

2. **Where it is impossible to interpret a national rule such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter of Fundamental Rights, the national court, before which a dispute between the legal heir of a deceased worker and the former employer of that worker has been brought, must disapply that national legislation and ensure that the legal heir receives payment from the employer of an allowance in lieu of paid annual leave acquired under those provisions and not taken by the worker before his death. That obligation on the national court is dictated by Article 7 of Directive 2003/88 and Article 31(2) of the Charter of Fundamental Rights where the dispute is between the legal heir and an employer which has the status of a public authority, and under the second of those provisions where the dispute is between the legal heir and an employer who is a private individual.**

LECTURE 5: 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.
- General Court, 25 January 2023, Case T-163/21, *Emilio De Capitani v Council of the European Union*, EU:T:2023:15.
- General Court, 14 June 2023, Case T-201/21, *Covington & Burling and Van Vooren v European Commission,* EU:T:2023:333.
- Court of Justice, 21 January 2021, Case C-761/18 P, *Päivi Leino-Sandberg v European Parliament,* EU:C:2021:52.
- A. Marcouilli and L. Cappelletti, 'Recent trends and developments in the case law of EU Courts on access to documents', 23 *ERA Forum* (2023), p. 477–497 (available on eCampus)

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 T-163/21, *Emilio De Capitani v Council of the European Union*

In Case T-163/21,

Emilio De Capitani, residing in Brussels (Belgium), represented by O. Brouwer, lawyer, and S. Gallagher, Solicitor,

applicant,

supported by

Kingdom of Belgium, represented by C. Pochet, L. Van den Broeck and M. Jacobs, acting as Agents,

by

Kingdom of the Netherlands, represented by M. Bulterman, M.H.S. Gijzen and J. Langer, acting as Agents,

by

Republic of Finland, represented by M. Pere, acting as Agent,

and by

Kingdom of Sweden, represented by C. Meyer-Seitz and R. Shahsavan Eriksson, acting as Agents,

interveners,

v

Council of the European Union, represented by J. Bauerschmidt and K. Pavlaki, acting as Agents,

defendant,

THE GENERAL COURT (Tenth Chamber, Extended Composition),

composed, at the time of the deliberations, of A. Kornezov (Rapporteur), President, E. Buttigieg, K. Kowalik-Bańczyk, G. Hesse and D. Petrlík, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure,

further to the hearing on 22 September 2022,

gives the following

Judgment

1 By his action under Article 263 TFEU, the applicant, Mr Emilio De Capitani, seeks the annulment of Decision SGS 21/000067 of the Council of the European Union of 14 January 2021, by which the Council refused him access to certain documents, coded 'WK', exchanged within the Council working groups in the context of legislative procedure 2016/0107 (COD), concerning the amendment of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European

Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ 2013 L 182, p.19) ('the contested decision').

Background to the dispute

2 On 15 October 2020, the applicant submitted, pursuant 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), a request for access to certain documents exchanged within the Council's 'Company Law' working group relating to legislative procedure 2016/0107 (COD), which was ongoing at the time the request was made.

3 On 10 November 2020, the Council granted that request in part, releasing seven documents to the applicant and refusing access in full to seven other documents, namely those with reference numbers WK 6662/18, WK 14969/17 REV 1, WK 14969/17 INIT, WK 5230/17, WK 12197/17, WK 12197/17 REV1 and WK 10931/17 ('the documents at issue'), on the ground, in essence, that their disclosure would seriously undermine the Council's decision-making process within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001.

4 On 25 November 2020, the applicant submitted a confirmatory application to the Council in which he repeated his request for access to the documents at issue.

5 On 14 January 2021, the Council adopted the contested decision, by which it confirmed its refusal to grant access to the documents at issue on the basis of the first subparagraph of Article 4(3) of Regulation No 1049/2001.

Forms of order sought

6 The applicant claims that the Court should:

– annul the contested decision;

– order the Council to pay the costs.

7 The Council contends that the Court should:

– dismiss the action as inadmissible or, in the alternative, as unfounded;

– order the applicant to pay the costs.

8 The interveners, the Kingdom of Belgium, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden state that they support the forms of order sought by the applicant.

Law

The applicant's continuing interest in bringing proceedings

9 Without formally raising, by separate document, a plea that there is no need to adjudicate, the Council contends that the applicant's interest in bringing proceedings had, in the course of the proceedings, ceased to exist since, by letter of 14 June 2021, the Council released to him all the documents at issue. Therefore, the action is no longer capable, through its outcome, of procuring any advantage for the applicant and has thus become devoid of purpose.

10 The applicant, supported in that regard by the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden, disputes that his interest in bringing proceedings ceased to exist in the course of the proceedings. First, he claims that he did not have access to the documents at issue in good time, that is to say, at a stage which would have enabled him to exercise fully and effectively his rights as a European citizen in a democratic society as regards the legislative procedure in question. Second, he takes the view that he retains an

interest in bringing proceedings in order to ensure that the unlawful act committed by the Council does not recur in the future.

11 In that regard, it should be borne in mind that the 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. That purpose must continue to exist, like the interest in bringing proceedings, until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be liable, if successful, to procure an advantage for the party bringing it (see judgment of 21 January 2021, *Leino-Sandberg* v *Parliament*, C-761/18 P, EU:C:2021:52, paragraph 32 and the case-law cited).

12 In the present case, it is not disputed that the documents at issue were disclosed by the Council to the applicant on 14 June 2021, that is to say, after the present action was brought. However, the contested decision has not been formally withdrawn by the Council, with the result that the legal proceedings have retained their purpose (see, to that effect, judgments of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 45, and of 21 January 2021, *Leino-Sandberg* v *Parliament*, C-761/18 P, EU:C:2021:52, paragraph 33 and the case-law cited).

13 Therefore, it is necessary to examine, in accordance with the case-law of the Court of Justice referred to in paragraph 11 above, whether the applicant could continue to invoke, notwithstanding that disclosure, an interest in bringing proceedings, which requires the determination of whether the applicant has obtained, by that disclosure, full satisfaction having regard to the objectives he pursued by his request for access to the documents in question, which involves determining whether that disclosure took place in good time (see, to that effect, judgments of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 47 and the case-law cited, and of 21 January 2021, *Leino-Sandberg* v *Parliament*, C-761/18 P, EU:C:2021:52, paragraph 34).

14 In that regard, as in essence the applicant and the Republic of Finland submit, the applicant, by his initial request of 15 October 2020 and by his confirmatory application of 25 November 2020, sought to obtain access to the documents at issue in order to ascertain the positions expressed by the Member States within the Council, the Council acting in its capacity as co-legislator, and to be able, if necessary, to inform the public of those positions and generate a debate in that regard before that institution established its position in the legislative procedure in question.

15 In the present case, disclosure of the documents at issue did not take place until after the Council had adopted, on 3 March 2021, its negotiating position in that procedure and after the agreement reached on 1 June 2021, in the context of inter-institutional trilogues.

16 The disclosure of the documents at issue did not take place in good time in the light of the objectives of informing the public and generating debate which the applicant pursued by his application for access to those documents, within the meaning of the case-law referred to in paragraph 13 above (see, to that effect and by analogy, judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 59, and of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 33). At the time of that disclosure, the Council's position had been adopted and an interinstitutional agreement had been reached within the framework of the trilogues. Although, it is true that, at that time, the legislative procedure had not yet been formally concluded, the fact remains that, more often than not, agreements reached in trilogues are subsequently adopted by the co-legislators without substantial amendment (see, to that effect, judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 72).

17 Therefore, by disclosure of the documents at issue, the applicant did not obtain full satisfaction in the light of the objectives pursued by his application for access to those documents.

18 Accordingly, the Council's argument that the applicant's interest in bringing proceedings has ceased to exist in the course of the proceedings must be rejected.

Substance

19 The applicant submits, in support of his action, two main pleas in law, alleging, first, infringement of the first subparagraph of Article 4(3) of Regulation No 1049/2001 and failure to state reasons concerning whether disclosure of the documents at issue would seriously undermine the decision-making process and, second, failure

to comply with that provision and failure to state reasons concerning the absence of an overriding public interest justifying disclosure of those documents. He also raises, in the alternative, a third plea, alleging infringement of Article 4(6) of Regulation No 1049/2001 and failure to state reasons.

20 The first plea consists, in essence, of two parts, concerning, first, the applicability of the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001 to legislative documents and, second, the application of that exception in the present case.

The applicability of the first subparagraph of Article 4(3) of Regulation No 1049/2001 to legislative documents

21 The applicant claims that, by refusing access to the documents at issue, which are, in essence, legislative documents, on the basis of the first subparagraph of Article 4(3) of Regulation No 1049/2001, the Council disregarded the new constitutional dimension concerning access to documents drawn up in the context of legislative procedures established by the FEU Treaty and the Charter of Fundamental Rights of the European Union ('the Charter'). Thus, unlike the previous Article 207(3) EC, which allowed the Council to determine the cases in which it was to be regarded as acting in its legislative capacity in order to allow better access to documents in those cases, while preserving the effectiveness of its decision-making process, the FEU Treaty and the Charter no longer refer to any exception relating to the protection of the decision-making process in the context of legislative procedures. There are therefore legal tensions between the first subparagraph of Article 4(3) of Regulation No 1049/2001, which was adopted on the basis of earlier interpretations of the principle of transparency stemming from the EC Treaty, and Article 15(2) TFEU and Article 42 of the Charter. Therefore, the Council is required to comply directly with its obligations under the FEU Treaty and the Charter, which confer on it no discretion allowing it to refuse access to documents drawn up in the context of a legislative procedure.

22 In the reply, the applicant states that the first subparagraph of Article 4(3) of Regulation No 1049/2001 is no longer applicable to the legislative debates and ancillary documents. It adds that other exceptions, such as those provided for in Article 4(1) and (2) of Regulation No 1049/2001, remain, by contrast, relevant as regards access to legislative documents and that Article 15(3) TFEU must be understood as referring to those types of exceptions.

23 The Council replies that the applicant is confusing two different dimensions of legislative transparency, namely, first, that relating to the meetings of the European Parliament and of the Council in which their respective members deliberate on draft legislative acts and, second, that concerning access to the documents which relate to legislative procedures. Article 15(2) TFEU refers to that first dimension and is therefore not relevant in the present case. That provision should be understood as referring to the Council in its composition comprising representatives at ministerial level, authorised to commit the government of the Member State which they represent and to exercise voting rights, in accordance with Article 16(2) TEU. By contrast, the second dimension of legislative transparency, namely that referred to in Article 15(3) TFEU, does not provide for an unconditional right of access to documents, including legislative documents.

24 In the rejoinder, the Council submits that the applicant's argument that Article 4(3) of Regulation No 1049/2001 can no longer apply to documents drawn up in the context of a legislative procedure after the entry into force of the FEU Treaty and the Charter constitutes a 'new plea of illegality' raised for the first time in the reply and, therefore, a new plea, which must be declared inadmissible. It also asks, in the event that the 'new plea in law' is to be regarded as admissible, that a measure of organisation of procedure be adopted pursuant to Article 88(1) of the Rules of Procedure of the General Court in order to invite the European Parliament and the European Commission to express a view on the alleged unlawfulness of that provision.

25 When questioned on that point in the context of a measure of organisation of procedure, the applicant challenges the plea of inadmissibility raised by the Council, claiming, in essence, that the application already set out clearly the argument that, since the entry into force of the FEU Treaty and the Charter, there is legal tension between the first subparagraph of Article 4(3) of Regulation No 1049/2001 and primary law, in particular Article 15(2) TFEU, and that, therefore, the Council had to comply with its obligations under primary law by making the legislative documents available to the public.

– *The plea of inadmissibility raised by the Council*

26 According to settled case-law concerning Article 84(1) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or fact which have come to light in

the course of the procedure. However, a plea which constitutes an amplification of a plea made previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible. To be regarded as an amplification of a plea or a head of claim previously advanced, a new line of argumentation must, in relation to the pleas or heads of claim initially set out in the application, present a sufficiently close connection in order to be considered as forming part of the normal evolution of debate in proceedings before the Court (see judgment of 5 October 2020, *HeidelbergCement and Schwenk Zement* v *Commission*, T-380/17, EU:T:2020:471, paragraph 87 (not published) and the case-law cited).

27 In the present case, it must be noted that, in the application, the applicant clearly submitted that Article 15(2) TFEU and Article 42 of the Charter must be interpreted as meaning that they do not confer on the Council 'any discretion' to refuse access to documents drawn up in the context of a legislative procedure, that that institution was required to comply 'directly' with its obligations under the Treaties and that, therefore, that institution had, in the present case, given an excessively broad interpretation of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001. He also claimed that there was 'legal tension' between the latter provision and the FEU Treaty and the Charter.

28 In the reply, the applicant merely develops that part of his argument further, in response to the arguments put forward by the Council in the defence. He submits, inter alia, that Article 4(3) of Regulation No 1049/2001 'can no longer apply' to legislative documents, since Article 15(2) TFEU 'directly' imposes an obligation of transparency on the EU legislature as regards the legislative process.

29 It follows that, in the reply, the applicant merely amplified, at most, a plea in law set out in the application, which must be allowed by the EU judicature.

30 Moreover, contrary to the Council's contention, the applicant does not raise any plea of illegality in respect of the first subparagraph of Article 4(3) of Regulation No 1049/2001, as he confirmed moreover at the hearing. By his line of argument, the applicant does not consider that the first subparagraph of Article 4(3) of Regulation No 1049/2001 is unlawful as such, because it is contrary to the FEU Treaty and to the Charter, but that that provision must be interpreted in the light of the FEU Treaty and the Charter as meaning that it does not apply to legislative documents, while remaining fully applicable to other types of document.

31 As to the remainder, it must be stated that, in accordance with Article 82 of the Rules of Procedure, a copy of the application and of the defence was sent to the Parliament and the Commission to enable them to assess whether the inapplicability of one of their acts was invoked under Article 277 TFEU. Since the applicant's line of argument was already clearly set out in the application, it must be held that the Parliament and the Commission decided not to intervene in the present case in full knowledge of the facts. Therefore, there is no need to grant the Council's request for the adoption of a measure of organisation of procedure in that regard.

32 Accordingly, the plea of inadmissibility and the Council's request for the adoption of a measure of organisation of procedure must be rejected.

– *Substance*

33 Under the first subparagraph of Article 4(3) of Regulation No 1049/2001, 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 if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

34 As noted in paragraphs 21 and 22 above, the applicant submits, in essence, that the first subparagraph of Article 4(3) of Regulation No 1049/2001 cannot be applied in order to refuse access to documents exchanged within the Council's working groups in the context of a legislative procedure following the entry into force of the FEU Treaty and the Charter.

35 In that regard, it should be noted that the Council does not dispute the legislative nature of the documents at issue.

36 In that context, 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 (judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 77).

37 It is precisely openness in the legislative process that contributes to conferring greater legitimacy on the institutions in the eyes of Union 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).

38 The principles of publicity and transparency are therefore inherent in the legislative procedures of the European Union (judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 81).

39 However, that does not mean that EU primary law provides for an unconditional right of access to legislative documents.

40 In that regard, it must be borne in mind that Article 42 of the Charter states that 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.

41 The Explanations relating to the Charter, published in the *Official Journal of the European Union* of 14 December 2007 (OJ 2007 C 303, p. 17), to which due regard must be given by the Courts of the European Union when interpreting the Charter (see fifth recital of the preamble to the Charter), state as follows:

'The right guaranteed in [Article 42] has been taken over from Article 255 of the EC Treaty, on the basis of which Regulation … No 1049/2001 has subsequently been adopted. The European Convention has extended this right to documents of institutions, bodies and agencies generally, regardless of their form (see Article 15(3) of the Treaty on the Functioning of the European Union). In accordance with Article 52(2) of the Charter, the right of access to documents is exercised under the conditions and within the limits for which provision is made in Article 15(3) of the [FEU] Treaty'.

42 It follows that the right of access to documents, enshrined in Article 42 of the Charter, is exercised 'under the conditions and within the limits for which provision is made in Article 15(3)', TFEU.

43 That interpretation is, moreover, consistent with Article 52(2) of the Charter, according to which 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.

44 Under 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, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, 'subject to the principles and the conditions to be defined in accordance with this paragraph'. The second subparagraph of that paragraph states that, 'general principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure'.

45 The fifth subparagraph of Article 15(3) TFEU states that the Parliament and the Council are to ensure publication of the documents relating to the legislative procedures 'under the terms laid down by the regulations referred to in the second subparagraph' of that paragraph. Although it thus highlights the principle that legislative documents must be published, that provision does not provide that those documents must be made public in all cases and without exception, as evidenced by the reference to the 'terms' which the regulations may lay down for that purpose.

46 It follows that the right of access to documents of the institutions, including legislative documents, of Union citizens and any person residing or having its registered office in the territory of the European Union, is exercised

in accordance with the general principles, limits and terms determined by means of regulations. Article 15(3) TFEU does not exclude legislative documents from its scope.

47 Consequently, the provisions of the FEU Treaty and of the Charter governing the right of access to documents of the institutions, bodies, offices and agencies of the Union provide that the exercise of that right may be subject to limits and conditions laid down by regulations, including as regards access to legislative documents.

48 That conclusion is not called into question by the arguments put forward by the applicant.

49 First, the applicant's argument that Regulation No 1049/2001 has, in a sense, become obsolete because it was adopted on the basis of the EC Treaty and therefore does not take account of the amendments made by the FEU Treaty and by the Charter cannot succeed. As noted in paragraph 41 above, the explanations relating to the Charter state that the right guaranteed in Article 42 'has been taken over from Article 255 of the EC Treaty, on the basis of which [that regulation] has subsequently been adopted'. That clarification thus refers to the continuity which exists in this area between the EC Treaty and the FEU Treaty and to the continuing relevance of that regulation following the entry into force of the FEU Treaty and the Charter. If the authors of the Charter had wished to govern the right of access to documents in a way that was substantially different from the regime in force under the EC Treaty, they would have indicated this in the explanations relating to that treaty.

50 Second, the applicant submits that the second subparagraph of Article 15(3) TFEU must be interpreted as meaning that the 'limits' to the right of access to documents referred to in that provision are intended to apply to other types of exception, such as those provided for in Article 4(1) and (2) of Regulation No 1049/2001, but not for the purposes of protecting the decision-making process within the meaning of the first subparagraph of Article 4(3) of that regulation.

51 However, the second subparagraph of Article 15(3) TFEU refers to 'limits on grounds of public or private interest governing [the] right of access to documents', without any further clarification or distinction being made as to the nature of those limits. Therefore, there is nothing to support the conclusion that the provisions of the FEU Treaty and of the Charter exclude, as a matter of principle, the possibility that access to legislative documents may be refused on the ground that their disclosure would seriously undermine the decision-making process of the institution in question, within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001.

52 Third, the applicant relies, in support of his argument, on Article 15(2) TFEU. Under that provision, 'the European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.'

53 It follows from the word 'meet' that Article 15(2) TFEU lays down the principle of publication of legislative debates during the sessions of the Parliament and the Council. However, that provision does not concern the right of access to documents or the limits and conditions for the exercise of that right, which are governed by Article 15(3) TFEU and Article 42 of the Charter.

54 The legislative context of the right of access to documents supports the conclusion set out in paragraph 47 above.

55 It should be recalled that, under Article 1 TEU, that 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'. Article 10(3) TEU provides 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. Similarly, 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 shall conduct their work as openly as possible'.

56 All of those provisions confirm that the principle of openness, although of fundamental importance to the EU legal order, is not absolute.

57 Lastly, the EU judicature has already had occasion to state that it remains open to the EU institutions to refuse, on the basis of the first subparagraph of Article 4(3) of Regulation No 1049/2001, to grant access to certain documents of a legislative nature in duly justified cases (judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 112).

58 Similarly, in its judgment of 17 October 2013, *Council* v *Access Info Europe* (C-280/11 P, EU:C:2013:671, paragraphs 36 to 40 and 62), the Court of Justice held, in essence, that the first subparagraph of Article 4(3) of Regulation No 1049/2001 was intended to apply to legislative documents and that, when applying that provision, the General Court had to take account of the balance between the principle of transparency and the preservation of the effectiveness of the Council's decision-making process.

59 As regards the applicant's argument that the case-law relating to the first subparagraph of Article 4(3) of Regulation No 1049/2001 was based on the EC Treaty and was therefore rendered redundant by the FEU Treaty, suffice it to note that the judgment referred to in paragraph 57 above was delivered in relation to a decision taken well after the entry into force of the FEU Treaty.

60 Lastly, although the applicant also refers to Article 41 of the Charter, that provision is irrelevant to the outcome of the present dispute, since it concerns the right of every person to have access 'to his or her file'. However, it is common ground that the documents at issue do not specifically concern the applicant.

61 To conclude, while it is true that access to legislative documents must be as wide as possible, the fact remains that the provisions of the Treaties and of the Charter relied on by the applicant cannot be interpreted as precluding, as a matter of principle, access to such documents from being refused on the ground that their disclosure would seriously undermine the institution in question's decision-making process, within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001.

62 In the light of the foregoing, the first part of the first plea must be rejected as unfounded.

The application to the present case of the first subparagraph of Article 4(3) of Regulation No 1049/2001

63 The applicant, supported by all the interveners, submits, in essence, that the Council has not demonstrated that disclosure of the documents at issue would specifically and actually undermine its decision-making process and that the risk of such undermining was reasonably foreseeable and not purely hypothetical.

64 The Council disputes the applicant's arguments, reproducing, in essence, the reasons given in the contested decision.

65 In that regard, it should be recalled that, 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 that regulation, the right of public access to the documents of the institutions is connected with the democratic nature of those institutions.

66 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 (see judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 58 and the case-law cited).

67 That right is nonetheless subject to certain limitations based on grounds of public or private interest. 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 (see judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 59 and the case-law cited).

68 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 (see judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 61 and the case-law cited).

69 Where an EU institution, body, office or agency to which a request for access to a document has been made decides to refuse to grant that request on the basis of one of the exceptions laid down in Article 4 of Regulation No 1049/2001, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by that exception, and the risk of that undermining must be reasonably foreseeable and not purely hypothetical (judgments of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 51, and of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraphs 63 to 65).

70 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, *MasterCard and Others* v *Commission*, T-516/11, not published, EU:T:2014:759, paragraph 62).

71 In the present case, the documents at issue are documents exchanged within the Council's 'Company Law' working group. In particular, documents WK 5230/17, of 8 May 2017, WK 10931/17, of 6 October 2017, WK 12197/17, of 27 October 2017 and WK 12197/17 REV1, of 18 July 2018, contain specific textual comments and amendments proposed by the delegations of the Member States concerning the legislative proposal in question as a whole, in the form of summary tables. Documents WK 14969/17, of 19 December 2017, and WK 14969/17 REV 1, of 8 January 2018, contain notes of the Presidency of the Council addressed to the working group in question, in which the Presidency noted, inter alia, cross-referencing errors in the legislative proposal, proposed amendments designed to clarify the wording of a provision and put forward a point which had yet to be discussed, namely that of finding a more appropriate drafting for certain provisions in order to avoid the risk of circumvention of the application of the directive for certain undertakings. Document WK 6662/18, of 1 June 2018, contains an invitation from the Presidency to a meeting of the working group aimed at continuing work on the legislative proposal in question, which states that delegations are invited to comment inter alia on the proposals contained in the previous documents.

72 In the contested decision, the Council justified its refusal of access to the documents at issue on a number of grounds.

73 First, in paragraph 9 of the contested decision, the Council stated that the subject of the tax transparency of multinational undertakings was 'highly sensitive' from a political point of view.

74 In that regard, it is apparent from the full version of the documents at issue, now disclosed, that they contain proposals and amendments to legislative texts which form part of the normal legislative process. However, the Council does not identify, either in the contested decision or before the Court, any concrete and specific aspect of those documents of a particularly sensitive nature.

75 Moreover, it should be noted, as the Council itself points out in the contested decision, that, in its conclusions of 18 December 2014, the European Council considered that there was 'an urgent need to advance efforts in the fight against tax avoidance and aggressive tax planning, both at the global and EU levels' and that the Parliament had adopted a resolution on 16 December 2015 with recommendations to the Commission on bringing transparency, coordination and convergence to corporate tax policies in the European Union (2015/2010 (INL)). Those documents show the great importance for European citizens of the subject of the tax transparency of multinational undertakings, which militates in favour of the widest possible access to the relevant legislative documents, and not in favour of restricted access. Access to all the information forming the basis for EU legislative action is a precondition for the effective exercise by Union citizens of their democratic rights as recognised, in particular, in Article 10(3) TEU (see, to that effect, judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 92).

76 Accordingly, whilst relating to a matter of some importance, possibly characterised by both political and legal difficulty, there is nothing in the contested decision to suggest that the content of the documents at issue is 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 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 97 and the case-law cited). Moreover, before the Court, the Council also does not specify the specific aspects of the content of those documents which are particularly sensitive.

77 Second, in paragraph 21 of the contested decision, the Council submits that the legislative proposal at issue was the subject of ongoing discussions and that the documents at issue were not exhaustive and did not necessarily reflect the definitive positions of the Member States.

78 In that regard, it should be borne in mind that the preliminary nature of the discussions relating to the legislative proposal in question does not justify, as such, the application of the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001. That provision makes no distinction according to the state of progress of the discussions. It 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), 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 been reached within the Council on those proposals do not therefore establish that the decision-making process has been seriously undermined (see, to that effect, judgments of 22 March 2011, *Access Info Europe* v *Council*, T-233/09, EU:T:2011:105, paragraphs 75 and 76, and of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 100).

79 Similarly, according to the case-law, 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. For precisely the same reasons, an applicant for access to legislative documents in the context of an ongoing procedure will be fully aware of the preliminary character of the information contained therein and of the fact that it is intended to be amended throughout the discussions in the course of the preparatory work of the Council working group until agreement on the whole text is reached (see, to that effect, judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 102 and the case-law cited). This is particularly evident from the objective pursued in the present case by the request for access, in that the applicant sought to know the positions expressed by the Member States within the Council specifically in order to generate a debate in that regard before that institution established its position in the legislative procedure in question (see paragraph 14 above).

80 Third, the Council noted, in paragraph 22 of the contested decision, that the elements set out in the documents at issue were the result of 'difficult negotiations' between the Member States and reflected the difficulties which it still had to resolve before reaching an agreement.

81 However, in the contested decision, the Council does not specify which concrete and specific 'elements' of the documents at issue would have been sources of difficulties such that their disclosure could have seriously undermined its decision-making process. Moreover, the reason that some of the proposed amendments reflected in the documents at issue had yet to be discussed before an agreement was reached is too general and capable of applying to any document of a legislative nature drawn up or exchanged within the framework of a Council working group.

82 Fourth, in paragraph 23 of the contested decision, the Council stated that the documents at issue contained free and frank discussions between Member States, the disclosure of which at that stage of the 'negotiations' would damage the mutual confidence which governs the work of Council working groups.

83 However, the Council has not produced any tangible evidence to show that, as regards the legislative procedure at issue, access to the documents at issue would have harmed the Member States' cooperation in good faith. The risk invoked thus appears to be hypothetical. Moreover, since Member States express, in the context of Council working groups, their respective positions on a given legislative proposal, and accept that their position could evolve, the fact that those elements are then disclosed, on request, is not in itself capable of undermining the sincere cooperation which the Member States and the institutions are required to exercise among themselves pursuant to Article 4(3) TEU (see, by analogy, judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraphs 103 and 104).

84 Although, by the ground relied on in paragraph 23 of the contested decision, the Council alluded to a risk of public pressure, as it submits in the defence, it should be recalled that, in a system based on the principle of democratic legitimacy, co-legislators must be answerable 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 with regard to a particular legislative proposal forms an integral part of the exercise of Union citizens' democratic rights (judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 98).

85 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. There is no tangible evidence in the case file establishing, in the event of disclosure 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 Council 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, judgments of 22 March 2011, *Access Info Europe* v *Council*, T-233/09, EU:T:2011:105, paragraph 74, and of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 99).

86 Fifth, in paragraphs 23 and 24 of the contested decision, the Council explained that disclosure of the documents at issue would seriously undermine the effectiveness of its decision-making process and would reduce the chances of reaching an agreement.

87 However, the ground relied on in paragraphs 23 and 24 of the contested decision is still too general, in that the Council does not explain how access to the documents at issue would specifically, effectively and in a non-hypothetical manner seriously undermine the possibility of reaching an agreement on the legislative proposal in question.

88 Sixth, in paragraphs 25 and 27 of the contested decision, the Council stated that the legitimate public interest justifying disclosure of the documents at issue did not outweigh the equally legitimate need to protect the decision-making process.

89 By the ground relied on in paragraphs 25 and 27 of the contested decision, the Council appears to confuse, as the applicant submits, two separate stages in the application of the first subparagraph of Article 4(3) of Regulation No 1049/2001. It is only if the institution concerned considers that disclosure of a document would specifically and actually undermine the decision-making process in question that it is then required to ascertain whether an overriding public interest nevertheless justifies disclosure of the document concerned. In other words, it is in that context that 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 of that regulation, 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 (see, by analogy, judgment of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P et C-52/05 P, EU:C:2008:374, paragraph 45).

90 Seventh, in paragraph 26 of the contested decision, the Council stated that the refusal to disclose a limited number of documents covered by the applicant's request does not amount to denying citizens the possibility of being informed of the decision-making process in question.

91 In that regard, as the applicant has acknowledged and as has, moreover, the Council, the ground relied on in paragraph 26 of the contested decision is not a relevant criterion for assessing whether the conditions for refusal under the first subparagraph of Article 4(3) of Regulation No 1049/2001 are met. The mere fact that access to certain documents relating to the same legislative procedure has been granted cannot justify the refusal of access to other documents.

92 Eighth, the Council submits, in paragraph 28 of the contested decision, that, 'following its specific assessment of the content and context' of the documents at issue, it concluded that there were objective reasons demonstrating that there was a reasonably foreseeable risk that disclosure of those documents would seriously undermine the decision-making process in question.

93 However, that alleged 'specific assessment of the content and context' of the documents at issue is not apparent from the contested decision, with the result that the risk that the decision-making process would be seriously undermined is not substantiated by any tangible, concrete and specific evidence.

94 Lastly, in its written pleadings before the Court, the Council adds that it is necessary to distinguish between documents drawn up in the context of trilogues which were the subject of the judgment of 22 March 2018, *De Capitani* v *Parliament* (T-540/15, EU:T:2018:167), and the documents at issue. In its view, documents drawn up in the context of trilogues are involved at a stage of the legislative procedure in which it has already adopted its position on a legislative proposal, whereas the documents at issue relate to discussions within working groups between officials of the delegations of the Member States acting at 'technical level'. In the present case, the documents at issue concern preparatory work and have no political implications so long as they are not submitted, as such, to the Committee of Permanent Representatives (Coreper), or subsequently to one of the ministerial formations of the Council.

95 Although, by that argument, the Council seeks to justify less extensive access to documents drawn up by its working groups because of their allegedly 'technical' nature, first of all, it must be pointed out that whether or not a document is 'technical' is not a relevant criterion for the purposes of the application of the first subparagraph of Article 4(3) of Regulation No 1049/2001. Next, and in any event, the actual content of the documents at issue shows that they contain normative proposals for various legislative texts and that they therefore form part of the normal legislative process. The documents at issue are therefore in no way 'technical'. Lastly, the members of Council working groups are given a mandate from the Member States that they represent and, at the time of deliberation on a given legislative proposal, they express the position of their Member State within the Council when the Council acts in its capacity as co-legislator. The fact that those working groups are not authorised to adopt the definitive position of that institution does not mean, however, that their work does not form part of the normal legislative process, which, moreover, the Council does not dispute, or that the documents that they draw up are 'technical' in nature.

96 In the light of all the foregoing considerations, it must be concluded that none of the grounds relied on by the Council in the contested decision supports the conclusion that disclosure of the documents at issue would specifically, effectively and in a non-hypothetical manner seriously undermine the legislative process, within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001.

97 Accordingly, the second part of the first plea in law must be upheld and, consequently, the contested decision must be annulled, without it being necessary to examine the other pleas and heads of claim put forward in support of the action.

Costs

98 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 Council 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 him.

99 In accordance with Article 138(1) of the Rules of Procedure, the Kingdom of Belgium, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden are to bear their own costs.

On those grounds,

THE GENERAL COURT (Tenth Chamber, Extended Composition)

hereby:

1. **Annuls Decision SGS 21/000067 of the Council of the European Union of 14 January 2021;**

2. **Orders the Council to bear its own costs and to pay those incurred by Mr Emilio De Capitani;**

3. **Orders the Kingdom of Belgium, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden to bear their own costs.**

Case T-201/21, *Covington & Burling and Van Vooren v European Commission*

In Case T-201/21,

Covington & Burling LLP, established in Saint-Josse-ten-Noode (Belgium),

Bart Van Vooren, residing in Meise (Belgium),

represented by P. Diaz Gavier, lawyer,

applicants,

v

European Commission, represented by C. Ehrbar and A. Spina, acting as Agents,

defendant,

THE GENERAL COURT (Fifth Chamber),

composed, at the time of the deliberations, of D. Spielmann, President, U. Öberg (Rapporteur) and R. Mastroianni, Judges,

Registrar: V. Di Bucci,

having regard to the written procedure,

having regard to the fact that no request for a hearing was submitted by the parties within three weeks after service of notification of the close of the written part of the procedure, and having decided to rule on the action without an oral part of the procedure, pursuant to Article 106(3) of the Rules of Procedure of the General Court,

gives the following

Judgment

1 By their action based on Article 263 TFEU, the applicants, Covington & Burling LLP and Mr Bart van Vooren, seek the annulment of the implied decision of the European Commission of 12 March 2021 and of confirmatory decision C(2021) 2541 final of the Commission of 7 April 2021 ('the confirmatory decision'), by which their application for access to the documents relating to the voting of the Member States in a comitology procedure concerning the amendment of Annex III to Regulation (EC) No 1925/2006 of the European Parliament and of the Council as regards botanical species containing hydroxyanthracene derivatives was refused.

Background to the dispute

2 On 4 December 2020, the applicants submitted via the Commission's online portal an application for access to documents containing the votes of 22 Member States in the Standing Committee on Plants, Animals, Food and Feed – General Food Law Section ('the PAFF Committee'). Those votes were cast in favour of the draft Commission regulation amending Annex III to Regulation (EC) No 1925/2006 of the European Parliament and of the Council as regards botanical species containing hydroxyanthracene derivatives ('the draft amending regulation'), which led to the adoption of Commission Regulation (EU) 2021/468 of 18 March 2021 amending Annex III to Regulation (EC) No 1925/2006 of the European Parliament and of the Council as regards botanical species containing hydroxyanthracene derivatives (OJ 2021 L 96, p. 6; 'the regulation at issue').

3 On 11 January 2021, the Commission's Directorate-General (DG) for Health and Food Safety sent by letter to 'Mr Bart Van Vooren Covington & Burling LLP' a reply to the application for access to documents of 4 December 2020.

4 In that letter, the Commission indicated that 21 documents ('the requested documents') had been identified as falling within the scope of the request. Access to those documents was refused on the basis of the exception relating to the protection of the decision-making process provided for in the second subparagraph of Article 4(3) 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).

5 By email of 29 January 2021, Mr Van Vooren made a confirmatory application pursuant to Article 7(2) of Regulation No 1049/2001 in response to the initial negative reply.

6 On 15 February 2021, the Commission informed the applicants, in an email addressed to Mr Van Vooren, that the time limit prescribed for the adoption of a confirmatory decision had been extended by a further 15 working days, namely until 12 March 2021.

7 On 10 March 2021, the Commission sent a further email to the applicants, indicating that it would not be able to adopt a confirmatory decision within the extended time limit.

Procedure and forms of order sought

8 Following the bringing of the present action for annulment of the Commission's implied decision of 12 March 2021 refusing access to the requested documents, the Commission adopted, on 7 April 2021, the confirmatory decision and notified it to Mr Van Vooren. In that decision, the Commission confirmed its refusal to grant access to the requested documents, invoking the exception relating to the protection of the decision-making process, in accordance with the second subparagraph of Article 4(3) of Regulation No 1049/2001. In addition, it relied on the exception relating to the protection of privacy and the integrity of the individual, provided for in Article 4(1)(b) of that regulation, on the basis of which it refused to grant access to the personal data contained in the requested documents.

9 By separate document lodged at the Court Registry on 12 April 2021, the applicants modified the application, pursuant to Article 86 of the Rules of Procedure of the General Court, to take account of the adoption of the confirmatory decision.

10 The applicants claim that the Court should:

– annul the Commission's implied decision of 12 March 2021 and the confirmatory decision;

– order the Commission to grant access to the requested documents immediately;

– order the Commission to pay the costs.

11 The Commission contends that the Court should:

– declare that there is no need to adjudicate on the action for annulment of its implied decision of 12 March 2021;

– dismiss the action as partly inadmissible and partly unfounded;

– order the applicants to pay the costs.

Law

Subject matter of the action

12 The Commission contends that the action should be declared devoid of purpose as regards the implied refusal decision of 12 March 2021. That implied decision having been withdrawn and replaced by the final confirmatory decision of 7 April 2021, only the latter should be the subject of the action.

13 The applicants dispute that argument and submit that, by their action, the subject matter of which they have sought to extend, they are targeting both the implied refusal decision and the confirmatory decision. In the alternative, in so far as the Court considers the implied refusal decision to have been replaced by the confirmatory decision, the applicants consider that that implied decision must be taken into account as an act preparatory to the confirmatory decision.

14 The Court recalls that, where an implied decision refusing access has been withdrawn by the effect of an express decision taken subsequently, there is no longer any need to adjudicate on the action in so far as it is directed against that implied decision (judgment of 2 July 2015, *Typke* v *Commission*, T-214/13, EU:T:2015:448, paragraph 36; see also, to that effect, judgment of 2 October 2014, *Strack* v *Commission*, C-127/13 P, EU:C:2014:2250, paragraphs 88 and 89).

15 The confirmatory decision having replaced the implied refusal decision of 12 March 2021, there is no longer any need to adjudicate on the application for annulment of that implied decision.

The claim for directions to be issued

16 Without raising a formal plea of inadmissibility under Article 130 of the Rules of Procedure by separate document, the Commission has expressed doubts as to the standing and interest in bringing proceedings of one of the applicants, namely the law firm Covington & Burling LLP.

17 The Commission also contends that the applicants' claim that it should be ordered to grant access to the requested documents immediately is inadmissible.

18 The applicants submit that the confirmatory decision was addressed to 'Bart Van Vooren Covington & Burling LLP' and that the requests for access to documents were made on behalf of both applicants. In any event, it is sufficient for one or other of the applicants to have demonstrated an interest in bringing proceedings.

19 In that regard, the Court notes that the confirmatory decision was addressed to 'Bart Van Vooren Covington & Burling LLP'.

20 In so far as that decision contains particulars identifying both Mr Van Vooren and the law firm Covington & Burling LLP, the applicants both have standing to bring proceedings as addressees of the said decision.

21 As to the interest in bringing proceedings, the annulment of the confirmatory decision may have consequences for the legal position of the law firm Covington & Burling LLP in that it is one of the addressees of that decision. The action brought by that law firm may thus, by its outcome, procure an advantage for it. In those circumstances, the action is admissible.

22 So far as concerns the admissibility of the head of claim by which the applicants request the Court to 'order the Commission to grant access to the requested documents immediately', the jurisdiction of the EU Courts in this case is limited to reviewing the legality of the contested measure. The General Court may not, in the exercise of that jurisdiction, issue directions to the institutions of the Union (see order of 26 October 1995, *Pevasa and Inpesca* v *Commission*, C-199/94 P and C-200/94 P, EU:C:1995:360, paragraph 24 and the case-law cited).

23 Accordingly, that head of claim must be rejected on the ground of lack of jurisdiction.

Substance

24 The confirmatory decision is based on the exception to access to documents relating to the protection of the decision-making process and, as regards the personal data contained in the requested documents, on the exception to access to documents relating to the protection of privacy and the integrity of the individual.

25 The applicants put forward five pleas in law concerning exclusively the application of the exception relating to the protection of the decision-making process, provided for in the second subparagraph of Article 4(3) of Regulation No 1049/2001. The first plea alleges infringement of the second subparagraph of Article 4(3) of Regulation No 1049/2001. The second plea, put forward in the alternative like the rest of the pleas, alleges failure

to demonstrate that disclosure of the requested documents would undermine the decision-making process and the seriousness of that undermining. The third plea alleges that the Commission erred in relying on Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, p. 13) to justify its refusal to grant access to the requested documents. The fourth plea alleges that the Commission erred in relying on the Standard Rules of Procedure for Committees published in the *Official Journal of the European Union* (OJ 2011 C 206, p. 11; 'the Standard Rules of Procedure') to justify its refusal to grant access to the requested documents. The fifth plea alleges violation of the principle of transparency and an undermining of the democratic legitimacy of implementing acts adopted under the procedure established by Regulation No 182/2011.

First plea: inapplicability of the exception relating to the protection of the decision-making process provided for in the second subparagraph of Article 4(3) of Regulation No 1049/2001

26 According to the applicants, it is clear from the very wording of the second subparagraph of Article 4(3) of Regulation No 1049/2001 that that provision applies only to 'a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution'. They argue that that provision is not applicable to their request for access to documents.

27 In that regard, the Court recalls that Article 2(3) of Regulation No 1049/2001 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.

28 Under the second subparagraph of Article 4(3) of Regulation No 1049/2001, access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned is to 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.

29 Therefore, it is only for part of the documents for internal use, namely those containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned, that the second subparagraph of Article 4(3) allows, depending on the case, access to be refused even after the decision has been taken, where their disclosure would seriously undermine the decision-making process of that institution (judgment of 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 79).

30 According to the applicants, none of those criteria is satisfied as regards the documents reflecting the individual votes of the Member States.

31 First, their request focused on the votes of the 22 Member States that had voted in favour of the draft amending regulation. Those votes do not constitute deliberations and preliminary consultations in themselves, but are the outcome of them. In other words, the exception provided for in the second subparagraph of Article 4(3) of Regulation No 1049/2001 protects the internal decision-making process, not the external outcome of that process, namely the breakdown of the votes of the Member States.

32 The inherent nature of a vote of a Member State means that it is 'external' to the Commission or the PAFF Committee. Obtaining a qualified majority, leading to a positive opinion of the PAFF Committee, itself leads – where the Council or the Parliament does not object – to the adoption of the regulation at issue, which creates legal obligations directly applicable to the persons concerned.

33 Second, a vote of a Member State does not represent the opinion of an individual committee member. On the contrary, it is an act by which the committee member in question merely exercises sovereign power on behalf of the relevant Member State, his or her personal view being irrelevant for voting purposes.

34 The Commission disputes the applicant's line of argument.

35 In that regard, the requested documents were issued as part of the decision-making process which resulted in the adoption of the regulation at issue and which was conducted on the basis of Article 8(2) of Regulation No 1925/2006. Under that provision, the Commission may, on its own initiative or on the basis of information provided by Member States, initiate a procedure to include, in accordance with the regulatory procedure with

scrutiny referred to in Article 14(3) of the said regulation, a substance or an ingredient containing a substance other than vitamins or minerals, in Annex III thereto listing the substances whose use in foods is prohibited, restricted or under European Union scrutiny, provided that that substance represents a potential risk to consumers within the meaning of Article 8(1) of the same regulation.

36 By virtue of paragraph 3 of Article 14 of Regulation No 1925/2006, where reference is made to that paragraph, Article 5a(1) to (4) and Article 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) are to apply.

37 Decision 1999/468 was repealed by Regulation No 182/2011. Nevertheless, pursuant to the second paragraph of Article 12 of that regulation, the effects of Article 5a of that decision are to be maintained for the purposes of existing basic acts making reference thereto. The procedure applicable to the draft amending regulation was thus the regulatory procedure with scrutiny referred to in that Article 5a.

38 In the case at hand, and pursuant to Article 5a of Decision 1999/468, the Commission submitted the draft amending regulation to the PAFF Committee, which delivered a positive opinion, acting by a qualified majority. The Commission then submitted the draft amending regulation to the Parliament and to the Council. Finally, the Commission adopted the regulation at issue.

39 According to Article 14 of Regulation No 1925/2006, the Commission is to be assisted by the PAFF Committee. In that context, the Court recalls that that committee is a standing committee which assists the Commission in the exercise of its implementing powers. It is composed of representatives of the Member States and chaired by a representative of the Commission.

40 As the applicants rightly submit, the votes of the Member States are the expression of their sovereign rights and the qualified majority vote in which the Member States take part leads to the adoption of the regulation at issue, subject to opposition by the Council or the Parliament.

41 However, the votes of the Member States were cast within the PAFF Committee in order to enable the Commission to draw up a position on the basis of the positive or negative opinion delivered by that committee, before the draft amending regulation was submitted to the Parliament and the Council pursuant to Article 5a(3)(a) and (4)(a) of Decision 1999/468.

42 Put another way, the outcome of the individual votes of the Member States cast in the PAFF Committee had an influence on the Commission's internal decision-making process. It follows, as the Commission has rightly argued, that the individual votes of the Member States cast within the said committee must be regarded as acts preparatory to the draft amending regulation adopted by the Commission which it should take into account in its internal decision-making process before that draft is submitted to the Parliament and the Council.

43 Those votes must therefore be considered as being cast 'as part of deliberations and preliminary consultations' within the Commission concerning the draft amending regulation.

44 The question whether the votes of the Member States are the outcome of deliberations or constitute deliberations themselves is irrelevant in that regard. Although those votes may be regarded as the outcome of deliberations and thus constitute, depending on the outcome of the vote, the final stage of deliberations, that stage relates to the internal deliberations of the Commission. In any event, even if those votes are deemed to be part of the overall decision-making process involving the Parliament and the Council, they were cast 'as part of deliberations' of the PAFF Committee within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001, as the Commission rightly notes in the confirmatory decision.

45 That interpretation is confirmed by the judgment of 14 September 2022, *Pollinis France* v *Commission* (T-371/20 and T-554/20, under appeal, EU:T:2022:556, paragraph 107), which confirms that the Commission, in duly justified cases, may refuse access to documents which show the individual position of the Member States within the PAFF Committee where their disclosure would be likely specifically to undermine the interests protected by the exceptions provided for in Article 4 of Regulation No 1049/2001.

46 It follows that the conditions of applicability of the second subparagraph of Article 4(3) of Regulation No 1049/2001 are satisfied, such that the exception to the right of access to documents laid down by that provision is applicable to the documents reflecting the individual votes of the Member States within the PAFF Committee.

47 The first plea must therefore be rejected.

Misapplication of the exception to the right of access to documents for the protection of the decision-making process, provided for in the second subparagraph of Article 4(3) of Regulation No 1049/2001

48 In support of the second, third and fourth pleas in law, the applicants submit, in essence, that the Commission failed to demonstrate that disclosure of the requested documents would seriously undermine the decision-making process. The Commission also erred in law in finding that there was no overriding public interest justifying disclosure (second plea), that neither Regulation No 182/2011 (third plea) nor the Standard Rules of Procedure (fourth plea) could ground such disclosure or lead to such an interpretation of the second subparagraph of Article 4(3) of Regulation No 1049/2001. In addition, the Commission's application of the exception provided for in the second subparagraph of Article 4(3) of that regulation violates the general principle of transparency guaranteed by the Treaties and the Charter of Fundamental Rights of the European Union and undermines democratic legitimacy (fifth plea).

49 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 (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 49).

50 Moreover, the risk of that interest being undermined must be reasonably foreseeable and not purely hypothetical. The mere fact that a document concerns an interest protected by an exception is not by itself sufficient to justify application of that exception (see judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 62 and the case-law cited).

51 According to the Court's case-law, the application of the exception provided for in the first and second subparagraphs of Article 4(3) of Regulation No 1049/2001 requires it to be established that access to the document for internal use is likely, specifically and actually, to undermine the protection of the decision-making process of the institution and that the decision-making process must be seriously undermined (see judgment of 12 March 2019, *De Masi and Varoufakis* v *ECB*, T-798/17, EU:T:2019:154, paragraph 27 and the case-law cited). That is the case, in particular, where the disclosure of the document 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 (see judgment of 7 June 2011, *Toland* v *Parliament*, T-471/08, EU:T:2011:252, paragraph 71 and the case-law cited).

52 The institutions cannot be required to submit evidence to establish the existence of such a risk. It is sufficient in that regard if the decision contains tangible elements from which it can be inferred that the risk of the decision-making process being undermined is, 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 requested documents were disclosed (see judgment of 22 March 2018, *De Capitani* v *Parliament*, T-540/15, EU:T:2018:167, paragraph 65 and the case-law cited).

53 It is in the light of those considerations that the reasons put forward by the Commission in the confirmatory decision to justify the application of the exception provided for in the second subparagraph of Article 4(3) of Regulation No 1049/2001 must be examined.

– *The individual position of the Member States in comitology procedures*

54 In the confirmatory decision, the Commission stated that the whole legal framework applicable to comitology clearly provides for the confidentiality of individual voting positions of Member States.

55 The applicants are of the view that Regulation No 182/2011 and the Standard Rules of Procedure cannot be relied on to justify the Commission's refusal to grant access to the requested documents.

56 As a preliminary point, the Court finds in this case that, to refuse access to documents reflecting the individual votes of the Member States on the draft amending regulation, the Commission did indeed rely on Regulation No 1049/2001, but that it intended to interpret it in the light of Regulation No 182/2011 and the Standard Rules of Procedure. In that regard, the Commission itself states that it took those provisions into account in order to determine whether the disclosure of the requested documents would seriously and concretely undermine the decision-making process.

57 Therefore, contrary to what the Commission submits, the applicants' argument concerning the reference to the legal framework relating to comitology procedures is not ineffective.

58 In the confirmatory decision, the Commission stated that the whole legal framework applicable to the comitology procedure clearly provides for the confidentiality of individual voting positions of the Member States. It added that Regulation No 1049/2001 and Regulation No 182/2011 must be applied in the light of their respective provisions in a coherent manner.

59 In that regard, it follows from the case-law that the EU legislation on access to documents cannot justify an institution's refusal, as a matter of principle, to grant access to documents pertaining to its deliberations on the basis that they contain information relating to positions taken by representatives of the Member States. Therefore, as regards public access to the documents inherent in the work of comitology committees, the Commission cannot take the view that the relevant legal framework excludes, as a matter of principle, public access to the individual positions of the Member States (see judgment of 14 September 2022, *Pollinis France* v *Commission*, T-371/20 and T-554/20, under appeal, EU:T:2022:556, paragraphs 98 and 99 and the case-law cited).

60 According to the applicants, Article 10(2) and Article 13(2) of the Standard Rules of Procedure, which provide for the confidentiality of the positions of committee members, do not justify refusal of access, either. In the light of the principle of the hierarchy of norms, the Standard Rules of Procedure should be interpreted in the light of Regulation No 1049/2001, which lays down the principle of disclosure, without one trumping the other, and contains no justification allowing it to be demonstrated that disclosure of the requested documents could undermine the decision-making process.

61 The Commission, first, contends that Regulation No 182/2011 and the Standard Rules of Procedure adopted on the basis of Article 9 of that regulation clearly provide for the confidentiality of individual voting positions of Member States. Second, those acts contain a reference to Regulation No 1049/2001 which, at the same time, governs access to documents of the committees. Thus, there is no opposition between those two legal frameworks. It was in that legal context that the Commission applied the exception provided for in the second subparagraph of Article 4(3) of Regulation No 1049/2001 'in conformity with [Regulation No 182/2011], so as not to deprive the above mentioned confidentiality requirements of any meaningful effect', as the confirmatory decision indicates.

62 The Commission adds that the legislative provisions of the Standard Rules of Procedure and of Regulation No 182/2011 were referred to because they were relevant for the assessment of the negative effect of the disclosure of the documents created in the framework of the comitology procedure. Thus, disclosure of the individual positions of the Member States would seriously affect the decision-making process.

63 In that regard, it should be borne in mind that the provisions of the rules of procedure of a committee, or even those of the Standard Rules of Procedure, whether or not they have been adopted by the committee as its rules of procedure, cannot, in response to a request for public access, make it possible for protection to be granted to documents which go beyond what is provided for by Regulation No 1049/2001. They cannot therefore be interpreted as precluding public access to the individual positions of the Member States (see, to that effect, judgment of 14 September 2022, *Pollinis France* v *Commission*, T-371/20 and T-554/20, under appeal, EU:T:2022:556, paragraphs 96, 97 and 100).

64 In particular, the Commission cannot rely on the content of Article 10(2) of the Standard Rules of Procedure concerning the content of the 'summary record' of the work of committees. That provision does not relate to public access to the documents of committees, but to the content of the summary record. The fact that the summary record does not mention the individual position of the Member States has no bearing on access to documents. It

cannot therefore prejudice public access, upon application, to documents showing those individual positions (judgment of 14 September 2022, *Pollinis France* v *Commission*, T-371/20 and T-554/20, under appeal, EU:T:2022:556, paragraph 101).

65 Nor can the Commission rely on Article 13(2) of the Standard Rules of Procedure, which states that 'the committee's deliberations shall be confidential'.

66 The scope of that provision is qualified by the whole of Article 13 of the Standard Rules of Procedure. Thus, Article 13(1) and (3) of those rules of procedure provides for the possibility that, in accordance with Regulation No 1049/2001, access may be granted to documents transmitted by a member of the committee to the other members of the committee, to experts and to representatives of third parties and that, in those cases, those documents are not confidential, or lose their confidentiality. It cannot be ruled out, however, that such documents may contain the individual votes of Member States reflecting their individual positions on a draft regulation (see, to that effect, judgment of 14 September 2022, *Pollinis France* v *Commission*, T-371/20 and T-554/20, under appeal, EU:T:2022:556, paragraphs 104 and 105).

67 Furthermore, in so far as, before the Court, the Commission also relied on Article 10(1) of Regulation No 182/2011 in support of the argument that that provision requires only that a register be kept for the total result of the votes and not for the individual votes of the Member States, that argument must also be rejected. That provision concerns only the content of the register of the committee proceedings, and not public access to documents, which, as follows from Article 9(2) of Regulation No 182/2011, may be granted pursuant to Regulation No 1049/2001 (see, to that effect, judgment of 14 September 2022, *Pollinis France* v *Commission*, T-371/20 and T-554/20, under appeal, EU:T:2022:556, paragraph 102).

68 It follows that, contrary to what the Commission maintained in the confirmatory decision, the comitology procedures, and in particular the Standard Rules of Procedure, do not in themselves require access to documents showing the individual position of the Member States within the PAFF Committee to be refused in order to protect the decision-making process of that committee, within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001 (see, to that effect, judgment of 14 September 2022, *Pollinis France* v *Commission*, T-371/20 and T-554/20, under appeal, EU:T:2022:556, paragraph 107). Accordingly, the legal framework relating to comitology procedures cannot, in itself, preclude the right of access to documents resulting from Regulation No 1049/2001 nor can it lead the Commission to allege a risk of serious undermining of the decision-making process solely because of the applicability of that legal framework.

69 However, as has already been emphasised in paragraph 45 above, that does not in any way prevent the Commission, in duly justified cases, from refusing access to documents which show the individual position of the Member States within that committee where their disclosure would be likely specifically to undermine the interests protected by the exceptions provided for in Article 4 of Regulation No 1049/2001 (judgment of 14 September 2022, *Pollinis France* v *Commission*, T-371/20 and T-554/20, under appeal, EU:T:2022:556, paragraph 107).

– *Cooperation of the Member States in the comitology procedure*

70 In their second plea, the applicants claim that the Commission merely alleged that disclosure would have a negative impact on the cooperation of the Member States in the comitology procedure.

71 The Commission submits that the risk posed by the disclosure of the documents at issue is not purely hypothetical. Under the rules applicable to comitology procedures, Member States trust the Commission to respect fully the confidentiality of their individual positions, in order to preserve their ability to express themselves in a free and unhindered manner in the framework of committee deliberations. That is also justified by the ability of the Commission to conduct the preparatory stages of the adoption of the implementing acts efficiently. It adds that public access to the individual votes of the Member States would actually and specifically undermine the decision-making process in that it would have a negative effect on the behaviour of Member States in future comitology procedures.

72 In the confirmatory decision, the Commission states, in essence, that, in view of the regulatory framework applicable to the comitology procedure, disclosure of the requested documents would affect the mutual trust between the Member States and would be at odds with the principle of sincere cooperation provided for in

Article 4(3) TEU. The Commission adds that, given that the Member States legitimately expect it to preserve the confidentiality of their individual positions, disclosure of such positions, in disregard of the rules applicable to the comitology procedure, would have a negative impact on their cooperation.

73 It must be stated that, in that regard, the Commission relied on abstract reasoning relating to the maintenance of that cooperation in comitology procedures in general. The negative consequences cited by the Commission in the confirmatory decision are based on the premiss that comitology procedures protect, as regards an application for access to documents, the confidentiality of the individual positions of the Member States.

74 Such a premiss, however, has been rejected in paragraph 68 above. The justifications put forward by the Commission therefore have no concrete link with the specific circumstances of the decision-making process at issue.

75 It follows that the reasons put forward by the Commission in the confirmatory decision cannot justify, in the circumstances of the present case, the application of the exception provided for in the second subparagraph of Article 4(3) of Regulation No 1049/2001.

76 Accordingly, the confirmatory decision must be annulled in so far as it refuses access to the requested documents on the basis of the second subparagraph of Article 4(3) of Regulation No 1049/2001, without there being any need to examine the question of the existence of an overriding public interest or the fifth plea in the action.

Costs

77 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. Furthermore, under Article 137 of the Rules of Procedure, where a case does not proceed to judgment, the costs are to be in the discretion of the Court. Since the Commission has been largely unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicants.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Declares that there is no longer any need to adjudicate on the claim for annulment of the implied decision refusing access of 12 March 2021;**

2. **Annuls decision C(2021) 2541 final of the European Commission of 7 April 2021 to the extent that it refuses access to the individual votes of the representatives of the Member States on the basis of the second subparagraph of Article 4(3) 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;**

3. **Dismisses the action as to the remainder;**

4. **Orders the Commission to pay the costs.**

Case C-761/18 P, *Päivi Leino-Sandberg v European Parliament*

In Case C-761/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 3 December 2018,

Päivi Leino-Sandberg, residing in Helsinki (Finland), represented by O. W. Brouwer and B. A. Verheijen, advocaten, and by S. Schubert, Rechtsanwalt,

appellant,

supported by:

Republic of Finland, represented by M. Pere, acting as Agent,

Kingdom of Sweden, represented initially by A. Falk, C. Meyer-Seitz, H. Shev, J. Lundberg and H. Eklinder, and subsequently by C. Meyer-Seitz, H. Shev and H. Eklinder, acting as Agents,

interveners in the appeal,

the other party to the proceedings being:

European Parliament, represented by C. Burgos, I. Anagnostopoulou and L. Vétillard, acting as Agents,

defendant at first instance,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič, E. Juhász, C. Lycourgos and I. Jarukaitis (Rapporteur), Judges,

Advocate General: M. Bobek,

Registrar: Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 16 July 2020,

gives the following

Judgment

1 By her appeal, Ms Päivi Leino-Sandberg seeks to have set aside the order of the General Court of the European Union of 20 September 2018, *Leino-Sandberg* v *Parliament* (T-421/17, not published, EU:T:2018:628), ('the order under appeal'), by which it held that there was no longer any need to adjudicate on her action for the annulment of the European Parliament Decision A(2016) 15112 ('the decision at issue'), of 3 April 2017, refusing to grant her access to Decision A(2015) 4931 of the Parliament, of 8 July 2015, addressed to Emilio De Capitani.

Background to the dispute

2 Ms Päivi Leino-Sandberg, a Professor of International and European Law at the University of Eastern Finland, submitted to the European Parliament a request for access to documents of that institution in the context

of two research projects relating to transparency in trilogues. In that context, she specifically requested to have access to Decision A(2015) 4931 of the European Parliament of 8 July 2015 refusing to grant Mr Emilio De Capitani full access to documents LIBE-2013-0091-02 and LIBE-2013-0091-03 ('Decision A(2015) 4931' or 'the requested document'). By that decision, the Parliament in essence refused Mr De Capitani access to the fourth column of two tables drawn up in the context of the trilogues that were ongoing at the time.

3 That decision was the subject of an action for annulment lodged by Mr De Capitani, registered by the Registry of the General Court on 18 September 2015 as Case T-540/15. In the meantime, Mr De Capitani made that document available to the public by publishing it on the internet in a blog ('the document at issue').

4 By the decision at issue, the Parliament refused to grant the appellant access to the requested document, on the ground that, as it was being contested by its addressee before the General Court and the judicial proceedings were still in progress, its disclosure would undermine the protection of court proceedings provided for by the second indent of Article 4(2) 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).

5 By judgment of 22 March 2018, *De Capitani* v *Parliament* (T-540/15, EU:T:2018:167), the Court annulled Decision A(2015) 4931.

Proceedings before the General Court and the order under appeal

6 By application lodged at the Registry of the General Court on 6 July 2017, the appellant brought an action seeking the annulment of the decision at issue. The Republic of Finland and the Kingdom of Sweden applied to intervene in the proceedings in support of the forms of order sought by the appellant.

7 On 14 November 2017, the General Court, by a measure of organisation of procedure adopted pursuant to Article 89 of its Rules of Procedure, asked the appellant, in particular, to indicate whether she had obtained satisfaction by the fact that she was able to access the requested document on the internet. On 27 March 2018, by a separate document lodged at the Registry of the General Court pursuant to Article 130(2) of the Rules of Procedure, the Parliament lodged an application for a declaration that there was no need to adjudicate.

8 On 20 April 2018, the appellant lodged with the Registry of the General Court her observations on the application for a declaration that there was no need to adjudicate, asking the Court to reject that application.

9 By the order under appeal, the General Court held that there was no longer any need to adjudicate on the appellant's action as, following the disclosure of the document at issue on the internet, the action had become devoid of purpose. The General Court excluded the application of the case-law of the Court of Justice that an applicant may retain an interest in seeking the annulment of an act of a European Union institution to prevent its alleged unlawfulness recurring in the future. According to the General Court, the refusal made by the Parliament was specific to the case and ad hoc in nature.

Forms of order sought by the parties before the Court of Justice

10 By its appeal, the appellant claims that the Court of Justice should:

– set aside the order under appeal;

– give a final ruling on the dispute;

– order the Parliament to pay the costs, and

– order the interveners to bear their own costs.

11 The Republic of Finland submits that the Court should:

– set aside the order under appeal, and

– refer the case back to the General Court for reconsideration.

12 The Kingdom of Sweden contends that the Court should:

– set aside the order under appeal, and

– give final judgment on the matter.

13 The Parliament contends that the Court should:

– dismiss the appeal, and

– order the appellant to pay the costs.

The appeal

14 In support of her appeal, the appellant puts forward two grounds. By her first ground of appeal, she criticises the General Court for having concluded that the action had become devoid of purpose and that there was no longer any need to adjudicate. By her second ground of appeal, the appellant criticises the General Court for having held that the publication of the document at issue by a third party had entailed the loss of her interest in bringing proceedings.

The first ground of appeal

Arguments of the parties

15 By her first ground of appeal, which contains two complaints, the appellant submits, in essence, that the General Court committed an error of law in finding that the publication of the document at issue on the internet, by the addressee thereof, had resulted in the action at first instance becoming devoid of purpose.

16 The appellant submits, first, that the General Court failed to apply the principle established by the judgment of 4 September 2018, *ClientEarth* v *Commission* (C-57/16 P, EU:C:2018:660), according to which legal proceedings retain their purpose where, notwithstanding the publication of the documents sought, the institution which had originally refused to grant access to those documents does not withdraw its decision. In the present case, the Parliament has not withdrawn the decision at issue.

17 Second, the appellant criticises the General Court for having applied a criterion that was overly narrow and incorrect by merely considering whether the appellant could 'in an entirely legal manner' use the document at issue, following its publication by Mr De Capitani on his blog. In that regard, and as Mr De Capitani had himself indicated that the published version of the requested document was 'a version emphasised/notated', the appellant submits that her status as a researcher required to comply with academic standards of quality, objectivity, and research ethics put her under an obligation to use only information obtained from authentic sources. In addition, it does not follow from the purpose of Regulation No 1049/2001 that the regulation must be interpreted as meaning that the publication of a document by a third party may be a substitute for public access granted by the institution in question under that regulation.

18 The Finnish and Swedish Governments support the appellant's arguments and consider that the legal proceedings have not become devoid of purpose.

19 In particular, the Finnish Government observes that, to its knowledge, the Court has never held that the disclosure of a document by a third party is relevant for the purposes of assessing whether the interest of an applicant in bringing proceedings persists in a case regarding the applicant of Regulation No 1049/2001. That government submits, moreover, that the circumstances at issue in the cases that gave rise to the order of 11 December 2006, *Weber* v *Commission* (T-290/05, not published, EU:T:2006:381) and to the judgments of 3 October 2012, *Jurašinović* v *Council* (T-63/10, EU:T:2012:516), and of 15 October 2013, *European Dynamics Belgium and Others* v *EMA* (T-638/11, not published, EU:T:2013:530), to which the general Court referred in paragraph 27 of the order under appeal, are different from the circumstances at issue in the present case.

20 For its part, the Parliament contends that the first ground of appeal should be rejected.

21 First, the Parliament submits that the facts underlying the present case, and those that gave rise to the judgment of 4 September 2018, *ClientEarth* v *Commission* (C-57/16 P, EU:C:2018:660), are different and that the reasoning followed by the Court in that judgment cannot be transposed to this case. The only point that that judgment and this case have in common is that the institution in question did not withdraw the decision at issue.

22 Second, the Parliament submits that the argument concerning quality standards and the impossibility for an academic researcher to rely on research conducted on the internet was not raised before the General Court. That, according to the Parliament, is thus a new plea which extends the subject matter of the dispute and which, therefore, must be rejected as inadmissible.

23 In addition, the Parliament observes that the General Court did not find that, or even examine whether, the publication of the document at issue by Mr De Capitani was validly capable of being a substitute for public access, but only assessed whether the appellant could make use of it, in an entirely legal manner, for the purposes of her academic work.

24 Furthermore, as regards the Finnish Government's assertion that the appellant could not have complete certainty as to the legitimacy of the publication and of the use of the document at issue, the Parliament submits that it had never expressed any doubt as to the fact that Mr De Capitani, the addressee of the requested document, was in fact the person who had published the document at issue. The Parliament submits that there is no doubt on that point.

25 Finally, the Parliament stresses that, contrary to what is suggested by the Finnish Government, it is clear from the case-law cited in the order under appeal that the General Court laid down a general criterion when it held that an action for annulment of a decision refusing access to documents no longer has any purpose when the documents in question have been made accessible by a third party and the applicant can access them and use them in a way which is as lawful as if he or she had obtained them as a result of his or her application under Regulation No 1049/2001.

Findings of the Court

26 By her first ground of appeal, the appellant, supported by the Finnish and Swedish Governments, submits, in essence, that the General Court committed an error of law in finding that the action had become devoid of purpose. By the first complaint, she submits that as the Parliament had not withdrawn the decision at issue, the action retained its purpose. By the second complaint, she submits that the General Court applied a too narrow and incorrect criterion by merely considering whether the appellant could legally use the document at issue, following its publication by a third party on the internet, in a version that was annotated and underlined, whereas her status as an academic researcher required her to use only information obtained from authentic sources.

27 As regards the plea of inadmissibility, set out in paragraph 22 of this judgment, alleging that the second complaint was not raised before the General Court, it must be recalled that, according to the case-law of the Court of Justice, to allow a party to put forward for the first time before the Court of Justice a plea in law which that party has not raised before the General Court would be to allow it to bring before the Court of Justice a case of wider ambit than that presented before the General Court. In an appeal, the Court's jurisdiction is, as a general rule, confined to a review of the assessment by the General Court of the pleas argued before it. However, an argument which was not raised at first instance does not constitute a new plea that is inadmissible at the appeal stage if it is simply an amplification of an argument already developed in the context of a plea set out in the application before the General Court (judgment of 10 April 2014, *Areva and Others* v *Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraphs 113 and 114 and the case-law cited).

28 In the present case, it must be observed that the appellant submits, in essence, in paragraph 3 of her observations on the application for a declaration of no need to adjudicate submitted to the General Court, that a document cannot be regarded as having been the subject of a 'publication' as such, where it has been disclosed on the internet by a private person, since such disclosure is not comparable to access granted to it by the institution or its publication by that institution.

29 Therefore, and even though the appellant did not expressly state, at first instance, that her status as an academic researcher obliged to comply with academic standards of quality and objectivity required her to use only information obtained from authentic sources, the second complaint, alleging that the General Court applied an overly narrow and incorrect criterion when basing its findings on the fact that the applicant could legally use the document at issue following its publication by a third party, is the amplification of the argument she made before the General Court.

30 Accordingly, the second complaint within the first ground of appeal is admissible.

31 As regards the merits of the first ground of appeal, it should be recalled that, in paragraph 27 of the order under appeal, the General Court recalled its case-law according to which an action for the annulment of a decision refusing access to documents no longer has any purpose when the documents in question have been made accessible by a third party and the applicant can access them and use them in a way which is as lawful as if he or she had obtained them as a result of his or her application under Regulation No 1049/2001. Furthermore, in paragraph 28 of that order, the General Court held that that case-law applied a fortiori in the present case 'given that a full version of the [document at issue] [had been] made accessible by the addressee of the document himself, with the effect that there [was] no doubt that the applicant can use it in an entirely legal manner for the purposes of her university work.'

32 It is important to bear in mind that, in accordance with the Court's settled case-law, 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. That purpose must continue to exist, like the interest in bringing proceedings, until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be liable, if successful, to procure an advantage for the party bringing it (judgments of 28 May 2013, *Abdulrahim* v *Council and Commission*, C-239/12 P, EU:C:2013:331, paragraph 61; of 23 November 2017, *Bionorica and Diapharm* v *Commission*, C-596/15 P and C-597/15 P, EU:C:2017:886, paragraphs 84 and 85; of 6 September 2018, *Bank Mellat* v *Council*, C-430/16 P, EU:C:2018:668, paragraph 50; and of 17 October 2019, *Alcogroup and Alcodis* v *Commission*, C-403/18 P, EU:C:2019:870, paragraph 24).

33 In the present case, it must be held that even if the document at issue has been disclosed by a third party, the decision at issue has not been formally withdrawn by the Parliament, with the result that the legal proceedings, contrary to what the General Court held, in particular in paragraphs 27 and 28 of the order under appeal, retained their purpose (see, to that effect, the judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 45 and the case-law cited).

34 Therefore in order to ascertain whether the General Court should have ruled on the substance of the action, it is necessary to examine, in accordance with the case-law of the Court recalled in paragraph 32 of this judgment, whether the appellant could continue to invoke, notwithstanding that disclosure, an interest in bringing proceedings, which requires the determination of whether the appellant has obtained, by that disclosure, full satisfaction having regard to the objectives she pursued by her request for access to the document in question (see, to that effect, the judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 47).

35 As a preliminary matter, it must be observed that, while it is true that interest in bringing proceedings, which must continue until the final decision is delivered failing which there will be no need to adjudicate, constitutes a procedural condition independent of the substantive law applicable to the substance of the case, it cannot however be detached from that law as whether there is an interest in bringing proceedings must be assessed in the light of the substantive claim that has been made in the application initiating the proceedings.

36 In that regard, it should be borne in mind that, in accordance with recital 1 thereof, Regulation No 1049/2001 reflects the intention of the European Union legislature, expressed in the second paragraph of Article 1 TEU, to mark 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 (judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 73 and the case-law cited).

37 That core EU objective is also reflected in Article 15(1) TFEU, which provides that the institutions, bodies, offices and agencies of the European Union are to conduct their work as openly as possible, that principle of openness also being expressed in Article 10(3) TEU and in Article 298(1) TFEU, and in the enshrining of the

right of access to documents in Article 42 of the Charter of Fundamental Rights of the European Union (judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 74 and the case-law cited).

38 From that perspective, Regulation No 1049/2001 seeks, as recital 4 and Article 1 thereof state, to confer on the public as wide a right of access as possible to documents of the EU institutions (judgment of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 33).

39 To that end, Article 2 of Regulation No 1049/2001 provides, in paragraph 1, that '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' and adds, in paragraph 4, that 'without prejudice to Articles 4 and 9 [of this regulation], documents shall be made accessible to the public either following a written application or directly in electronic form or through a register'.

40 Thus, the regulation establishes, first, the right, in principle, for any person to access documents of an institution and, second, the obligation, in principle, of an institution to grant access to its documents.

41 Article 4 of the regulation lists exhaustively the exceptions to the right of public access to documents of the institutions on the basis of which the institutions may refuse access to a document, in order to prevent disclosure of the document from undermining one of the interests protected by Article 4 (see, to that effect, judgment of 28 November 2013, *Jurašinović* v *Council*, C-576/12 P, EU:C:2013:777, paragraph 44 and the case-law cited).

42 Thus, Article 10 of that regulation, which concerns the rules governing access to documents following an application, provides in paragraph 1 thereof that such access is exercised 'either by consulting them on the spot or by receiving a copy, including, where available, an electronic copy, according to the applicant's preference'.

43 Furthermore, it should be observed that Article 10(2) of Regulation No 1049/2001 provides that 'the institution may fulfil its obligation of granting access to documents by informing the applicant how to obtain the requested document', but that is the case only 'if a document has already been released by the institution concerned and is easily accessible to the applicant'.

44 Thus, by informing the applicant how to obtain the requested document, which has already been released by the institution concerned, that institution satisfies its obligation to grant access to that document in the same way as if it had itself directly communicated it to the applicant. Such information constitutes, in effect, an essential prerequisite to confirm the exhaustive and complete nature and lawful use of the requested document.

45 By contrast, it cannot be held that the institution concerned satisfies its obligation to grant access to a document on the sole ground that the document has been disclosed by a third party and that the applicant has obtained knowledge of it.

46 Contrary to a situation in which the institution itself has disclosed a document, thus allowing the applicant to obtain knowledge of it and to make use of it legally, while being assured of the exhaustive and complete nature of that document, a document disclosed by a third party cannot be regarded as constituting an official document, or as expressing the official position of the institution, in the absence of an unequivocal endorsement by that institution according to which the document obtained emanates from it and expresses its official position.

47 If the position defended by the Parliament and adopted by the General Court were upheld, an institution would be relieved of its obligation to grant access to the requested document even where none of the conditions permitting it to avoid that obligation, laid down in Regulation No 1049/2001 were satisfied.

48 Therefore, in a situation such as that in the present case, where the appellant has only obtained access to the document at issue disclosed by a third party and where the Parliament continues to refuse to grant her access to the requested document, it cannot be considered that the appellant has obtained access to that document, within the meaning of Regulation No 1049/2001, nor that, therefore, she no longer has any interest in seeking the annulment of the decision at issue solely as a result of that disclosure. On the contrary, in such circumstances, the appellant retains a genuine interest in obtaining access to an authenticated version of the requested document, within the meaning of Article 10(1) and (2) of the regulation, guaranteeing that that institution is the author and that the document expresses its official position.

49 Consequently, the General Court erred in law, in paragraphs 27 and 28 of the order under appeal, in treating the disclosure of a document by a third party as being the same as disclosure by the institution concerned of the requested document, within the meaning of Regulation No 1049/2001, and in having concluded, in paragraph 37 of that order, that there was no longer any need to adjudicate on the appellant's action on the ground that, since the document had been disclosed by a third party, the appellant could access it and use it in a way which is as lawful as if she had obtained it as a result of her application under Regulation No 1049/2001.

50 It follows from the foregoing that the first ground of appeal must be upheld and the order under appeal must be set aside, without it being necessary to examine the other arguments raised in that ground, or those raised in the second ground of appeal.

The action before the General Court

51 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court may, after quashing the decision of the General Court, itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

52 In the present case, since the General Court upheld the Parliament's application for a declaration that there was no longer any need to adjudicate without having examined the substance of the appellant's action, the Court considers that the state of the proceedings does not permit a final decision to be given. Accordingly, the case must be referred back to the General Court.

Costs

53 Since the case is being referred back to the General Court, it is appropriate to reserve the costs.

On those grounds, the Court (Fifth Chamber) hereby:

1. **Sets aside the order of the General Court of the European Union of 20 September 2018, *Leino-Sandberg* v *Parliament* (T-421/17, not published, EU:T:2018:628);**

2. **Refers the case back to the General Court of the European Union;**

3. **Reserves the costs.**

LECTURE 6: 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, 6 October 2021, Case T-827/17, *Aeris Invest Sàrl v European Central Bank*, EU:T:2021:660.
- Court of Justice, 17 December 2020, Case C-342/19 P, *Fabio De Masi and Yannis Varoufakis v European Central Bank*, EU:C:2020:1035.

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-827/17, *Aeris Invest Sàrl v European Central Bank*

In Case T-827/17,

Aeris Invest Sàrl, established in Luxembourg (Luxembourg), represented by R. Vallina Hoset and E. Galán Burgos, lawyers,

applicant,

v

European Central Bank (ECB), represented by T. Filipova, D. Báez Seara and F. von Lindeiner, acting as Agents, and by M. Kottmann, lawyer,

defendant,

supported by

European Commission, represented by É. Gippini Fournier, J. Rius, C. Ehrbar and A. Steiblytė, acting as Agents,

and by

Banco Santander, SA, established in Santander (Spain), represented by J. Rodríguez Cárcamo and A. Rodríguez Conde, lawyers,

interveners,

APPLICATION under Article 263 TFEU for annulment of Decisions LS/MD/17/405, LS/MD/17/406 and LS/MD/17/419 of the ECB of 7 November 2017 refusing to grant full access to certain documents concerning the adoption of a resolution scheme for Banco Popular Español, SA,

THE GENERAL COURT (Third Chamber, Extended Composition),

composed of A.M. Collins, President, V. Kreuschitz, Z. Csehi, G. De Baere (Rapporteur) and G. Steinfatt, Judges,

Registrar: A. Juhász-Tóth, Administrator,

having regard to the written part of the procedure and further to the hearing on 4 March 2021,

gives the following

Judgment

I. Background to the dispute

Resolution of Banco Popular Español, SA

1 Banco Popular Español, SA ('Banco Popular') was a credit institution established in Spain subject to direct prudential supervision by the European Central Bank (ECB) pursuant to Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63).

2 On 6 June 2017, the ECB, after consulting the Single Resolution Board (SRB), carried out an assessment regarding whether Banco Popular was failing or was likely to fail ('the FOLTF assessment'), in accordance with the second subparagraph of Article 18(1) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

3 That same day, Banco Popular's board of directors informed the ECB that it had reached the conclusion that the bank was likely to fail.

4 Also on the same day, the ECB sent the final version of the FOLTF assessment to the SRB and the European Commission, in accordance with the third subparagraph of Article 18(1) of Regulation No 806/2014.

5 In the FOLTF assessment, the ECB stated that in the preceding months there had been a substantial deterioration in the liquidity situation of Banco Popular, primarily driven by a significant depletion of its deposit base.

6 In view, in particular, of the excessive deposit outflows, the speed at which Banco Popular had lost liquidity and its inability to generate further liquidity, the ECB took the view that there were objective elements indicating that Banco Popular would be unlikely, in the near future, to be able to pay its debts or other liabilities as they fell due. The ECB concluded from this that Banco Popular was failing or, in any case, was likely to fail in the near future, in accordance with Article 18(1)(a) and (4)(c) of Regulation No 806/2014.

7 On 7 June 2017, the SRB in its executive session adopted Decision SRB/EES/2017/08 concerning a resolution scheme in respect of Banco Popular on the basis of Regulation No 806/2014 ('the resolution scheme'). The resolution scheme was addressed to the Fondo de Reestructuración Ordenada Bancaria (FROB, Fund for Orderly Bank Restructuring, Spain).

8 Prior to the adoption of the resolution scheme, Banco Popular was valued in accordance with Article 20 of Regulation No 806/2014. That valuation comprised an initial valuation report dated 5 June 2017, drawn up by the SRB pursuant to Article 20(5)(a) of Regulation No 806/2014, and a second valuation report dated 6 June 2017, drawn up by an independent expert pursuant to Article 20(10) of Regulation No 806/2014. Those two valuation reports are annexed to the resolution scheme.

9 Taking the view that the conditions laid down in Article 18(1) of Regulation No 806/2014 were met, the SRB decided to place Banco Popular under resolution. Thus, the SRB found, first, that Banco Popular was failing or was likely to fail, second, that there were no alternative measures that could prevent Banco Popular's failure within a reasonable timeframe and, third, that a resolution action in the form of a sale-of-business tool in respect of Banco Popular was necessary in the public interest.

10 The application of the sale-of-business tool consisted in transferring the shares in Banco Popular, free and clear of any rights or liens of any third party, to Banco Santander, SA, as consideration for the purchase price of EUR 1.

11 On 7 June 2017, the Commission adopted Decision (EU) 2017/1246 endorsing the resolution scheme for Banco Popular (OJ 2017 L 178, p. 15) and notified it to the SRB.

12 That same day, the FROB adopted the necessary measures to implement the resolution scheme, in accordance with Article 29 of Regulation No 806/2014.

13 The SRB published a press release on its website summarising the effects of the resolution scheme. Furthermore, on 11 July 2017, a summary notification of the resolution scheme was published in the *Official Journal of the European Union* (OJ 2017 C 222, p. 3). That summary notification stated that further information on the resolution scheme was available on the SRB's website and provided the link giving access to that information, including the non-confidential version of the resolution scheme. That same day, Decision 2017/1246 was published in the *Official Journal of the European Union* (OJ 2017 L 178, p. 15).

14 By application lodged at the Registry of the General Court on 18 September 2017, the applicant, Aeris Invest Sàrl, brought an action for annulment of the resolution scheme. That action was registered as Case T-628/17. On 10 October 2017, the applicant also brought an action for non-contractual liability against the SRB seeking compensation for the harm allegedly sustained following the adoption of the resolution scheme. That action was registered as Case T-714/17.

The applications for access to documents submitted by the applicant

15 The applicant held shares in Banco Popular before the adoption of the resolution scheme.

16 Between 19 June and 2 August 2017, it submitted three applications for access to documents to the ECB, under Article 6(1) of Decision 2004/258/EC of the ECB of 4 March 2004 on public access to ECB documents (OJ 2004 L 80, p. 42), as amended by Decision 2011/342/EU of the ECB of 9 May 2011 (OJ 2011 L 158, p. 37) and Decision (EU) 2015/529 of the ECB of 21 January 2015 (OJ 2015 L 84, p. 64), and two applications to Banco de España (Bank of Spain, Spain). The applications sent to the Bank of Spain, which concerned documents drawn up or held by the ECB, were forwarded to the ECB, in accordance with the second paragraph of Article 5 of Decision 2004/258.

17 In response to the applicant's applications for access to documents, the ECB adopted four decisions, namely Decision LS/PT/2017/66 of 11 August 2017, Decision LS/PT/2017/77 of 30 August 2017, Decision LS/PT/2017/71 of 31 August 2017 and Decision LS/PT/2017/74 of 1 September 2017.

18 Following those decisions, in accordance with Article 8(2) of Decision 2004/258, the applicant submitted a single confirmatory application to the Executive Board of the ECB ('the confirmatory application') in which it grouped together all the documents to which it sought full access, referred to in the decisions of the ECB mentioned in paragraph 17 above.

19 Thus, the applicant requested, inter alia, access to the following documents:

– the redacted data concerning the ceiling for emergency liquidity assistance ('ELA'), the amount of ELA actually granted, the collateral provided by Banco Popular for the grant of ELA ('the collateral provided'), the liquidity situation and the capital ratios;

– the FOLTF assessment;

– any document from the Bank of Spain showing the daily balance (positive or negative) of the deposits of Banco Popular, namely both withdrawals and amounts deposited, between 1 January and 6 June 2017, and any documents containing some or all of that information;

– any document from the Bank of Spain containing, first, the average balance (positive or negative) of the deposits of Banco Popular, namely both withdrawals and amounts deposited, between 1 January and 23 May 2017, and, second, the daily balance (positive or negative) of the withdrawals from Banco Popular between 1 January and 23 May 2017;

– the documents sent by Banco Popular to the ECB and the Bank of Spain within the framework of the Single Supervisory Mechanism (SSM) between 1 and 6 June 2017 relating to the adoption by the SRB of the resolution scheme, in particular correspondence sent by Banco Popular to the ECB on 6 June 2017 and, in the alternative, the letter that Banco Popular sent to the ECB on 6 June 2017.

20 The ECB replied to the confirmatory application by three decisions adopted on 7 November 2017 ('the contested decisions').

21 By Decision LS/MD/17/405 of 7 November 2017 ('the first contested decision'), the ECB refused to grant access to the information listed in the third and fourth indents of paragraph 19 above. According to the ECB, the document containing that information was covered by a general presumption of confidentiality under Article 4(1)(c) of Decision 2004/258, which seeks to protect the confidentiality of information that is protected as such under EU law.

22 In that regard, the ECB stated that in the context of its ongoing prudential supervisory activities, it collects information on deposits at specific end-period dates for the credit institutions it directly supervises. Such reporting does not usually cover information relating to the daily balance (positive or negative) of deposits, that is to say both withdrawals and deposits, or information relating to the liquidity coverage capacity of the credit institution concerned. In Banco Popular's case, the ECB exceptionally began to collect that information on 3 April 2017.

23 According to the ECB, the document containing that information was prepared by it in the context of its prudential supervisory tasks and its contents were taken into account in preparing the FOLTF assessment. As such, the requested document was part of the administrative file relating to the ongoing prudential supervision of Banco Popular and the FOLTF procedure.

24 Therefore, the requested document was covered by the obligations of professional secrecy laid down in Article 27 of Regulation No 1024/2013, Article 53 et seq. of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338), and Article 84 of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190). According to the ECB, its disclosure could have damaging consequences not only for Banco Popular but also for the banking system in general, since banks could no longer be sure that the information provided would remain confidential.

25 By Decision LS/MD/17/406 of 7 November 2017 ('the second contested decision'), the ECB refused to grant access to the information listed in the first indent of paragraph 19 above. That information had been redacted when the ECB granted the applicant partial access in response to its first application for access. That partial access concerned the following four documents:

– a letter from the Governor of the Bank of Spain to the President of the ECB of 5 June 2017 entitled 'Emergency liquidity assistance';

– a follow-up letter from the Governor of the Bank of Spain to the President of the ECB of 5 June 2017 entitled 'Emergency liquidity assistance';

– a proposal from the Executive Board to the Governing Council of the ECB of 5 June 2017 entitled 'Emergency liquidity assistance request from Banco de España';

– the minutes of the 447th meeting of the Governing Council of the ECB held by teleconference on 5 June 2017.

26 The ECB decided that full access to those documents could not be granted for several reasons. First, the information they contained concerning the ELA ceiling and the amount of ELA actually granted was covered by the exceptions laid down in the first indent of Article 4(1)(a) of Decision 2004/258, relating to the protection of the public interest in the confidentiality of the proceedings of the ECB's decision-making bodies, in the second indent of Article 4(1)(a) of that decision, relating to the protection of the public interest in the financial, monetary or economic policy of the European Union or of a Member State, and in the seventh indent of Article 4(1)(a) of that decision, relating to the protection of the public interest in the stability of the financial system in the European Union or in a Member State. Second, according to the ECB, the information contained in the requested documents concerning the collateral provided was also protected by the exception laid down in the first indent of Article 4(2) of Decision 2004/258, relating to the protection of the commercial interests of a natural or legal person. Third, the ECB took the view that information concerning Banco Popular's liquidity situation and capital ratios was protected under the exceptions laid down in Article 4(1)(c) of Decision 2004/258, relating to the protection of the confidentiality of information that is protected as such under EU law, and in the first indent of Article 4(2) of that decision, relating to the protection of the commercial interests of a natural or legal person.

27 As for information concerning the ELA ceiling and the amount of ELA actually granted, the ECB stated that disclosure of that information could specifically and effectively undermine monetary policy and financial

stability in so far as the unfettered ability of national central banks to address temporary liquidity problems is an essential component of financial stability and a fundamental prerequisite for the effectiveness of monetary policy.

28 According to the ECB, the resolution of Banco Popular increased the sensitivity of the Spanish financial market to possible similar cases. Market confidence deteriorated, especially regarding small financial institutions. The disclosure of information relating to the ELA ceiling and the amount of ELA actually granted might revive tensions vis-à-vis financial institutions or fuel unwarranted speculation as regards the situation of Banco Santander. In addition, since financial markets are highly interconnected, any negative developments in Spain could have spillover effects in other Member States, which could ultimately have adverse effects on the financial stability of the European Union.

29 The ECB also pointed out that disclosure of the ELA ceiling and the amount of ELA actually granted to Banco Popular could reduce the flexibility that national central banks have to tailor ELA to specific circumstances in future cases. Moreover, disclosure of that data might lead to an expectation that national central banks and the ECB will act in the same way even in situations not warranting such an approach.

30 As for the collateral provided, the ECB stated, in essence, that disclosure of that information would undermine the effectiveness of ELA as a tool for maintaining financial stability. According to the ECB, banks would be deterred from seeking ELA at the appropriate time if information concerning the collateral provided were published. Disclosure of that information, even *ex post*, could also have the effect of reducing the flexibility of national central banks to consider a wide range of possible assets, since knowledge of the approach they have endorsed in the past would create expectations as to the type of collateral that might be accepted in the future. That would curtail their ability to respond effectively to future liquidity problems and would undermine the effectiveness of ELA as a tool for maintaining financial stability.

31 As regards information relating to Banco Popular's liquidity situation and capital ratios, the ECB stated that that information fell within the scope of prudential supervision and was therefore protected by the rules of professional secrecy and confidentiality applicable to that area, provided for in Article 27 of Regulation No 1024/2013, read in conjunction with Article 53 et seq. of Directive 2013/36. According to the ECB, disclosure of that data would trigger speculation among market participants about Banco Santander's liquidity situation and its financing needs, thereby generating unwarranted funding pressures. Disclosure of that information would thus risk undermining the public interest in the stability of the financial system in Spain and the European Union and also risk undermining Banco Santander's commercial interests.

32 Lastly, the ECB stated that, in its view, there was no overriding public interest that could trump the application of the exception laid down in the first indent of Article 4(2) of Decision 2004/258. It found that the interest relied on in the present case by the applicant, namely its status as former shareholder, was a private interest which could not prevail over the public interest protected by that provision.

33 By Decision LS/MD/17/419 of 7 November 2017 ('the third contested decision'), the ECB refused to grant access to the documents listed in the second and fifth indents of paragraph 19 above. The ECB took the view that those documents were covered by a general presumption of confidentiality based on the exceptions laid down in Article 4(1)(c) of Decision 2004/258, relating to the protection of the confidentiality of information that is protected as such under EU law, and in the first indent of Article 4(2) of that decision, relating to the protection of the commercial interests of a natural or legal person.

34 The ECB explained that the full text of the FOLTF assessment and the documentation provided by Banco Popular, namely Banco Popular's capital and liquidity situation, information on the requirements for its authorisation and correspondence sent by Banco Popular to the ECB between 1 and 6 June 2017, were part of the administrative files relating to ongoing prudential supervision and the FOLTF assessment procedure.

35 Since those administrative files were linked to the performance by the ECB of its tasks as prudential supervisory authority, they were covered by the obligations of professional secrecy and confidentiality applicable in that area, provided for in Article 27 of Regulation No 1024/2013, Article 53 et seq. of Directive 2013/36 and Article 84 of Directive 2014/59.

36 According to the ECB, disclosure of the requested documents could have damaging consequences not only for the credit institution concerned but also for the banking system in general, since banks could no longer be sure that the information they provide to the ECB for prudential supervision purposes will remain confidential.

37 The rules governing professional secrecy and confidentiality permit the disclosure of confidential information only in summary or aggregate form in such a way that the credit institution concerned cannot be identified. Those rules continue to apply even where a credit institution has been the subject of resolution.

38 The ECB then noted that the requested documents also contained information on Banco Popular's market position and its assets and liabilities, disclosure of which could adversely affect the commercial interests of Banco Popular and its parent company, Banco Santander. The ECB considered, in particular, that information such as the assessment of the impact of Banco Popular's liquidity on the funding and operating structure of its subsidiary Banco Popular Portugal was commercially sensitive and could trigger unwarranted speculation about the group's financial and liquidity situation.

39 Lastly, the ECB stated that, in its view, there was no overriding public interest that could trump the application of the exception laid down in the first indent of Article 4(2) of Decision 2004/258. It found that the interest relied on in the present case by the applicant, namely its status as former shareholder, was a private interest which could not prevail over the public interest protected by that provision.

II. **Events subsequent to the bringing of the action**

40 Following actions brought before the SRB's Appeal Panel by several former shareholders, including the applicant, and creditors of Banco Popular, the SRB published on its website a number of documents concerning the resolution of Banco Popular.

41 By application lodged at the Court Registry on 6 February 2018, the applicant brought an action for annulment of the decision of the SRB's Appeal Panel of 28 November 2017, registered as Case T-62/18.

42 In addition, on 18 July 2018, the applicant brought an action for annulment of Decision LS/MD/18/141 of the ECB of 8 May 2018, by which the ECB had refused to grant access to certain documents concerning the resolution of Banco Popular, other than the documents forming the subject matter of the present action. That action was registered as Case T-442/18.

43 On 14 June 2018, the firm Deloitte sent the SRB a valuation report drawn up in order to ascertain whether the shareholders and creditors would have received better treatment if the institution under resolution had entered into normal insolvency proceedings, as provided for in Article 20(16) to (18) of Regulation No 806/2014 ('Valuation 3').

44 On 6 August 2018, the SRB published on its website its Notice of 2 August 2018 regarding its preliminary decision SRB/EES/2018/132 on whether compensation needs to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular have been effected and the launching of the right to be heard process, together with a non-confidential version of Valuation 3. On 7 August 2018, an announcement concerning the SRB's Notice of 2 August 2018 was published in the *Official Journal of the European Union* (OJ 2018 C 277 I, p. 1).

45 On 17 March 2020, the SRB adopted Decision SRB/EES/2020/52 determining whether compensation needs to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular have been effected. In that decision, published on its website, the SRB took the view that the shareholders and creditors that had been affected by the resolution of Banco Popular were not entitled to compensation from the Single Resolution Fund (SRF) pursuant to Article 76(1)(e) of Regulation No 806/2014. On 20 March 2020, an announcement concerning that decision was published in the *Official Journal of the European Union* (OJ 2020 C 91, p. 2).

III. **Procedure and forms of order sought by the parties**

46 By application lodged at the Court Registry on 27 December 2017, the applicant brought the present action.

47 By separate document lodged at the Court Registry on the same day, the applicant requested that the present action be dealt with under an expedited procedure in accordance with Article 152 of the Rules of Procedure of the General Court. The ECB submitted its observations on that request within the prescribed period. By decision of 26 January 2018, the General Court (Eighth Chamber) refused the request for an expedited procedure.

48 By documents lodged at the Court Registry on 6 March 2018, Banco Popular and Banco Santander each applied for leave to intervene in these proceedings in support of the form of order sought by the ECB.

49 By document lodged at the Court Registry on 11 April 2018, the Commission applied for leave to intervene in these proceedings in support of the form of order sought by the ECB.

50 By decision of 17 July 2018, the President of the Eighth Chamber of the General Court granted the Commission leave to intervene. The Commission lodged its statement in intervention and the main parties lodged their observations on that statement within the prescribed period.

51 By orders of 27 July 2018, the President of the Eighth Chamber of the General Court granted Banco Santander and Banco Popular leave to intervene. They lodged their statements in intervention and the main parties lodged their observations on those statements within the prescribed period.

52 By document lodged at the Court Registry on 30 October 2018, Banco Santander informed the Court that with effect from 28 September 2018, it had become the universal successor of Banco Popular and that Banco Popular's intervention had been withdrawn.

53 The applicant lodged its observations on the withdrawal of Banco Popular's intervention within the prescribed period. Neither the ECB nor the Commission lodged observations in that regard.

54 By order of 5 February 2019, the President of the Eighth Chamber of the General Court removed Banco Popular's intervention from the register and ordered Banco Santander to bear its own costs and to pay the costs incurred by the applicant in relation to the intervention of Banco Popular. It also decided that the ECB and the Commission should bear their own costs.

55 By decision of the President of the Eighth Chamber of 1 August 2019, after the parties had been heard, the proceedings were stayed in accordance with Article 69(b) of the Rules of Procedure pending a final decision in the case having since given rise to the judgment of 19 December 2019, *ECB* v *Espírito Santo Financial (Portugal)* (C-442/18 P, EU:C:2019:1117).

56 Following a change in the composition of the Chambers of the Court, pursuant to Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was assigned to the Third Chamber, to which the present case was accordingly allocated.

57 On 19 December 2019, the Court of Justice delivered its judgment in *ECB* v *Espírito Santo Financial (Portugal)* (C-442/18 P, EU:C:2019:1117). In consequence, the proceedings in the present case were resumed.

58 By way of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, the applicant was invited to express its views on the inferences which it considered should be drawn from the judgment of 19 December 2019, *ECB* v *Espírito Santo Financial (Portugal)* (C-442/18 P, EU:C:2019:1117), for the present case, while the ECB, the Commission and Banco Santander were invited to submit observations on the applicant's reply.

59 By way of a measure of organisation of procedure provided for in Article 89 of the Rules of Procedure, the applicant, the ECB and the Commission were invited to reply in writing to a number of questions put by the Court. They replied within the prescribed period.

60 By order relating to measures of inquiry of 27 November 2020, the Court ordered the ECB, under the first paragraph of Article 24 of the Statute of the Court of Justice of the European Union and under Article 91(c) and Article 104 of the Rules of Procedure, to produce the documents to which access had been refused in the contested decisions.

61 Acting on a proposal from the Third Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a chamber sitting in extended composition.

62 By letter of 12 February 2021, Banco Santander stated that on account of the COVID-19 health crisis it was unable to travel to Luxembourg (Luxembourg) for the hearing and asked to be allowed to plead by videoconference. By decision of 17 February 2021, the President of the Third Chamber, Extended Composition, granted Banco Santander's request.

63 The parties presented oral argument and answered the oral questions put to them by the Court at the hearing on 4 March 2021.

64 The applicant claims that the Court should:

– annul the contested decisions;

– order the ECB to pay the costs.

65 The ECB, supported by the Commission and Banco Santander, contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

IV. **Law**

66 In support of its action, the applicant puts forward five pleas in law. The first plea alleges that the ECB infringed Article 4(1)(c) of Decision 2004/258 in the contested decisions. In the second plea, the applicant claims that the ECB infringed the second and seventh indents of Article 4(1)(a) of Decision 2004/258 in the second contested decision. The third plea seeks annulment of the second and third contested decisions on the ground of infringement of the first indent of Article 4(2) of Decision 2004/258. The fourth plea alleges infringement of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). In the fifth plea, raised for the first time in its observations on the statements in intervention of the Commission and Banco Santander, the applicant submits that the second contested decision is vitiated by an infringement of the obligation to state reasons in relation to the application of the first indent of Article 4(1)(a) of Decision 2004/258.

67 Before examining the five pleas in law raised by the applicant, it is necessary to determine whether the purpose of the action and the applicant's interest in bringing proceedings continue to exist.

68 The Court will then need to examine the wording of the second contested decision. On the basis of that analysis, the fifth and second pleas will be dealt with first. Thereafter, the Court will consider the first and, if appropriate, the third plea, followed by, finally, the fourth plea.

A. **Purpose of the action and the applicant's interest in bringing proceedings**

69 In its statement in intervention, Banco Santander draws the Court's attention to the fact that, since the lodging of the present action, some documents have already been published to a large extent or will soon be published on the SRB's website following the decisions of its Appeal Panel (see, in that regard, paragraph 40 et seq. above). Banco Santander submits that that fact could render the action devoid of purpose.

70 The ECB and the applicant dispute Banco Santander's claims.

71 As Banco Santander rightly points out, it has been held that an intervener is not entitled to raise an objection of inadmissibility independently and that the Court is therefore not bound to consider the pleas on which the intervener relies exclusively, which do not relate to public policy (judgments of 24 March 1993, *CIRFS and Others* v *Commission*, C-313/90, EU:C:1993:111, paragraph 22, and of 13 December 2018, *Post Bank Iran* v *Council*, T-559/15, EU:T:2018:948, paragraph 63).

72 However, under Article 131(1) of the Rules of Procedure, if the Court declares that the action has become devoid of purpose and that there is no longer any need to adjudicate on it, it may at any time, of its own motion, on a proposal from the Judge-Rapporteur and after hearing the parties, decide to rule by reasoned order.

73 According to settled case-law, 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. That purpose must continue to exist, like the interest in bringing proceedings, until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be liable, if successful, to procure an advantage for the party bringing it (see judgment of 21 January 2021, *Leino-Sandberg* v *Parliament*, C-761/18 P, EU:C:2021:52, paragraph 32 and the case-law cited).

74 Concerning, first, the purpose of the action, the Court of Justice recalled in paragraph 33 of its judgment of 21 January 2021, *Leino-Sandberg* v *Parliament* (C-761/18 P, EU:C:2021:52), that in the field of public access to documents of the EU institutions, an action retains its purpose as long as the decision by which the institution concerned refused access to the requested document has not been formally withdrawn by that institution, even if the requested document has been disclosed by a third party.

75 Since the ECB has not formally withdrawn the contested decisions, the present action retains its purpose.

76 Concerning, second, the applicant's interest in bringing proceedings, it should be pointed out that the following documents relating to the resolution of Banco Popular have been published in part or in full on the SRB's website: (i) the resolution scheme; (ii) the first valuation report of 5 June 2017 drawn up by the SRB under Article 20(5)(a) of Regulation No 806/2014; (iii) the second valuation report of 6 June 2017 drawn up by an independent expert under Article 20(10) of Regulation No 806/2014; (iv) the 2016 resolution plan; (v) the letter of sale of 6 June 2017; (vi) the SRB's decision of 3 June 2017 to initiate the sale of Banco Popular; (vii) the cover letter to the SRB's decision of 3 June 2017 to initiate the sale of Banco Popular; (viii) Valuation 3; (ix) the SRB's Notice of 2 August 2018 regarding its preliminary decision on whether compensation needs to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular have been effected and the launching of the right to be heard process; (x) the 2017 data liability report; (xi) the 2017 critical functions report; and (xii) documents received from Banco Popular in the course of the private sale.

77 It must be stated that the documents referred to in paragraph 76 above do not include the documents forming the subject matter of the present dispute, as mentioned in paragraphs 21 to 25 and 33 above, which was confirmed by the applicant both in writing and at the hearing.

78 In any event, the Court of Justice has pointed out that in a situation where the applicant has only obtained access to the requested document disclosed by a third party and where the institution concerned continues to refuse to grant him or her access to the requested document, it cannot be considered that the applicant has obtained access to that document or that, therefore, he or she no longer has any interest in seeking the annulment of the decision at issue solely as a result of that disclosure. On the contrary, in such circumstances, the applicant retains a genuine interest in obtaining access to an authenticated version of the requested document guaranteeing that that institution is the author and that the document expresses its official position (see, to that effect, judgment of 21 January 2021, *Leino-Sandberg* v *Parliament*, C-761/18 P, EU:C:2021:52, paragraph 48).

79 As the ECB confirmed at the hearing that it had not disclosed the requested documents since the lodging of the present action and that it continued to refuse access to them, it must be concluded that the applicant retains its interest in bringing proceedings in this action.

B. **Interpretation of the second contested decision**

80 As a preliminary point, it must be observed that there is a mismatch between the way in which the ECB has summarised the second contested decision in its written pleadings before the Court and the actual wording of that decision. Specifically, that mismatch concerns the provisions of Decision 2004/258 on which the ECB relied in the second contested decision in order to refuse access to the various types of information concerned.

81 It must be observed, first of all, that the Court will use the English version of the second contested decision in order to interpret the content of that decision. The Spanish version of the second contested decision contains the words 'Traducción de cortesía (en caso de discrepancia prevalece la versión en inglés)' (Courtesy translation

(in the event of divergence, the English-language version prevails)). It is common ground between the parties that the English version of that decision must be regarded as the authentic version.

82 Next, as stated in paragraph 25 above, it should be recalled that the second contested decision contains a refusal to grant partial access to four documents containing five categories of information: information relating to the ELA ceiling, the amount of ELA actually granted, the collateral provided, the liquidity situation of Banco Popular and the capital ratios of Banco Popular. The second contested decision applied five exceptions to the right of access to those five categories of information, exceptions which overlap depending on the type of information in question.

83 In response to a question put by the Court at the hearing, the ECB explained that, in its view, the second contested decision is based on the exceptions laid down in the first, second and seventh indents of Article 4(1)(a) of Decision 2004/258 as regards each of the five categories of information to which access was refused (see paragraph 82 above). According to the ECB, that interpretation is confirmed by Annex B.1 to the defence, containing a table listing the documents requested and the grounds for (partial) non-disclosure relied on by the ECB, which forms an integral part of the second contested decision.

84 In response to the ECB's claims, the applicant stated at the hearing that it considered its rights of the defence to have been infringed since it did not receive Annex B.1 to the defence with the second contested decision and the wording of the second contested decision did not confirm the ECB's view that the five categories of information to which access had been refused were covered by the set of exceptions laid down in the first, second and seventh indents of Article 4(1)(a) of Decision 2004/258.

85 It must be stated, first, that the second contested decision was intended to confirm Decision LS/PT/2017/66 of the ECB of 11 August 2017. It is apparent from the wording of the decision of 11 August 2017 that only information concerning the ELA ceiling, the amount of ELA actually granted and the collateral provided was covered by the exceptions laid down in the first, second and seventh indents of Article 4(1)(a) of Decision 2004/258, not information concerning Banco Popular's liquidity situation and capital ratios.

86 Second, in the second contested decision, under the heading 'Information on the liquidity situation and the capital ratios of BPE', the ECB stated that 'in your confirmatory application you do not contest the ECB's reasoning and arguments put forward as justification for the non-disclosure of the liquidity situation and the capital ratios of BPE' and that 'the Executive Board takes the view that such data are protected under Article 4(1)(c) ("protected as such under Union law") and the first indent of Article 4(2) ("the commercial interests of a natural or legal person") of Decision ECB/2004/3'. Those sentences leave no doubt that information relating to Banco Popular's liquidity situation and capital ratios was not covered by the exceptions laid down in the first, second and seventh indents of Article 4(1)(a) of Decision 2004/258.

87 Third, it must be observed that, contrary to the ECB's claims, there is nothing in the case file to support the conclusion that Annex B.1 to the ECB's defence is an integral part of the second contested decision.

88 The second contested decision does not refer to any attached annex. Moreover, the table in Annex B.1 concerns the three contested decisions, not just the second contested decision, so that it is likely that that annex was drawn up for the purposes of the present action.

89 In the light of those considerations, it must be concluded that, contrary to the ECB's arguments in its written pleadings before the Court and at the hearing, the second contested decision is not based on the exceptions laid down in the first, second and seventh indents of Article 4(1)(a) of Decision 2004/258 as regards each of the five categories of information to which access was refused. Specifically, in the second contested decision the ECB only refused access to the ELA ceiling, to the amount of ELA actually granted and to the collateral provided on the basis of the first, second and seventh indents of Article 4(1)(a) of Decision 2004/258. Access to information concerning the collateral provided was also refused on the basis of the first indent of Article 4(2) of Decision 2004/258. By contrast, as regards the refusal to grant access to information concerning Banco Popular's liquidity situation and capital ratios, the second contested decision is based solely on Article 4(1)(c) and the first indent of Article 4(2) of Decision 2004/258.

C. **Fifth plea in law: infringement of the obligation to state reasons in relation to the application of the first indent of Article 4(1)(a) of Decision 2004/258 in the second contested decision**

90 In its observations on the statements in intervention of the Commission and Banco Santander, the applicant raises a plea alleging that the second contested decision is vitiated by a failure to state reasons because the ECB did not explain in that decision the reasons for its view that (i) information concerning the ELA ceiling, the amount of ELA actually granted and the collateral provided was covered by the exception provided for in the first indent of Article 4(1)(a) of Decision 2004/258, relating to the protection of the public interest in the confidentiality of the proceedings of the ECB's decision-making bodies, and (ii) disclosure of that information could specifically and actually undermine the interest protected by that exception.

91 In support of that plea, the applicant refers to the judgment of 26 April 2018, *Espírito Santo Financial (Portugal)* v *ECB* (T-251/15, not published, EU:T:2018:234). In that judgment, the Court held that the ECB had infringed its obligation to state reasons by failing (i) to explain why the documents requested in that case fell within the area covered by the exception provided for in the first indent of Article 4(1)(a) of Decision 2004/258 and (ii) to provide a statement of reasons that would have made it possible to understand and verify how access to the documents at issue would have undermined the protected interest.

1. ***Preliminary remarks***

92 It must be stated that it was only at an advanced stage of the proceedings, namely in its observations on the statements in intervention of the Commission and Banco Santander, that the applicant raised the plea alleging infringement of the obligation to state reasons.

93 It should be borne in mind that in an action for annulment a plea alleging that the statement of reasons for a measure is lacking or inadequate involves a matter of public policy which may, or even must, be raised by the EU Courts of their own motion and, consequently, may be raised by the parties at any stage of the proceedings (judgments of 20 February 1997, *Commission* v *Daffix*, C-166/95 P, EU:C:1997:73, paragraph 25; of 13 December 2001, *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, T-45/98 and T-47/98, EU:T:2001:288, paragraph 125; and of 10 February 2021, *Şanli* v *Council*, T-157/19, not published, EU:T:2021:75, paragraph 34).

94 Moreover, according to settled case-law, the obligation to state the reasons on which an act adversely affecting an individual is based, as provided for in the second paragraph of Article 296 TFEU and enshrined in Article 41(2)(c) of the Charter, is a corollary of the principle of respect for the rights of the defence and its purpose is, first, to provide the person concerned with sufficient information to make it possible to ascertain whether the act is well founded or whether it is vitiated by a defect which may permit its legality to be contested before the EU Courts and, second, to enable those Courts to review the legality of that act (see judgments of 26 July 2017, *Council* v *LTTE*, C-599/14 P, EU:C:2017:583, paragraph 29 and the case-law cited, and of 10 February 2021, *Şanli* v *Council*, T-157/19, not published, EU:T:2021:75, paragraph 36 and the case-law cited).

95 According to equally settled case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution that adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the EU Courts to exercise their power of review (judgments of 30 April 2019, *Italy* v *Council (Fishing quota for Mediterranean swordfish)*, C-611/17, EU:C:2019:332, paragraph 40; of 8 May 2019, *Landeskreditbank Baden-Württemberg* v *ECB*, C-450/17 P, EU:C:2019:372, paragraph 85; and of 27 January 2021, *KPN* v *Commission*, T-691/18, not published, EU:T:2021:43, point 161).

96 In the present case, as will be explained below, the ECB's refusal to grant access to certain information on the basis of the first indent of Article 4(1)(a) of Decision 2004/258 does not meet those requirements.

2. ***Infringement of the obligation to state reasons***

(a) ***Failure to state reasons for the refusal to grant access to information relating to the ELA ceiling, the amount of ELA actually granted and the collateral provided***

97 It should be recalled, first of all, that with respect to the legal framework applicable to the right of access to ECB documents, the second paragraph of Article 1 TEU enshrines the principle that the European Union's decision-making process must be open. In that respect, Article 15(1) TFEU states that in order to promote good governance and ensure the participation of civil society, the European 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 European 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 European 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, under the second subparagraph of Article 15(3) TFEU, general principles and limits on grounds of public or private interest governing that 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. The third subparagraph of Article 15(3) TFEU provides that 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 thereof. 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 (EIB) are to be subject to that paragraph only when exercising their administrative tasks.

98 Decision 2004/258 seeks, as stated in recitals 2 and 3 thereof, to authorise wider access to ECB documents than that which existed under the rules established by ECB Decision 1999/284/EC 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 national central banks, and the confidentiality of certain matters specific to the performance of the ECB's tasks.

99 Article 2(1) of Decision 2004/258 thus gives any EU citizen, 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 laid down in that decision.

100 That right is subject to certain limits based on reasons of public or private interest. Specifically, and in accordance with recital 4 thereof, 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 national central banks.

101 Since the exceptions to the right of access laid down in Article 4 of Decision 2004/258 derogate from the right of access to documents, they must be interpreted and applied strictly (judgments of 29 November 2012, *Thesing and Bloomberg Finance* v *ECB*, T-590/10, not published, EU:T:2012:635, paragraph 41, and of 12 March 2019, *De Masi and Varoufakis* v *ECB*, T-798/17, EU:T:2019:154, paragraph 17).

102 Next, it must be observed that the judgment of 26 April 2018, *Espírito Santo Financial (Portugal)* v *ECB* (T-251/15, not published, EU:T:2018:234), relied on by the applicant in support of the fifth plea (see paragraph 91 above), was set aside by the judgment of 19 December 2019, *ECB* v *Espírito Santo Financial (Portugal)* (C-442/18 P, EU:C:2019:1117).

103 In the judgment of 19 December 2019, *ECB* v *Espírito Santo Financial (Portugal)* (C-442/18 P, EU:C:2019:1117), the Court of Justice held that with regard to the exclusive competence conferred on the Governing Council of the ECB, Article 4(1)(a) of Decision 2004/258, read in conjunction with the second sentence of Article 10.4 of Protocol No 4 on the Statute of the European System of Central Banks and of the ECB, annexed to the TEU and TFEU ('the Statute of the ESCB and of the ECB'), must be interpreted as protecting the confidentiality of the outcome of the proceedings of the Governing Council, without it being required that the refusal to grant access to the documents containing that outcome be subject to the condition that the disclosure thereof undermines the protection of the public interest (judgments of 19 December 2019, *ECB* v *Espírito Santo Financial (Portugal)*, C-442/18 P, EU:C:2019:1117, paragraph 43, and of 21 October 2020, *ECB* v *Estate of Espírito Santo Financial Group*, C-396/19 P, not published, EU:C:2020:845, paragraph 50).

104 The Court of Justice added that pursuant to the first indent of Article 4(1)(a) and Article 7(1) of Decision 2004/258, the Director-General Secretariat of the ECB is required to refuse to grant access to the outcome of the proceedings of the Governing Council, unless the latter has decided to make that outcome public in whole or in part (judgments of 19 December 2019, *ECB* v *Espírito Santo Financial (Portugal)*, C-442/18 P, EU:C:2019:1117, paragraph 44, and of 21 October 2020, *ECB* v *Estate of Espírito Santo Financial Group*, C-396/19 P, not published, EU:C:2020:845, paragraph 51).

105 The Court of Justice concluded from this that sufficient reasons are given for a decision refusing to disclose the outcome of the proceedings of the Governing Council solely by reference to the requirements of the first indent of Article 4(1)(a) of Decision 2004/258 in so far as documents recording the outcome of those proceedings are concerned (judgments of 19 December 2019, *ECB* v *Espírito Santo Financial (Portugal)*, C-442/18 P, EU:C:2019:1117, paragraph 46, and of 21 October 2020, *ECB* v *Estate of Espírito Santo Financial Group*, C-396/19 P, not published, EU:C:2020:845, paragraph 53).

106 In response to the Court's request to comment on the inferences to be drawn from the judgment of 19 December 2019, *ECB* v *Espírito Santo Financial (Portugal)* (C-442/18 P, EU:C:2019:1117), the applicant acknowledges that that judgment appears to allow the ECB to derogate from the obligation to state reasons for its decisions, in the light of the particular features of the confidentiality of the proceedings of its decision-making bodies arising from the Statute of the ESCB and of the ECB. However, the applicant states that the Court of Justice's reasoning is limited to 'documents reflecting the outcome of the proceedings of the ECB's decision-making bodies'.

107 According to the ECB, supported in that regard by the Commission and Banco Santander, the applicant's fifth plea must be rejected on the basis of the inferences to be drawn from the judgment of 19 December 2019, *ECB* v *Espírito Santo Financial (Portugal)* (C-442/18 P, EU:C:2019:1117). Thus, the ECB submits that it complied with its obligation to state reasons simply by invoking the application of the first indent of Article 4(1)(a) of Decision 2004/258 in order to refuse access to the requested information.

108 It is in the light of those considerations that it is necessary to examine whether the ECB provided sufficient reasons for the second contested decision inasmuch as it refused access to certain information on the basis of the exception laid down in the first indent of Article 4(1)(a) of Decision 2004/258, relating to the protection of the public interest in the confidentiality of the proceedings of the ECB's decision-making bodies.

109 As the ECB correctly states, the statement of reasons for the second contested decision is confined to the mere reference to the requirements of Article 4(1)(a) of Decision 2004/258 in order to refuse access to information relating to the ELA ceiling, the amount of ELA actually granted and the collateral provided.

110 The applicant is right to state that it follows from the case-law of the Court of Justice cited in paragraphs 103 to 105 above that it is only with regard to documents 'reflecting the outcome of the proceedings of the Governing Council' that a refusal to grant access is subject to a duty to state reasons, which may be confined to a mere reference to the requirements of the first indent of Article 4(1)(a) of Decision 2004/258.

111 In the present case, it must be observed that the ECB does not specify, for each type of information to which it refused access on the basis of the first indent of Article 4(1)(a) of Decision 2004/258, the document in which that information is to be found. It merely states, in general terms, that the three types of information to which it refused access on the basis of the exceptions it relied on are to be found in the four documents to which it granted partial access, namely the letter from the Governor of the Bank of Spain to the President of the ECB of 5 June 2017 entitled 'Emergency liquidity assistance'; the follow-up letter from the Governor of the Bank of Spain to the President of the ECB of 5 June 2017 entitled 'Emergency liquidity assistance'; the proposal from the Executive Board to the Governing Council of the ECB of 5 June 2017 entitled 'Emergency liquidity assistance request from Banco de España'; and the minutes of the 447th meeting of the Governing Council of the ECB held by teleconference on 5 June 2017.

112 Of those four documents, the only one clearly intended to record the outcome of the proceedings of the Governing Council of the ECB is the minutes of its 447th meeting held by teleconference on 5 June 2017. In that regard, the ECB explained in Decision LS/PT/2017/66 of 11 August 2017, which was confirmed by the second contested decision, that the decisions of the Governing Council not to oppose the ELA ceiling are recorded in the minutes of that body's meetings, which, under Article 10.4 of the Statute of the ESCB and of the ECB, are confidential in order to safeguard the independence of the members of the Governing Council and ensure that its decision-making process is effective.

113 After consulting the confidential versions of the four documents concerned, as lodged by the ECB in response to the measure of inquiry referred to in paragraph 60 above, the Court was able to ascertain that those minutes contained only one of the three items of information to which access was refused on the basis of the first indent of Article 4(1)(a) of Decision 2004/258, namely the ELA ceiling. Information relating to the amount of

ELA actually granted and the collateral provided was contained in the three other documents to which the ECB refused full access, namely the two letters from the Governor of the Bank of Spain of 5 June 2017 and the Executive Board's proposal of 5 June 2017.

114 Thus, in accordance with the case-law of the Court of Justice cited in paragraphs 103 to 105 above, the ECB provided sufficient reasons for its refusal to grant access to the ELA ceiling in so far as that information was found in the minutes of the 447th meeting of the Governing Council, since that document reflects the outcome of the proceedings of the Governing Council.

115 However, it is necessary to examine whether the ECB also provided sufficient reasons for its refusal to grant access to information relating to the ELA ceiling, the amount of ELA actually granted and the collateral provided, in so far as that information was contained in the other three documents.

116 When questioned in that regard at the hearing, the ECB stated that it was of the view that the two letters from the Governor of the Bank of Spain and the Executive Board's proposal are documents enabling the Governing Council to take an informed decision and, as such, are necessarily linked to the proceedings of that body. It follows that the protection of the confidentiality of the outcome of the proceedings of the Governing Council under the first indent of Article 4(1)(a) of Decision 2004/258, read in conjunction with the second sentence of Article 10.4 of the Statute of the ESCB and of the ECB, covers all preparatory documents submitted for the purposes of the Governing Council's proceedings. According to the ECB, by refusing access to the full text of those documents simply by invoking the requirements of the first indent of Article 4(1)(a) of Decision 2004/258, it complied with its duty to state reasons in line with the case-law of the Court of Justice set out in paragraphs 103 to 105 above.

117 The applicant countered by saying that since it was not in a position to know why the first indent of Article 4(1)(a) of Decision 2004/258 was applied to the redacted information in the letters from the Governor of the Bank of Spain and the Executive Board's proposal, it was impossible for it to put forward a plea questioning the justification for applying that provision. Specifically, it claimed that the exceptions to the right of access must be interpreted restrictively and that the broad interpretation of the first indent of Article 4(1)(a) of Decision 2004/258, read in conjunction with Article 10.4 of the Statute of the ESCB and of the ECB, as proposed by the ECB, clashes with that rule.

118 It must be stated that the two letters from the Governor of the Bank of Spain and the Executive Board's proposal predate the meeting of the Governing Council and therefore do not reflect the outcome of the proceedings of the Governing Council. It follows that the second sentence of Article 10.4 of the Statute of the ESCB and of the ECB does not apply to those documents, with the result that the Court of Justice's reasoning, as set out in paragraphs 103 to 105 above, cannot be applied to them.

119 In addition, it is for the ECB to provide a statement of reasons from which it is possible to understand and ascertain, first, whether the requested document does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine (judgments of 12 September 2013, *Besselink* v *Council*, T-331/11, not published, EU:T:2013:419, paragraph 99, and of 26 March 2020, *Bonnafous* v *Commission*, T-646/18, EU:T:2020:120, paragraph 24; also see, by analogy, judgment of 26 April 2005, *Sison* v *Council*, T-110/03, T-150/03 and T-405/03, EU:T:2005:143, paragraph 61).

120 In that regard, it must be observed that Decision 2004/258 contains an exception to the right of access, namely Article 4(3), which expressly refers to the refusal to grant access to documents drafted or received by the ECB for internal use as part of deliberations and preliminary consultations within the ECB (see, to that effect, judgment of 17 December 2020, *De Masi and Varoufakis* v *ECB*, C-342/19 P, EU:C:2020:1035, paragraphs 66 to 79).

121 The failure to state any reasons at all, in both Decision LS/PT/2017/66 of 11 August 2017 and the second contested decision, explaining why the refusal to grant full access to the letters from the Governor of the Bank of Spain and the Executive Board's proposal was covered by the exception laid down in the first indent of Article 4(1)(a) of Decision 2004/258, in so far as those documents contained information relating to the ELA ceiling, the amount of ELA actually granted and the collateral provided, prevented the applicant from understanding the reasons for the refusal to grant access to that information and, so the applicant claims, prevented

it from raising a plea challenging the justification for applying the first indent of Article 4(1)(a) of Decision 2004/258 to those documents.

122 As explained in paragraph 116 above, it was only at the hearing that the ECB stated that, in its view, since the letters from the Governor of the Bank of Spain and the Executive Board's proposal were necessary supporting material for the proceedings of the Governing Council, the refusal to grant access to certain information contained in those documents could be justified by simply referring to the requirements of the first indent of Article 4(1)(a) of Decision 2004/258, in accordance with the case-law of the Court of Justice set out in paragraphs 103 to 105 above.

123 It is settled case-law that the statement of reasons must, in principle, be notified to the person concerned at the same time as the decision adversely affecting him or her. The absence of reasoning cannot be legitimised by the fact that the person concerned becomes aware of the reasons for the decision during the procedure before the EU Courts (judgments of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 149; of 19 July 2012, *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 74; and of 10 September 2019, *Trasys International and Axianseu – Digital Solutions* v *EASA*, T-741/17, EU:T:2019:572, paragraph 53).

124 It is therefore appropriate to uphold the plea alleging that the statement of reasons for the second contested decision was inadequate inasmuch as it refused access to information concerning the ELA ceiling, the amount of ELA actually granted and the collateral provided on the basis of the first indent of Article 4(1)(a) of Decision 2004/258, in so far as that information was contained in the letter from the Governor of the Bank of Spain to the President of the ECB of 5 June 2017 entitled 'Emergency liquidity assistance', the follow-up letter from the Governor of the Bank of Spain to the President of the ECB of 5 June 2017 entitled 'Emergency liquidity assistance' and the proposal from the Executive Board to the Governing Council of the ECB of 5 June 2017 entitled 'Emergency liquidity assistance request from Banco de España'.

125 Before deciding on the consequences of that inadequate statement of reasons for the second contested decision, it is necessary to examine whether the other exceptions relied on by the ECB, the justification for which the applicant calls into question in the second plea, provide a proper foundation for refusing access to information relating to the ELA ceiling, the amount of ELA actually granted and the collateral provided.

(b) ***Failure to state reasons for the refusal to grant access to the outcome of the vote in the Governing Council***

126 On reading the confidential version of the minutes of the 447th meeting of the Governing Council of the ECB held by teleconference on 5 June 2017, the Court noted that the ECB had refused access to an item of information contained in that document which was not included in any of the five categories of information to which access was expressly refused in the second contested decision (see paragraph 82 above). The item of information in question is the outcome of the vote in the Governing Council. It does not concern the ELA ceiling, the amount of ELA actually granted, the collateral provided or Banco Popular's liquidity situation or capital ratios. The vote cast must be considered to constitute specific information which must be distinguished from information concerning the content of the proceedings prior to that vote.

127 When questioned at the hearing about the lack of any reference to the outcome of the vote, the ECB, supported in that regard by the Commission, replied that although it had not expressly stated that it also refused access to that type of information, its view was that it had provided sufficient reasons for its refusal to grant access to that item of information by invoking the application of the first indent of Article 4(1)(a) of Decision 2004/258 in order to refuse full access to the minutes of the 447th meeting of the Governing Council.

128 The approach suggested by the ECB would involve interpreting the notion of the 'outcome of the proceedings' of the Governing Council broadly, in so far as the outcome of the proceedings of the Governing Council would automatically include the outcome of the vote of that body. Such a broad interpretation would, consequently, justify the ECB's duty to state reasons when refusing access to a document containing the result of the vote in the Governing Council being limited in accordance with the case-law of the Court of Justice set out in paragraphs 103 to 105 above.

129 However, as the applicant rightly submitted at the hearing, such an approach would clearly be at variance with the principle that exceptions to the right of access must be interpreted strictly (see paragraphs 101 and 117 above).

130 Accordingly, the onus was on the ECB to state reasons for applying the first indent of Article 4(1)(a) of Decision 2004/258 to its refusal to grant access to the outcome of the vote in the Governing Council in such a way as to enable the applicant to assess whether it was justified.

131 By failing even to mention the existence of information relating to the outcome of the vote in the Governing Council, the second contested decision is vitiated by a failure to state reasons and it must be annulled in that respect.

D. **Second plea in law: infringement of the second and seventh indents of Article 4(1)(a) of Decision 2004/258 in the second contested decision**

132 In support of its second plea, the applicant submits that, in the second contested decision, the ECB infringed the second indent of Article 4(1)(a) of Decision 2004/258, relating to the protection of the public interest in the financial, monetary or economic policy of the European Union or of a Member State, and the seventh indent of Article 4(1)(a) of that decision, relating to the protection of the public interest in the stability of the financial system in the European Union or in a Member State, in so far as it wrongly asserted that the disclosure of Banco Popular's use of ELA in the days preceding its resolution and the disclosure of information relating to its liquidity situation and capital ratios could sap the effectiveness of monetary policy and jeopardise the financial stability of the European Union or of a Member State.

133 Although the applicant concedes that the ECB enjoys a broad discretion in deciding whether the public interest in the financial, monetary or economic policy of the European Union or of a Member State is undermined, it submits that the ECB committed a manifest error of assessment in the present case in so far as the requested documents are not concerned with the financial, monetary or economic policy of the European Union or of a Member State.

134 Thus, first, the applicant did not request information relating to a general policy; it only sought information relating to one particular case, limited to an identified financial institution, namely Banco Popular, covering a fixed period, namely that of the resolution of Banco Popular by the SRB. In accordance with the principle that exceptions to the right of access must be interpreted strictly, the applicant's application for access should not be construed so broadly as to equate it to an application for access to data relating to the financial, monetary or economic policy of the European Union or of a Member State.

135 Second, the information requested by the applicant does not concern the European Union or a Member State, but rather the liquidity situation of Banco Popular.

136 Third, the information requested is not of a general nature but, on the contrary, is very specific. It is concerned with a clearly defined and circumscribed period, namely the days preceding the resolution of Banco Popular, and relates to Banco Popular's individual situation. The information examined in the second contested decision, that is, the ELA ceiling, the amount of ELA actually granted, the collateral provided, and Banco Popular's liquidity situation and capital ratios, do not reveal a general policy of the European Union. Consequently, disclosure of that information would be unlikely to undermine the effectiveness of the monetary policy and financial stability of the European Union.

137 Fourth, the applicant submits that its application for access complies with the principle of proportionality, since it relates solely to information that would enable it to understand the alleged liquidity problems of Banco Popular which led to its resolution.

138 The ECB disputes the applicant's arguments.

1. ***The ineffectiveness of the second plea in law***

139 The ECB contends that the second plea is ineffective inasmuch as the application refers expressly to the exceptions in the second and seventh indents of Article 4(1)(a) of Decision 2004/258, but the arguments put forward relate solely to the second indent of that provision.

140 In that regard, it must be observed as a preliminary point that the wording of the second plea could indeed have been clearer to make it more readily understandable. Thus, in paragraph 48 of the application, the applicant states that the second contested decision relies on the second and seventh indents of Article 4(1)(a) of Decision 2004/258 in order to refuse access, inter alia, to information 'relating to the liquidity situation and the capital ratios'. As pointed out in paragraph 85 above, access to that information was refused solely on the basis of Article 4(1)(c) and the first indent of Article 4(2) of Decision 2004/258. The second plea is therefore ineffective inasmuch as it is concerned with that category of information to which access was refused in the second contested decision.

141 Next, as regards whether the second plea raised by the applicant seeks to challenge the application of both the second indent of Article 4(1)(a) of Decision 2004/258 and the seventh indent thereof, it must be held that the applicant's arguments, as set out in particular in paragraph 55 of the application, clearly seek to call into question the fact that the ECB relied on two exceptions with a very broad political and geographic scope, whereas the requested information was concerned with the very specific case of a single bank. Accordingly, the ECB's argument that the second plea is ineffective in that regard must be rejected.

142 Lastly, it should be borne in mind that the Court found in paragraph 124 above that as regards information relating to the ELA ceiling, the amount of ELA actually granted and the collateral provided, the second contested decision does not contain an adequate statement of reasons, in so far as that information was contained in the letter from the Governor of the Bank of Spain to the President of the ECB of 5 June 2017 entitled 'Emergency liquidity assistance', the follow-up letter from the Governor of the Bank of Spain to the President of the ECB of 5 June 2017 entitled 'Emergency liquidity assistance' and the proposal from the Executive Board to the Governing Council of the ECB of 5 June 2017 entitled 'Emergency liquidity assistance request from Banco de España'. The second plea is therefore not ineffective in so far as it is directed at that information.

143 By contrast, the second plea is ineffective in so far as it concerns the refusal to grant access to information relating to the ELA ceiling contained in the minutes of the 447th meeting of the Governing Council. Since the Court has ruled in paragraph 114 above that the second contested decision contains an adequate statement of reasons for the refusal to grant access to that information inasmuch as it was found in the minutes of the 447th meeting of the Governing Council, and since the applicant has not raised a plea seeking to challenge, on the substance, the application by the ECB of the first indent of Article 4(1)(a) of Decision 2004/258, it must be held that the refusal to grant access to information relating to the ELA ceiling contained in the minutes of the 447th meeting of the Governing Council is justified by that exception. That said, for the sake of completeness, the Court will also examine the merits of the second plea so far as concerns that information.

2. ***The merits of the second plea in law***

144 The second plea essentially hinges on two complaints. In the first complaint, the applicant takes issue with the ECB for having considered that the requested information fell within the scope of the exceptions provided for in the second and seventh indents of Article 4(1)(a) of Decision 2004/258. By its second complaint, the applicant denies that disclosure of the requested information, in so far as it is concerned solely with the individual situation of Banco Popular, undermines the effectiveness of monetary policy and financial stability.

(a) ***First complaint: the requested information does not fall within the scope of the second and seventh indents of Article 4(1)(a) of Decision 2004/258***

145 In the first complaint, the applicant submits that the exceptions to the right of access must be interpreted and applied strictly, so that an application for access to information relating to Banco Popular should not be interpreted as an application relating to the financial, monetary or economic policy of the European Union or of a Member State or to the stability of the financial system in the European Union or in a Member State. Thus, that information does not concern the European Union or a Member State, but only the liquidity situation of a particular financial institution, namely Banco Popular. It also covers a clearly defined period and relates to a very specific case. That information does not therefore relate to a general policy of the European Union, but only to the individual situation of Banco Popular.

146 As the applicant rightly points out, it has been held that since the exceptions to the right of access laid down in Article 4 of Decision 2004/258 derogate from the right of access to documents, they must be interpreted and applied strictly (judgments of 29 November 2012, *Thesing and Bloomberg Finance* v *ECB*, T-590/10, not published, EU:T:2012:635, paragraph 41; of 27 September 2018, *Spiegel-Verlag Rudolf Augstein and Sauga* v *ECB*, T-116/17, not published, EU:T:2018:614, paragraph 22; and of 12 March 2019, *De Masi and Varoufakis* v *ECB*, T-798/17, EU:T:2019:154, paragraph 17).

147 While it is true that the confirmatory application did not seek access to information expressly relating to the monetary policy or financial stability of the European Union or of a Member State, it cannot be inferred from this that the information identified by the ECB as relevant in the light of that application is concerned solely with Banco Popular's individual situation.

148 It is apparent from both Decision LS/PT/2017/66 of 11 August 2017 and the second contested decision that the information concerning the ELA ceiling, the amount of ELA actually granted and the collateral provided arose in a very specific regulatory context underpinned by considerations of price stability, monetary policy and financial stability of the European Union, with the result that that information necessarily goes beyond the specific case of a single credit institution.

149 Consequently, as regards information concerning the ELA ceiling and the amount of ELA actually granted, Decision LS/PT/2017/66 of 11 August 2017 describes in some detail the regulatory framework applicable to the grant of ELA, distinguishing between the nature of such credit and standard monetary transactions. The ECB explained in particular that, as a rule, national central banks alone are responsible under national law for the grant of ELA. It then stated that the ECB does not approve or adopt decisions concerning the grant of ELA, but that under Article 14.4 of the Statute of the ESCB and of the ECB, its power is limited to assessing whether the grant of ELA may, in a specific case, interfere with the objectives and tasks of the Eurosystem. In that regard, it noted that for the purposes of exercising that power, a system for the exchange of information between national central banks and the ECB is in place in the Eurosystem. Lastly, the ECB stated that the *ex post* publication of the ELA ceiling and the amount of ELA actually granted risks diminishing the flexibility that national central banks have to tailor an ELA operation to specific circumstances in future cases. Such publication would create an expectation that the ECB would act in the same way in the future, even where there was no justification for doing so. That might give rise to unwarranted market speculation, which would limit the Governing Council's ability to assess whether an envisaged ELA operation interferes with the objectives and tasks of the Eurosystem since the Governing Council would also have to take into account the effects of publication on financial stability and, ultimately, on monetary policy.

150 The second contested decision expressly referred to the detailed overview of the regulatory framework applicable to the grant of ELA as explained in paragraph 149 above. The ECB then stated that the ability of national central banks to address the temporary liquidity problems of credit institutions is an essential component of financial stability and a fundamental prerequisite for the effectiveness of monetary policy. In that regard, it pointed to the systemic effects which followed the resolution of Banco Popular and weakened the Spanish financial market and explained that publication of the requested information might revive tensions vis-à-vis financial institutions or give rise to warranted speculation about Banco Santander. Those detrimental effects in Spain could, moreover, owing to the highly interconnected nature of the markets, have adverse consequences in other Member States and, ultimately, jeopardise the financial stability of the European Union as a whole. The second contested decision also refers to Article 127(5) TFEU, which provides that the Eurosystem is to contribute to the stability of the financial system. Lastly, it reproduces the considerations set out in Decision LS/PT/2017/66 of 11 August 2017 concerning the *ex post* publication of information concerning the ELA ceiling and the amount of ELA actually granted, as well as the effect of such publication on the flexibility that national central banks and the ECB must have in the management of ELA operations.

151 As regards the collateral provided, both Decision LS/PT/2017/66 of 11 August 2017 and the second contested decision state that the publication of that information could reduce the effectiveness of ELA operations as a tool for maintaining financial stability. According to the ECB, such publication might deter credit institutions from participating in standard monetary policy operations which, in turn, could undermine the transmission mechanism implementing the ECB's monetary policy. The publication of information on the collateral provided might also diminish the flexibility that national central banks must have in order to respond effectively to future liquidity crises, since it would create expectations as to the type of collateral that would be accepted in the future. It is essential that national central banks retain their flexibility to consider a wide range of collateral options.

152 In view of the content of Decision LS/PT/2017/66 of 11 August 2017 and the second contested decision, the ECB, having drawn the applicant's attention to the rules applicable to the grant of ELA and explained the ECB's role in that regard, provided sufficient details enabling the applicant to understand that the information relating to the ELA ceiling, the amount of ELA actually granted and the collateral provided was generated and used in a context guided by considerations which were not confined to the individual situation of Banco Popular, but which essentially concerned the monetary policy and financial stability of the European Union and of Spain.

153 Information concerning the ELA ceiling, the amount of ELA actually granted and the collateral provided was included in the four documents concerned precisely for the purposes of the assessment, by the Governing Council of the ECB, of whether the Bank of Spain's planned ELA operation would interfere with the objectives of the European System of Central Banks (ESCB), of which monetary policy and financial stability form part, in accordance with Article 127(1), (2) and (5) TFEU and Articles 2 and 3 of the Statute of the ESCB and of the ECB. In other words, the rationale behind those documents lies in the very fact that that information relates to considerations which go beyond Banco Popular's specific situation. As the ECB rightly points out, information concerning the ELA ceiling and the amount of ELA actually granted reveals the ECB's position as to the marginal amount of ELA which may be granted without running the risk of frustrating the objectives of the European Union's monetary policy.

154 In the light of the foregoing, it must be concluded that the ECB did not infringe the principle that the exceptions to the right of access provided for in Decision 2004/258 must be interpreted strictly in finding that information concerning the ELA ceiling, the amount of ELA actually granted and the collateral provided fell within the scope of the exceptions provided for in the second and seventh indents of Article 4(1)(a) of Decision 2004/258.

155 The first complaint of the second plea must therefore be rejected.

(b) ***Second complaint: the refusal to grant access was not intended actually and specifically to protect the public interests at issue***

156 By its second complaint, the applicant claims that the ECB committed a manifest error of assessment regarding whether disclosure of the requested information could specifically and actually impair the effectiveness of the monetary policy and financial stability of the European Union or of a Member State.

157 As the applicant rightly points out, it has been held that the ECB must be recognised as enjoying a broad discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by a number of the exceptions laid down in Decision 2004/258 is liable to undermine the public interest at issue.

158 As regards the second and seventh indents of Article 4(1)(a) of Decision 2004/258, the existence of such discretion was expressly recognised in several judgments, including those of 29 November 2012, *Thesing and Bloomberg Finance* v *ECB* (T-590/10, not published, EU:T:2012:635, paragraphs 43 and 44); of 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein* v *ECB* (T-376/13, EU:T:2015:361, paragraph 53); and of 27 September 2018, *Spiegel-Verlag Rudolf Augstein and Sauga* v *ECB* (T-116/17, not published, EU:T:2018:614, paragraph 42).

159 That broad discretion was based, by analogy with the case-law relating to 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), on the finding that the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Decision 2004/258, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care (judgment of 29 November 2012, *Thesing and Bloomberg Finance* v *ECB*, T-590/10, not published, EU:T:2012:635, paragraph 44; also see, by analogy, judgments of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 35; of 27 November 2019, *Izuzquiza and Semsrott* v *Frontex*, T-31/18, EU:T:2019:815, paragraph 64; and of 25 November 2020, *Bronckers* v *Commission*, T-166/19, EU:T:2020:557, paragraph 34).

160 Furthermore, the recognition that the ECB enjoys a broad discretion was also guided by the fact that the criteria set out in Article 4(1)(a) of Decision 2004/258 are very general (judgment of 29 November 2012, *Thesing*

and Bloomberg Finance v *ECB*, T-590/10, not published, EU:T:2012:635, paragraph 43; also see, by analogy, judgment of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 36).

161 According to the case-law, the consequence of recognising that the ECB enjoys such discretion is that the EU Courts' review of legality in that regard must be limited to verifying whether the procedural rules and the obligation 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 judgment of 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein* v *ECB*, T-376/13, EU:T:2015:361, paragraph 53 and the case-law cited; judgment of 12 March 2019, *De Masi and Varoufakis* v *ECB*, T-798/17, EU:T:2019:154, paragraph 54).

162 In addition, given the limited scope of the review conducted by the EU Courts, the ECB's compliance with its obligation to provide a statement of reasons takes on even more fundamental importance. Indeed, only in this way can the EU Courts verify whether the factual and legal elements upon which the exercise of the power of assessment depends were present (see judgment of 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein* v *ECB*, T-376/13, EU:T:2015:361, paragraph 54 and the case-law cited; judgment of 12 March 2019, *De Masi and Varoufakis* v *ECB*, T-798/17, EU:T:2019:154, paragraph 54).

163 In the present case, it cannot be claimed that the ECB manifestly erred in taking the view that disclosure of the ELA ceiling, the amount of ELA actually granted and the collateral provided could actually and specifically undermine the monetary policy and financial stability of the European Union or of a Member State.

164 It must be noted that in both Decision LS/PT/2017/66 of 11 August 2017 and the second contested decision, the ECB established a specific causal link between the potential disclosure of the information at issue and the specific harm to the protected public interests.

165 Thus, as regards the ELA ceiling and the amount of ELA actually granted, the ECB explained that disclosure of that information could undermine the financial stability and monetary policy of the European Union because, since the Spanish market had been weakened following the resolution of Banco Popular, such disclosure might revive tensions vis-à-vis financial institutions and fuel unwarranted speculation as regards the situation of Banco Santander. Those detrimental effects on the Spanish market could then have spillover effects in other Member States' markets, which could have adverse consequences for the financial stability of the European Union. Moreover, the *ex post* publication of the information concerned would considerably reduce the ability of national central banks and the ECB to manage ELA operations in a flexible way in the future. Market participants' awareness of that specific information would create an expectation that the same approach would be followed where there was no justification for doing so. Such an expectation could also result in unwarranted speculation among market participants, which might hamper the ability of the ECB's Governing Council to assess whether an envisaged ELA operation interferes with the objectives and tasks of the Eurosystem, since the Governing Council would also have to factor in the possible effects of publishing the parameters of the operation concerned on financial stability and monetary policy in future cases.

166 Furthermore, as regards the collateral provided, the ECB explained that that information is an indicator of the stress level faced by a credit institution in so far as such collateral is potentially collateral that is not regarded as being eligible for use in standard monetary policy operations. The possible publication of that information might deter credit institutions from having recourse to ELA or from requesting it in good time for fear of market exposure. Market participants might also be tempted to request additional or different collateral in exchange for operating with the institution concerned or might stop lending money to that institution, which would pose a genuine threat to financial stability in the Member State concerned. Disclosure of that information, even *ex post*, could also have the effect of limiting the ability of national central banks to consider a wide range of possible collateral in a flexible way, since knowledge of the approach they have endorsed in the past would create expectations as to the type of collateral that might be accepted in the future. That would curtail their ability to respond effectively to future liquidity problems and would undermine the effectiveness of ELA as a tool for maintaining financial stability.

167 It must be observed that the applicant has not put forward any specific arguments, let alone evidence, capable of calling into question the merits of the ECB's reasoning set out in paragraphs 165 and 166 above. By merely invoking the fact that the requested information relates solely to the situation of Banco Popular over a short, fixed period, the applicant does not call into question the ECB's reasoning that disclosure of the information

concerned could have adverse consequences for the financial stability and monetary policy of the European Union in the future.

168 In the light of the foregoing, it must be held that the ECB did not commit a manifest error of assessment in finding that the disclosure of information relating to the ELA ceiling, the amount of ELA actually granted and the collateral provided would specifically and actually undermine the public interest in the monetary policy and financial stability of the European Union or of Spain.

169 Accordingly, the second complaint and, therefore, the second plea in its entirety must be dismissed.

170 Given that the refusal to grant access to information relating to the ELA ceiling, the amount of ELA actually granted and the collateral provided is lawfully based on the second and seventh indents of Article 4(1)(a) of Decision 2004/258, the finding made in paragraph 124 above that the second contested decision does not contain an adequate statement of reasons inasmuch as it refused access to that information on the basis of the first indent of Article 4(1)(a) of Decision 2004/258, in so far as that information was contained in the letter from the Governor of the Bank of Spain to the President of the ECB of 5 June 2017 entitled 'Emergency liquidity assistance', the follow-up letter from the Governor of the Bank of Spain to the President of the ECB of 5 June 2017 entitled 'Emergency liquidity assistance' and the proposal from the Executive Board to the Governing Council of the ECB of 5 June 2017 entitled 'Emergency liquidity assistance request from Banco de España', does not give grounds to annul the second contested decision in that respect.

E. **First plea in law: infringement of Article 4(1)(c) of Decision 2004/258 in the contested decisions**

171 The first plea revolves around three complaints alleging that (i) the ECB wrongly applied a general presumption of confidentiality on the basis of Article 4(1)(c) of Decision 2004/258; (ii) the conditions laid down in the judgment of 19 June 2018, *Baumeister* (C-15/16, EU:C:2018:464; 'the judgment in *Baumeister*'), are not satisfied; and (iii) the exemptions from the principle of confidentiality, provided for in the third subparagraph of Article 53(1) of Directive 2013/36 and Article 84(6) of Directive 2014/59 apply.

172 Before examining the arguments raised in the first plea, it should be borne in mind first of all that the ECB invoked the application of Article 4(1)(c) of Decision 2004/258 in all three contested decisions. In the first contested decision, the ECB relied on that provision in order to refuse access to the document containing an overview of the daily balance (positive or negative) of deposits, that is to say both withdrawals and deposits, and information relating to the liquidity coverage capacity of Banco Popular from 3 April 2017. In the second contested decision, the ECB redacted information relating to Banco Popular's liquidity situation and capital ratios in the letters from the Governor of Spain and the Executive Board's proposal, inter alia, on the basis of Article 4(1)(c) of Decision 2004/258. The third contested decision relies on the application, in particular, of that provision in order to refuse access to the FOLTF assessment and the documents that Banco Popular sent to the ECB and the Bank of Spain in the context of the SSM between 1 and 6 June 2017.

173 It must be observed that the second contested decision also contains a refusal to grant access to other information, namely the ELA ceiling, the amount of ELA granted and the collateral provided, which was not based on Article 4(1)(c) of Decision 2004/258. As the Court found in its examination of the second plea, the refusal to grant access to that information is lawfully based on the second and seventh indents of Article 4(1)(a) of Decision 2004/258.

1. ***First complaint: the ECB wrongly applied a general presumption of confidentiality on the basis of Article 4(1)(c) of Decision 2004/258***

174 In its first complaint, the applicant submits that, in the three contested decisions, the ECB wrongly relied on the application of a general presumption of confidentiality in order to refuse access to the requested documents. According to the applicant, such a presumption, which is based on the requested documents being protected by an obligation of professional secrecy on the part of the EU institutions, does not exist in the present case.

175 Although the applicant concedes that the application of general presumptions of confidentiality in certain specific cases has been accepted in case-law, it argues that that case-law cannot be transposed to the present case since the duty of professional secrecy applies to all the institutions under Article 339 TFEU, so that, if the ECB's logic were to be followed, any document of an EU institution would always be covered by a general presumption

based precisely on that duty. That would render meaningless the principle of transparency and the right of access to documents as provided for in Article 41 of the Charter.

176 The ECB contends that a general presumption of confidentiality applies in the present case. It refers, in that regard, to the case-law of the Court of Justice and the General Court, in which the existence of such presumptions has been recognised in the areas of State aid, mergers and concerted practices. According to the ECB, the underlying logic of that case-law, namely the need to guarantee the smooth functioning of procedures in those areas and ensure that their objectives are not jeopardised by preventing the right of access from being used to circumvent the specific rules providing for limited access to the file, also applies to the area of prudential supervision.

177 The ECB submits that unlike competition law procedures, which start and end with a decision, the ECB's prudential banking supervision is ongoing in nature. Thus, the various risks posed by credit institutions subject to prudential supervision are continuously assessed on the basis of information regularly provided by them. In addition, while the general presumptions of confidentiality accepted in other areas essentially protect the integrity of specific administrative procedures, the ECB's confidentiality obligations are intended moreover to protect the functioning of the prudential banking supervision mechanism as a whole and, therefore, the stability of the financial markets.

178 In the light of those considerations, the ECB maintains that Article 4(1)(c) of Decision 2004/258 should be interpreted as providing a level of protection for its prudential supervision files that is at least equivalent to the protection which the Court of Justice has recognised in the area of merger control.

179 In that context, the ECB disputes the applicant's argument that any document of an EU institution is always covered by an obligation of professional secrecy because Article 339 TFEU is applicable to all EU institutions. The ECB contends that its duty of professional secrecy in the exercise of its prudential supervisory tasks reflects the particular nature of its supervisory activities. That duty is, moreover, clearly defined and specific in terms of its scope *ratione personae*. It therefore differs from the general obligation of professional secrecy enshrined in Article 339 TFEU. Furthermore, the obligations of professional secrecy imposed by Article 339 TFEU and Article 37 of the Statute of the ESCB and of the ECB are not an absolute bar to disclosure, but prevent only the improper disclosure of confidential information.

180 It must be stated at the outset that the first complaint is based in part on a misreading of the contested decisions. Although the applicant asserts that 'the' contested decisions infringe Article 4(1)(c) of Decision 2004/258 on the ground that, in those decisions, the ECB relied on a general presumption of confidentiality to refuse access to the requested documents, the fact of the matter is that only the first and third contested decisions are based on such a presumption, which the ECB confirmed at the hearing.

181 Concerning the second contested decision, as the Court noted in paragraph 172 above, that decision relies on Article 4(1)(c) of Decision 2004/258 in order to refuse access to information relating to Banco Popular's liquidity situation and capital ratios. As the ECB explained at the hearing, instead of applying a general presumption to refuse access to that information, it carried out a specific and individual examination of the four documents to which it granted partial access to determine whether that information was protected by the exception provided for in Article 4(1)(c) of Decision 2004/258. That approach is in line with the case-law that recourse to a general presumption of confidentiality is merely an option for the EU institution, body, office or agency concerned and the latter always retains the possibility of carrying out a specific and individual examination of the documents in question (judgment of 22 January 2020, *PTC Therapeutics International* v *EMA*, C-175/18 P, EU:C:2020:30, paragraph 61).

182 Next, it should be borne in mind that the case-law which established the existence of general presumptions of confidentiality is based on the fact that the exceptions to the right of access to documents set out in Article 4 of Regulation No 1049/2001 cannot, where the documents subject to the application for disclosure fall within a particular area of EU law, be interpreted without taking account of the specific rules governing access to those documents. Those general presumptions thus make it possible to ensure consistency in the application of legal rules which pursue different objectives and do not expressly provide for one to take precedence over the other (see judgment of 19 September 2018, *Chambre de commerce et d'industrie métropolitaine Bretagne-Ouest (port de Brest)* v *Commission*, T-39/17, not published, EU:T:2018:560, paragraph 55 and the case-law cited).

183 The application of general presumptions is essentially dictated by the overriding need to ensure that the procedures at issue operate correctly, and to guarantee that their objectives are not jeopardised. Accordingly, a general presumption may be recognised on the basis that access to the documents involved in certain procedures is incompatible with the proper conduct of such procedures and the risk that those procedures could be undermined, it being understood that general presumptions ensure that the integrity of the conduct of the procedure can be preserved by limiting intervention by third parties (see judgment of 28 May 2020, *Campbell* v *Commission*, T-701/18, EU:T:2020:224, paragraph 50 and the case-law cited).

184 As general presumptions constitute an exception to the rule that the EU institution concerned is obliged to carry out a specific and individual examination of every document which is the subject of a request for access and, more generally, to the principle that the public should have the widest possible access to the documents held by the institutions of the European Union, they must be interpreted and applied strictly (see judgment of 4 September 2018, *ClientEarth* v *Commission*, C-57/16 P, EU:C:2018:660, paragraph 80 and the case-law cited; judgment of 28 May 2020, *Campbell* v *Commission*, T-701/18, EU:T:2020:224, paragraph 39).

185 It is in the light of those factors that it is necessary to examine whether the ECB was right to apply a general presumption of confidentiality based on Article 4(1)(c) of Decision 2004/258.

186 In that regard, first, it must be observed that Article 4(1)(c) of Decision 2004/258 provides that the ECB must refuse access to a document where disclosure would undermine the protection of the confidentiality of information protected as such 'under Union law'.

187 It must be stated that in the light of the wording of Article 4(1)(c) of Decision 2004/258, a general presumption of confidentiality based on that provision would not be clearly and precisely circumscribed in scope.

188 As regards the confidential nature of information which is deserving of protection as such, Article 4(1)(c) of Decision 2004/258, by referring to EU law, does not have specific content of its own and its application depends on reference to other rules of EU law applicable to the circumstances in which the documents to which access is sought were drawn up.

189 Article 4(1)(c) of Decision 2004/258 thus establishes a link between the rules governing public access to ECB documents and the rules of professional secrecy to which the ECB and its staff are subject under EU law, thus seeking to ensure that the ECB complies with its obligations of professional secrecy also in the context of applications for access to its documents.

190 The recognition of a general presumption of confidentiality based on a provision that is not clearly circumscribed in scope does not satisfy the requirements of legal certainty, which is one of the general principles of EU law and requires that rules of law be clear, precise and predictable in their effects, so that interested parties can ascertain their position in situations and legal relationships governed by EU law (judgments of 30 April 2019, *Italy* v *Council (Fishing quota for Mediterranean swordfish)*, C-611/17, EU:C:2019:332, paragraph 111; of 25 November 2020, *ACRE* v *Parliament*, T-107/19, not published, EU:T:2020:560, paragraph 66; and of 9 December 2020, *Adraces* v *Commission*, T-714/18, not published, EU:T:2020:591, paragraph 37). Compliance with the requirements flowing from that principle is all the more important where the rules of law in question may have negative consequences for individuals and undertakings (see, to that effect, judgments of 30 April 2019, *Italy* v *Council (Fishing quota for Mediterranean swordfish)*, C-611/17, EU:C:2019:332, paragraph 111, and of 26 March 2020, *HUNGEOD and Others*, C-496/18 and C-497/18, EU:C:2020:240, paragraph 93 and the case-law cited). In particular, that principle requires that EU rules enable those concerned to know precisely the extent of the obligations which are imposed on them, and that those persons are able to ascertain unequivocally what their rights and obligations are and take steps accordingly (judgment of 10 March 2009, *Heinrich*, C-345/06, EU:C:2009:140, paragraph 44).

191 Moreover, accepting that a general presumption of confidentiality exists based on a provision which is not clearly circumscribed in scope would be at variance with the case-law set out in paragraph 184 above, according to which, since presumptions are an exception to the principle of the widest possible access, they must be interpreted strictly.

192 Second, the recognition of a general presumption of confidentiality based on Article 4(1)(c) of Decision 2004/258 cannot be reconciled with the approach endorsed by the Court of Justice in the judgment in *Baumeister*.

193 In that judgment, which was delivered after the adoption of the decisions forming the subject matter of this dispute, the Court of Justice interpreted the notion of confidential information set out in Article 54 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1). In that regard, it must be observed that Article 54 of Directive 2004/39 establishes the general rule that disclosure of confidential information held by the competent authorities is prohibited and lists exhaustively the specific cases where, exceptionally, that general prohibition does not preclude the communication or use of that information (the judgment in *Baumeister*, paragraph 38).

194 In paragraph 46 of the judgment in *Baumeister*, the Court of Justice held that all information relating to a supervised entity and communicated by it to the competent authority, and all statements of that supervisory authority in its supervision file, including its correspondence with other bodies, does not constitute, unconditionally, confidential information that is covered by professional secrecy as provided for in Article 54 of Directive 2004/39. By contrast, according to the Court of Justice, information held by the competent authorities (i) which is not public and (ii) the disclosure of which is likely to affect adversely the interests of the natural or legal person who provided that information or of third parties, or the proper functioning of the system for monitoring the activities of investment firms, is to be so classified.

195 The parties do not dispute that the Court of Justice's interpretation of Article 54 of Directive 2004/39 in the judgment in *Baumeister* should be transposed to the present case, since that provision is worded in very similar terms to the provisions on which the ECB relied in the present case as constituting 'Union law' under Article 4(1)(c) of Decision 2004/258, namely the second subparagraph of Article 53(1) of Directive 2013/36 and Article 84(3) of Directive 2014/59. Article 54 of Directive 2004/39, the second subparagraph of Article 53(1) of Directive 2013/36 and Article 84(3) of Directive 2014/59 all prohibit the competent authorities from disclosing 'confidential information' held by them, save in summary or aggregate form such that the entities concerned cannot be identified.

196 Thus, the application of the second subparagraph of Article 53(1) of Directive 2013/36 and Article 84(3) of Directive 2014/59 presupposes that the ECB has checked that the two conditions set out in the judgment in *Baumeister* are satisfied in respect of each item of information to which access is requested. If those conditions are in fact satisfied, the ECB must refuse access to the information at issue. The provisions concerned leave no discretion in that regard, as the Court of Justice confirmed in paragraph 43 of the judgment in *Baumeister*. That process necessarily requires a specific and individual examination of each item of information concerned, which cannot be circumvented by the application of a general presumption of confidentiality.

197 Third, it must be borne in mind that the exception laid down in Article 4(1)(c) of Decision 2004/258 is an 'absolute' exception. Unlike exceptions whose application is based on a balance being struck between the relevant interests, the application of an absolute exception is mandatory where disclosure of the document concerned to the public is liable to undermine the interests which that exception protects.

198 According to settled case-law, the application of a general presumption does not rule out the possibility of demonstrating that a specific document, disclosure of which has been requested, is not covered by that presumption, or that there is an overriding public interest in disclosure of the document concerned by virtue of the last clause of Article 4(2) of Regulation No 1049/2001 (judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 62; also see judgments of 11 May 2017, *Sweden* v *Commission*, C-562/14 P, EU:C:2017:356, paragraph 46 and the case-law cited, and of 28 May 2020, *Campbell* v *Commission*, T-701/18, EU:T:2020:224, paragraph 37 and the case-law cited).

199 The fact that a general presumption may, according to the case-law cited in paragraph 198 above, be rebutted if it can be shown that an overriding public interest exists is at odds with the fact that the exception laid down in Article 4(1)(c) of Decision 2004/258 is an 'absolute' exception and therefore does not provide for any balancing exercise involving such an overriding interest.

200 Similarly, it should be recalled, as explained in paragraph 181 above, that recourse to a general presumption of confidentiality is merely an option for the EU institution, body, office or agency concerned and the latter always retains the possibility of carrying out a specific and individual examination of the documents in question (judgment of 22 January 2020, *PTC Therapeutics International* v *EMA*, C-175/18 P, EU:C:2020:30, paragraph 61).

201 In the present case, as the ECB submits in paragraph 94 of the defence and having regard to the findings made in paragraphs 228, 271 and 302 below, irrespective of whether or not a general presumption is applied to the information to which access was refused in the first and third contested decisions, that information constitutes, on any view, 'confidential information' which is covered by the application of Article 4(1)(c) of Decision 2004/258.

202 It follows that whatever the outcome of the examination of the first complaint of the first plea, it cannot call into question the lawfulness of the first and third contested decisions since, in the light of the rejection of the second and third complaints of the first plea, the information at issue is nevertheless covered by the exception laid down in Article 4(1)(c) of Decision 2004/258.

203 Therefore, even if the ECB sought to apply, by mistake, a general presumption of confidentiality in the first and third contested decisions, the first complaint of the first plea must be dismissed as ineffective.

2. ***Second complaint: the requested information is not confidential information***

204 In the second complaint, the applicant takes issue with the ECB for having refused access to information in the public domain. It also submits that the ECB failed to explain, to the requisite legal standard, the damage which access to the requested documents could cause both to the commercial interests of Banco Popular and Banco Santander and to the proper functioning of the prudential supervision system.

205 Those arguments essentially raise the question of whether the requested documents contain confidential information within the meaning of the second subparagraph of Article 53(1) of Directive 2013/36 and Article 84(3) of Directive 2014/59.

206 It is therefore necessary to examine whether the requested documents contained confidential information, that is, information (i) which is not public and (ii) the disclosure of which is likely to affect adversely the interests of the natural or legal person who provided that information or of third parties, or the proper functioning of the prudential supervision system (see, by analogy, the judgment in *Baumeister*, paragraph 46). Those two conditions will be examined in turn.

(a) ***Whether the requested information is of a public nature***

207 In the application, the applicant submits that the market was aware of most of the information relating to the resolution of Banco Popular, either in summary form or indirectly, since the information had appeared in the press and listed banks are subject to numerous transparency obligations. Thus, the applicant asserts that the market already knew that Banco Popular had faced liquidity problems which led to its resolution. It argues that disclosing the details of the resolution would not alter the market's perception of what happened.

208 In its observations on the statements in intervention of the Commission and Banco Santander, the applicant refers to numerous press articles and produces several of them concerning Banco Popular's ELA request and its liquidity situation, which it claims prove that that information is public.

209 In those observations, the applicant states, in essence, that Banco Santander itself does not consider the requested information to be confidential information. In that regard, the applicant submits that Banco Popular published data on short-term ratios in its annual and quarterly reports and that it also published its loan-to-deposit ratio, one of the indicators of its liquidity. Furthermore, the Asociación Española de Banca (Spanish Banking Association; 'AEB') published monthly financial statements for each bank setting out the volume of deposits and the volume of loans. Those data enable the loan-to-deposit ratio to be calculated. According to the applicant, Banco Santander does not explain why those data are allowed to be public while other liquidity indicators to which it has requested access should remain confidential.

210 According to the ECB, those claims are inadmissible or, at the very least, unfounded. It denies that the information to which it refused access on the basis of Article 4(1)(c) of Decision 2004/258 was in the public domain when the contested decisions were adopted. It also states that the applicant has not succeeded in identifying the information to which its claims relate.

211 In response to the ECB's assertions, the applicant clarified its arguments and provided additional documents to support them. Thus, first, as regards the documents concerned by the third contested decision, the applicant refers to an annex containing press articles mentioning the existence and content of the letter which Banco Popular sent to the ECB on 6 June 2017. Second, as for the documents 'relating to the liquidity of Banco Popular', which are the subject of the first contested decision, the applicant states that that information was published either in the annual and quarterly reports of Banco Popular or internally within the AEB, of which Banco Popular was a member, with a view to publication. In that regard, the applicant refers to the documents attached to its observations on the Commission's statement in intervention. Third, concerning the information relating to the grant of ELA, which is the subject of the second contested decision, the applicant refers to the annexes it submitted with its observations on the statements in intervention of the Commission and Banco Santander and also attached additional press articles which, in its view, confirm that the information was in the public domain.

212 In the first place, it must be observed that the ECB did not rely on the exception provided for in Article 4(1)(c) of Decision 2004/258 as a basis for its refusal to grant access to information relating to the ELA ceiling, the amount of ELA actually granted and the collateral provided (see, in that regard, paragraph 89 above). In so far as the applicant's claims in the present complaint concern that information, they must be rejected as ineffective.

213 In the second place, it must be recalled that according to settled case-law, Article 21 of the Statute of the Court of Justice of the European Union and Article 76(d) of the Rules of Procedure provide that the application initiating proceedings must contain a brief statement of the pleas on which it is based. That summary must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if appropriate, without other supporting information. The application must, accordingly, specify the nature of the grounds on which the action is based, which means that a mere abstract statement of the grounds does not satisfy the requirements of the Rules of Procedure. Similar requirements are called for where a submission is made in support of a plea in law (see, to that effect, judgments of 7 June 2018, *Winkler* v *Commission*, T-369/17, not published, EU:T:2018:334, paragraph 53 and the case-law cited, and of 13 May 2020, *Peek & Cloppenburg* v *EUIPO – Peek & Cloppenburg (Peek & Cloppenburg)*, T-446/18, not published, EU:T:2020:187, paragraph 29).

214 Whilst the body of the application may certainly be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application (see, to that effect, judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 40 and the case-law cited).

215 Thus, it is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (see judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 94 and the case-law cited; judgment of 24 February 2021, *Universität Koblenz-Landau* v *EACEA*, T-606/18, not published, EU:T:2021:105, paragraph 61).

216 It must be held, in the light of that case-law, that the applicant's claims are not sufficient to mount a valid challenge to the ECB's assertion that the requested information was not in the public domain when the contested decisions were adopted. The applicant has not adduced any tangible evidence to substantiate its claims, with the result that the Court is not in a position to determine whether they are true. In consequence, the applicant fails to specify, in the body of its pleadings, the precise information which it considers to be public and merely makes a general reference to approximately 10 annexes totalling more than 1 000 pages. The applicant does not identify the extracts from the annexes demonstrating that any of the requested items of information was public when the contested decisions were adopted.

217 In the third place, it must be observed, as the ECB rightly submits, that the ECB cannot be required to monitor the publication of material by the credit institutions concerned, the competent national authorities or the press.

218 Accordingly, in paragraph 56 of its judgment of 19 December 2019, *ECB* v *Espírito Santo Financial (Portugal)* (C-442/18 P, EU:C:2019:1117), the Court of Justice stated, in essence, that the confidentiality of certain information may be relied upon on condition that such information has not been made public by the ECB, and that the fact that comparable information has been published by third parties is not, per se, such as to require

the ECB to disclose that information. Therefore, even if the press articles mentioned by the applicant contained information which was very similar to that contained in the requested documents, that does not mean that the ECB would be under an obligation to grant access to those documents.

219 Furthermore, the unauthorised disclosure of a document cannot have the effect of granting public access to a document covered by one of the exceptions provided for in Article 4 of Decision 2004/258 (see, by analogy, judgment of 25 October 2013, *Beninca* v *Commission*, T-561/12, not published, EU:T:2013:558, paragraph 55).

220 In the fourth place, a reading of the requested documents suggests that the information contained therein is known only to a limited number of persons and is therefore not public in nature (see, to that effect, judgment of 30 May 2006, *Bank Austria Creditanstalt* v *Commission*, T-198/03, EU:T:2006:136, paragraph 71).

221 Thus, as regards, first, the FOLTF assessment, a reading of the full text of that assessment shows that the extracts to which access was refused essentially contained financial information relating to Banco Popular's capital and liquidity situation in the weeks preceding the drawing up of the assessment. As the ECB confirmed at the hearing, such information is not regularly or habitually published by the credit institution concerned, the national central bank or the ECB; rather, that information is sought out specifically in order to assess whether the supervised credit institution continues to satisfy the conditions for authorisation laid down in Directive 2013/36.

222 Second, as for the letter which Banco Popular sent to the ECB on 6 June 2017, the applicant asserts that even though the existence of that letter and its contents are mentioned in the press articles it produced, those references are very generic and do not disclose any of the data contained in that letter.

223 Third, concerning the document which is the subject of the first contested decision, namely the overview of the daily balance of the deposits of Banco Popular from 3 April 2017, the ECB explained in that decision that that document contains information which is not usually communicated to it but which it exceptionally began to collect on 3 April 2017. The ECB adds that that document was drawn up in the context of the prudential supervision of Banco Popular with a view to preparing the FOLTF assessment.

224 There is nothing in the applicant's arguments to support the conclusion that that information gathered exceptionally by the ECB was public when the first contested decision was adopted. The applicant merely asserts that Banco Popular and the AEB published certain data enabling 'Banco Popular's liquidity indicators' to be calculated. It states that it was unclear as to why 'other indicators to which [it] seeks access are confidential'. Therefore, far from adducing even minimal evidence that the information to which it seeks access is public, the applicant instead confirms that such information is not in the public domain.

225 Fourth, with respect to the information to which the ECB refused access in the second contested decision on the basis of Article 4(1)(c) of Decision 2004/258, namely information relating to Banco Popular's liquidity situation and capital ratios, it must be observed that the three documents containing that information were intended for internal use as part of the deliberations of the Governing Council of the ECB. Accordingly, by their very nature, those three documents were intended to be disclosed only to a limited number of persons.

226 In the fifth place, the applicant is also unable to rely on the argument that Banco Santander itself acknowledged that the requested information was not confidential since, in its contacts with the institutions, Banco Santander merely objected to the disclosure of certain specific information liable to harm its commercial interests, namely data relating to its customers, the consequences of the resolution mechanism for joint venture agreements and the details and evaluation of the policy for measuring Banco Popular's legal risks as of 6 June 2017.

227 As Banco Santander confirmed at the hearing, the contacts referred to took place in the context of proceedings for access to documents before the SRB and did not concern information held and used by the ECB. Furthermore, contrary to the applicant's claims, Banco Santander clearly submits in its statement in intervention that, in its view, the information requested in the present case was confidential when the contested decisions were adopted.

228 In the light of the foregoing, it must be held that there is nothing in the file to support the conclusion that the information to which access was refused on the basis of Article 4(1)(c) of Decision 2004/258 was in the public domain when the contested decisions were adopted.

(b) ***Whether disclosure is likely to affect adversely the interests of the natural or legal person who provided the requested information or of third parties, or the proper functioning of the prudential supervision and resolution system***

229 The second condition laid down by the Court of Justice in the judgment in *Baumeister* which must be satisfied if information is to be classified as confidential requires an examination of whether the disclosure of that information is likely to affect adversely the interests of the natural or legal person who provided it or of third parties, or the proper functioning of the prudential supervision and resolution system (the judgment in *Baumeister*, paragraph 46). The arguments put forward by the applicant in relation to that condition are divided into two parts.

(1) *First part: disclosure of the requested documents would not adversely affect the interests of the person who provided the information contained in them or of third parties*

230 In the first place, the applicant claims that because of the nature of the requested information, its disclosure would not have an appreciable effect on the commercial interests of Banco Popular or Banco Santander.

231 In that regard, the applicant states, first, that the information at issue belongs to the past. According to an economic report annexed to the application, only current and future data are important to the market and to institutions on the financial markets. In view of the particularities of the financial sector, where information circulates rapidly and operators draw quick conclusions from what they consider to be relevant information, information soon becomes outdated and thus worthless on the market. The applicant submits that this is precisely the case in respect of information concerning the collateral provided, the liquidity situation and capital ratios of Banco Popular, and its likely or actual failure. Even if that information is normally regarded as commercially sensitive, the applicant claims that it is no longer relevant to the financial market or to competitors since it predates the resolution of Banco Popular and therefore no longer reflects its current situation. All information prior to resolution has therefore become historical information and cannot be regarded as confidential.

232 The applicant also claims that the case-law follows a case-by-case approach in assessing whether information is historical. Although the judgment in *Baumeister* established a rebuttable presumption that information which is more than five years old is historical, it cannot be inferred from that judgment that information less than five years old cannot on any account be classified as historical information.

233 It must be borne in mind, at the outset, that according to settled case-law, in an action for annulment under Article 263 TFEU, the lawfulness of an EU measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see judgments of 28 January 2021, *Qualcomm and Qualcomm Europe* v *Commission*, C-466/19 P, EU:C:2021:76, paragraph 82 and the case-law cited, and of 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein* v *ECB*, T-376/13, EU:T:2015:361, paragraph 84 and the case-law cited; also see, to that effect, the judgment in *Baumeister*, paragraph 50). Thus, as Banco Santander correctly points out, the date which the Court must take into account in assessing the lawfulness of the ECB's refusal to grant access to the requested information is therefore the date on which the contested decisions were adopted, namely 7 November 2017.

234 Accordingly, the applicant's claim that the requested information is no longer relevant to the financial market or to competitors, since it predates the resolution of Banco Popular and thus no longer reflects its current situation, cannot be upheld.

235 Next, the Court of Justice stated in paragraph 54 of the judgment in *Baumeister* that where information that could constitute business secrets at a certain moment in time is at least five years old, that information must, as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature unless, exceptionally, the party relying on that nature shows that, despite its age, that information still constitutes an essential element of its commercial position or that of interested third parties.

236 In that regard, Banco Santander submits, without being contradicted by the other parties, that the requested information mainly dates back to the period immediately preceding the resolution and, in some instances, to the beginning of 2017.

237 Consequently, the requested information was at most a few months old when the contested decisions were adopted and thus could not, in the light of the criteria mentioned in paragraphs 233 and 235 above, be regarded as historical information.

238 That finding cannot be called into question by the applicant's argument that the judgment in *Baumeister* contains nothing to suggest that information under five years old cannot on any account be classified as historic information and a case-by-case approach is called for. In particular, in a case such as the present case, in which the requested information concerns the commercial position of a credit institution that was subject to a resolution scheme, the applicant contends that that information automatically became historical after the adoption of the resolution tool.

239 It cannot be accepted that the adoption of a resolution scheme gives rise to a fresh presumption that information relating to the commercial position of the credit institution subject to the resolution scheme automatically becomes historical. That approach would, as a matter of principle, preclude the application of the exception laid down in Article 4(1)(c) of Decision 2004/258, read together with the second subparagraph of Article 53(1) of Directive 2013/36 and Article 84(3) of Directive 2014/59.

240 As the ECB, the Commission and Banco Santander rightly point out, Banco Popular remained in business as part of the Banco Santander group after 7 June 2017, until 28 April 2018 when it was merged by absorption with Banco Santander.

241 One of the reasons why the SRB decided to adopt a resolution scheme in respect of Banco Popular was to ensure the continuity of its critical functions, in accordance with Article 14(2)(a) of Regulation No 806/2014. Thus, the sale of Banco Popular to Banco Santander enabled the former to continue to operate under normal market conditions as a member of the Santander group.

242 It follows that the ECB was entitled to take the view that disclosure of the daily balance of the deposits of Banco Santander from 3 April 2017, of Banco Popular's liquidity situation and capital ratios, of information on Banco Popular's market position, of its assets and liabilities, and of the assessment of the impact of Banco Popular's liquidity situation on the funding and operating structure of its subsidiary Banco Popular Portugal, was capable, when the contested decisions were adopted, of adversely affecting the interests of Banco Popular or those of its parent company, notwithstanding the application of a resolution tool.

243 In the second place, the applicant submits, in essence, that the ECB has not succeeded in demonstrating that disclosure of the requested information could specifically and actually undermine the commercial interests of Banco Santander and Banco Popular. The applicant considers, in that regard, that the statement of reasons for the contested decisions is very generic and could apply to any bank. It also states that the ECB did not genuinely take into account the resolution of Banco Popular or the exceptional nature of the situation.

244 In that regard, it must be stated at the outset that the applicant has not formally raised a plea alleging breach of the duty to state reasons. On reading the applicant's pleadings, it appears instead that the applicant disagrees with the reasons put forward by the ECB.

245 It is apparent from settled case-law that the duty to state reasons is an essential procedural requirement which must be distinguished from the question whether the reasoning is well founded, which is concerned with the substantive legality of the measure at issue. The reasoning of a decision consists in a formal statement of the grounds on which that decision is based. If those grounds are vitiated by errors, the latter will affect the substantive legality of the decision, but not the statement of reasons in it, which may be adequate even though it sets out reasons which are incorrect. It follows that objections and arguments intended to establish that a measure is not well founded are irrelevant in the context of a plea alleging an inadequate statement of reasons or a lack of such a statement (see judgments of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraph 85 and the case-law cited, and of 29 April 2020, *Tilly-Sabco* v *Council and Commission*, T-707/18, not published, EU:T:2020:160, paragraph 103 and the case-law cited).

246 In the first contested decision, the ECB stated that disclosure of the requested document would have adverse consequences for the credit institution concerned, since that institution could no longer be sure that the information provided to the ECB for the purposes of its prudential supervision would remain confidential. The ECB also made

clear in that decision that those rules on confidentiality apply irrespective of whether a bank has been the subject of a resolution scheme.

247 In the second contested decision, the ECB explained, as regards information relating to Banco Popular's liquidity situation and capital ratios, that disclosure of that information would fuel speculation among market participants as to Banco Santander's liquidity situation and its financing needs which, in turn, could generate unwarranted funding pressures.

248 In the third contested decision, the ECB found that the requested information related to Banco Santander's commercial position on the market and to its assets and liabilities and that disclosure of that information could have a detrimental impact on the commercial interests of Banco Popular and Banco Santander. In particular, according to the ECB, the assessment of the impact of Banco Popular's liquidity situation on the funding and operating structure of its subsidiary Banco Popular Portugal was commercially sensitive and could trigger unwarranted speculation about the group's financial and liquidity situation. That decision also states that the rules governing professional secrecy apply irrespective of whether a bank has been resolved.

249 Therefore, the ECB was entitled to take the view that the information to which it refused access on the basis of Article 4(1)(c) of Decision 2004/258 was capable, when the contested decisions were adopted, of specifically and actually undermining the interests of Banco Popular or of Banco Santander. The fact that the contested decisions contain only a very brief statement of reasons as to why such an adverse effect could be presumed notwithstanding the application of a resolution tool to Banco Popular in no way detracts from that finding.

250 In the light of the foregoing, the Court must reject the first part, alleging that disclosure of the requested information would not harm the interests of Banco Popular or of Banco Santander.

(2) *Second part: disclosure of the requested documents would not adversely affect the proper functioning of the prudential supervision system*

251 Before considering the arguments put forward by the applicant, it is necessary to bear in mind the considerations set out in paragraphs 157 to 162 above.

252 As the Commission rightly submits, the case-law according to which the ECB enjoys a broad discretion for the purpose of determining whether the disclosure of certain information could undermine a public interest as provided for in Article 4(1)(a) of Decision 2004/258 should be transposed to the assessment the ECB is required to carry out when applying the second condition in the judgment in *Baumeister*. The assessment of whether the proper functioning of the prudential supervision and resolution system is likely to be adversely affected is not dissimilar to the assessment of whether the public interest is likely to be undermined.

253 Furthermore, in accordance with the case-law referred to in paragraph 159 above, the ECB's assessment of whether the disclosure of certain documents would undermine the protection of the proper functioning of the prudential supervision and resolution system is a complex and delicate one which calls for the exercise of particular care.

254 Moreover, the criteria laid down by the Court of Justice in the judgment in *Baumeister* in order to assess whether the proper functioning of the system for monitoring the activities of investment firms might be adversely affected, which are applicable by analogy in the context of prudential supervision and resolution, are very general, as required by the case-law set out in paragraph 160 above.

255 It follows, first, that the review of legality which the General Court is called upon to carry out in that context is limited to the review provided for in the case-law cited in paragraph 161 above and, second, that the ECB's compliance with its obligation to provide sufficient reasons for its decisions takes on, in principle, even more fundamental importance (see, in that regard, paragraph 162 above).

256 In the present case, the ECB stated in the first contested decision that the document containing information concerning the daily balance of the deposits of Banco Popular was part of the administrative file relating to the ongoing supervision of Banco Popular and the final analysis of whether it was failing or was likely to fail.

257 In the second contested decision, the ECB stated that the applicant had not disputed the analysis conducted in Decision LS/PT/2017/66 of 11 August 2017, according to which the document entitled 'Emergency liquidity assistance request from Banco de España' of 5 June 2017 contained information concerning Banco Popular's liquidity situation and capital ratios. It went on to explain that that information had been provided to it by Banco Popular in the context of its ongoing prudential supervision.

258 As regards the full text of the FOLTF assessment and the documentation provided by Banco Popular concerning, inter alia, its capital position, its liquidity situation and the other conditions for its continued authorisation, the ECB explained, in the third contested decision, that those documents were part of the administrative files concerning ongoing prudential supervision and the FOLTF assessment procedure. According to the ECB, those administrative files were related to the performance by the ECB of its tasks as competent supervisory authority, tasks laid down in Regulation No 1024/2013.

259 In all three contested decisions, the ECB also stated that in the performance of the tasks entrusted to it by Regulation No 1024/2013, it is bound by obligations of professional secrecy. Against that background, it set out the applicable legislative provisions, explained the content of the obligation of professional secrecy and stated that the exemptions from that obligation were not applicable in the present case.

260 The ECB concluded from this that the disclosure of confidential information arising from prudential supervision could have damaging consequences for both the credit institution directly concerned and the banking system in general, since banks could no longer be sure that the information provided to the ECB in the context of prudential supervision would remain confidential.

261 In the first and third contested decisions, the ECB referred, in that respect, to the judgments of 11 December 1985, *Hillenius* (110/84, EU:C:1985:495, paragraph 27), and of 12 November 2014, *Altmann and Others* (C-140/13, EU:C:2014:2362, paragraphs 31 to 33). The ECB also stated in those decisions that the resolution of Banco Popular had not altered that bank's status as supervised entity and that the rules on confidentiality therefore continued to apply vis-à-vis Banco Popular.

262 The ECB thus provided an explanation as to the need for protection on which it relied, arguing that disclosure of the requested documents would undermine, inter alia, the banking system in general.

263 Those findings are not invalidated by the applicant's arguments.

264 First, the applicant's argument that the statement of reasons is generic and formulaic must be dismissed. Account must be taken of the fact that it may be impossible to give the reasons justifying the refusal of access to each document, or in this instance to each piece of information in the documents, without disclosing the content of the document or an essential aspect of it and thereby depriving the exception of its very purpose. In the present case, because the requested document was covered by the public interest exceptions relating to the proper functioning of the prudential supervision and resolution system, any more complete and individualised demonstration of its content could jeopardise the confidentiality of information intended to remain confidential (see, by analogy, judgment of 26 April 2005, *Sison* v *Council*, T-110/03, T-150/03 and T-405/03, EU:T:2005:143, paragraph 84).

265 Second, the Court must also dismiss the argument that the disclosure of information such as liquidity ratios would in no way establish a precedent whereby that type of information would, in the future, be broadcast to the market, since Banco Popular's resolution was of an exceptional nature.

266 The applicant has not succeeded in challenging the ECB's assessment that the disclosure of certain information would be liable to undermine the mutual trust between the ECB and the institutions under supervision, trust which is needed for the prudential supervision mechanism. In that regard, the fact that the bank resolution remains exceptional and that certain information was collected only exceptionally by the ECB has no bearing on the risk that other institutions might no longer be sure that the information they are likely to provide to the ECB in the future in the context of prudential supervision will remain confidential.

267 Furthermore, according to the case-law, an EU institution may rely on the hypothetical conduct of market operators and on the effects of that conduct on future interventions (see, by analogy, judgment of 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein* v *ECB*, T-376/13, EU:T:2015:361, paragraph 78).

268 Accordingly, the ECB was entitled to rely on the risk that market operators would engage in speculation based on the data concerning Banco Popular's liquidity situation prior to its resolution, as long as it is reasonably foreseeable that such data could be regarded as information capable of giving rise to speculation and, thus, of jeopardising the proper functioning of the prudential supervision and resolution system.

269 On the basis of the foregoing considerations, it must be held that the applicant has not succeeded in demonstrating that the ECB committed a manifest error of assessment in considering that disclosure of the requested documents would be likely to adversely affect the proper functioning of the prudential supervision and resolution system.

270 It is therefore necessary to reject the second part, alleging that disclosure of the requested information would not adversely affect the proper functioning of the prudential supervision and resolution system.

271 Accordingly, it must be concluded that the requested documents to which the ECB refused access on the basis of Article 4(1)(c) of Decision 2004/258 contained confidential information within the meaning of the second subparagraph of Article 53(1) of Directive 2013/36 and Article 84(3) of Directive 2014/59.

3. ***Third complaint: the exemptions provided for in the third subparagraph of Article 53(1) of Directive 2013/36 and Article 84(6) of Directive 2014/59 apply to the requested documents***

272 By its third complaint, the applicant submits that the third subparagraph of Article 53(1) of Directive 2013/36 and Article 84(6) of Directive 2014/59 allow the ECB to grant access to the requested documents in or for the purpose of legal proceedings. It follows, in particular, from a teleological interpretation of those provisions that there is an exception to confidentiality where access to the requested documents is necessary for the purpose of exercising the right to effective judicial protection in legal proceedings related to the conduct of an EU institution or body.

273 The applicant adds that, according to the case-law, the assessment of whether information is confidential requires the legitimate interests opposing its disclosure to be weighed against the public interest. It claims that the specific features of the present case, namely the fact that Banco Popular's former shareholders wish to learn of the circumstances in which the resolution of the bank took place, justify disclosure of the requested information. In that regard, it is of crucial importance, according to the applicant, that account be taken of the fact that it has brought two actions before the Court: one for annulment of the resolution mechanism (registered as Case T-628/17) and another for non-contractual liability (registered as Case T-714/17). The information requested in the present case is to serve solely as evidence in those two actions.

274 The applicant states that, among other things, it needs to be apprised of the liquidity problems which led to the resolution of Banco Popular, but that both the FOLTF assessment and the resolution scheme had been redacted in that regard. Access to that data would enable it to adduce evidence in support of its argument that Banco Popular's liquidity situation was not sufficiently serious for its resolution to be declared and that any liquidity problems were linked to statements made by the Chair of the SRB.

275 The ECB, supported by the Commission and Banco Santander, disputes the applicant's arguments.

276 In that regard, it must be observed, first of all, that the Court of Justice stated in paragraph 30 of its judgment of 13 September 2018, *Buccioni* (C-594/16, EU:C:2018:717; 'the judgment in *Buccioni*'), that the specific cases in which the general rule that disclosure of confidential information held by the competent authorities is prohibited, laid down in Article 53(1) of Directive 2013/36, does not, exceptionally, preclude their communication or use, are exhaustively set out in that directive. In addition, the Court stated in paragraph 37 of that judgment that the exemptions provided for in Directive 2013/36 from the general prohibition on the disclosure of confidential information must be interpreted strictly.

277 The same considerations apply, by analogy, to the exemption from the prohibition on disclosure laid down in Article 84(6) of Directive 2014/59.

278 The applicant's arguments must be assessed in the light of those principles.

279 Concerning the third subparagraph of Article 53(1) of Directive 2013/36, that provision states that where a credit institution has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that credit institution may be disclosed in civil or commercial proceedings.

280 In the present case, as the ECB rightly points out, Banco Popular was neither declared bankrupt nor ordered to be compulsorily wound up. On the contrary, it is apparent from the resolution scheme that that scheme was intended, among other things, to sell Banco Popular's business to Banco Santander. That sale enabled Banco Popular to continue to operate under normal market conditions as a member of the Santander group.

281 Furthermore, it is apparent from Regulation No 806/2014 that it is precisely with a view to avoid winding up under normal insolvency proceedings that that regulation provides for the application of resolution tools to failing entities.

282 Thus, before adopting a resolution action, as part of the assessment of the condition that resolution be in the public interest, provided for in Article 18(1)(c) of Regulation No 806/2014, the SRB must, inter alia, assess whether the resolution of an insolvent entity is preferable to its winding up. In that regard, recital 58 of Regulation No 806/2014 states that where the liquidation of a failing entity under normal insolvency proceedings could jeopardise financial stability, interrupt the provision of essential services and affect the protection of depositors, there is a public interest in applying resolution tools.

283 Furthermore, following the adoption of a resolution action in accordance with Article 15(1)(g), Article 20(16) and Article 76(1)(e) of Regulation No 806/2014, an independent expert's valuation must compare the actual treatment that shareholders and creditors have received in the context of resolution and the treatment they would have received if the entity had entered into normal insolvency proceedings when the decision on the resolution action was taken. If it is determined that shareholders and creditors have received, in payment of their claims in the context of resolution, less than the amount they would have received under normal insolvency proceedings, they should, in principle, be entitled to compensation.

284 In the light of those considerations, it must be concluded that the nature and objectives of bankruptcy are essentially different from those of resolution and that the application by analogy of the third subparagraph of Article 53(1) of Directive 2013/36 to an entity under resolution is therefore precluded.

285 The application by analogy of that provision would also be contrary to the principles recalled in paragraph 276 above, according to which the exemptions listed in Directive 2013/36 from the general prohibition on disclosing confidential information are exhaustive and must be interpreted strictly.

286 It follows that the exemption provided for in the third paragraph of Article 53(1) of Directive 2013/36 does not apply in the present case.

287 Concerning the exemption from the principle of professional secrecy laid down in Article 84(6) of Directive 2014/59, that provision states that it applies without prejudice to national law concerning the disclosure of information for the purpose of legal proceedings in criminal or civil cases.

288 As the ECB rightly points out, the applicant has not relied on any provision of national law which requires disclosure of the requested documents.

289 Furthermore, Article 84(6) of Directive 2014/59 concerns the exceptional disclosure of confidential information in national proceedings. The applicant does not deny that its applications for access were motivated by its intention to bring an action before the Court.

290 Accordingly, the exemption provided for in Article 84(6) of Directive 2014/59 does not apply in this case.

291 Those findings cannot be called into question by the applicant's arguments.

292 First, the Court must dismiss the applicant's argument that the confidentiality rule does not apply where the applicant puts forward precise and consistent evidence plausibly suggesting that the information is relevant for

the purposes of civil or commercial proceedings which are under way or to be initiated. The applicant refers to the judgment in *Buccioni* in support of that argument. It must be observed that unlike the present case, the case which gave rise to the judgment in *Buccioni* concerned a credit institution which had been compulsorily wound up (the judgment in *Buccioni*, paragraph 17). As explained in paragraphs 281 to 285 above, a broad application of the third subparagraph of Article 53(1) of Directive 2013/36 would breach the principle that exemptions from the principle of confidentiality must be interpreted strictly, which the Court of Justice itself recalled in paragraph 37 of the judgment in *Buccioni*.

293 In any event, the approach advocated in the judgment in *Buccioni* cannot be transposed to the present case. In paragraphs 38 and 40 of that judgment, the Court of Justice stated that the applicant for access to confidential information must put forward precise and consistent evidence plausibly suggesting that the requested information is relevant for the purposes of civil or commercial proceedings which are under way or to be initiated, the subject matter of which must be specifically identified by the applicant. Such an approach would result in an application *contra legem* of Article 6 of Decision 2004/258, which provides that a person requesting access is not required to justify the request. The absence of any obligation to demonstrate an interest in having access to a document is one of the cornerstones of the rules on access to documents which, according to settled case-law, specifically prohibits persons requesting access to documents being treated differently depending on their individual interests or needs (see, to that effect, judgments of 26 April 2005, *Sison* v *Council*, T-110/03, T-150/03 and T-405/03, EU:T:2005:143, paragraphs 50 to 56, and of 6 July 2006, *Franchet and Byk* v *Commission*, T-391/03 and T-70/04, EU:T:2006:190, paragraph 82).

294 Moreover, as the ECB rightly submits, when a document is disclosed, following an application made under the rules governing public access to documents, it becomes public *erga omnes*. In the judgment in *Buccioni*, the Court of Justice held that subject to the conditions set out in paragraph 38 thereof, the competent authorities may disclose confidential information for the purposes of civil or commercial proceedings which are under way or to be initiated, 'without which the information in question cannot be used'. Decision 2004/258, specifically Article 9 thereof, which deals with access following an application, does not however provide for the possibility of granting access to a document to a member of the public at the same time as requiring him or her him not to disclose it to others. Such a possibility would be contrary to the spirit and logic of that decision since, where the exceptions to the right of access laid down in Article 4 of that decision are applicable, access to the document in question is simply refused (see, by analogy, order of 7 March 2013, *Henkel and Henkel France* v *Commission*, T-64/12, not published, EU:T:2013:116, paragraph 47).

295 Second, the applicant's argument, put forward in the alternative, requesting the Court to grant it access to the documents concerned in the form of a confidentiality undertaking, is not only inconsistent with the considerations relating to the nature of the rules governing public access to documents, referred to in paragraph 293 above, but also disregards the fact that, under Article 104 of the Rules of Procedure, a document to which access has been denied by an institution and which has been the subject of a measure of inquiry cannot be communicated to the other parties. The purpose of that rule is to prevent an action before the Court from becoming devoid of purpose as a result of the communication of the document concerned to the person requesting access (see, to that effect, judgment of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 39). In addition, access in the form of a confidentiality undertaking, as proposed by the applicant, is one of the methods envisaged in the Rules of Procedure to ensure that information in the possession of one of the parties to proceedings before the Court can be produced and used in those proceedings.

296 Third, the applicant cannot claim that the fact that certain exemptions from the principle of confidentiality apply on account of the existence of proceedings before the national courts does not preclude the application of those exemptions in the present dispute before the Court. That, according to the applicant, would lead to the absurd situation whereby national courts would be able to access documents of the EU institutions while the Court would not. For the reasons set out in paragraph 295 above, it is not for the Court, in proceedings concerning access to documents, to order the disclosure to the applicant of a document to which it has been refused access. Moreover, although the rules governing the taking of evidence before the EU Courts differ from those before the national courts, they are nonetheless a comprehensive set of rules. Article 89 et seq. of the Rules of Procedure provide that the Court may, in the course of proceedings, request or order the production of a document by one of the parties to the case. Furthermore, the Court may, on the basis of Article 24 of the Statute of the Court of Justice of the European Union, require the institutions, bodies, offices and agencies not being parties to the case to supply all information which the Court considers necessary for the purposes of examining the dispute. Contrary to the applicant's assertions, the Court, like the national courts, has all the means necessary at its disposal to be able to

obtain access to documents deriving from prudential supervision and to resolve cases brought before it in that area.

297 Fourth, the case-law cited by the applicant in paragraphs 38 and 39 of the application in support of its argument that the specific features of the present case justify disclosure of the requested information, in the light of the various interests at stake, also does not invalidate the findings made in the analysis of the third complaint. The judgments of 9 June 2010, *Éditions Jacob* v *Commission* (T-237/05, EU:T:2010:224, paragraph 90), and of 24 May 2011, *NLG* v *Commission* (T-109/05 and T-444/05, EU:T:2011:235, paragraph 140), concern the application of the principle of professional secrecy by the Commission in the context of competition law. In both judgments, the Court stated that the duty of professional secrecy is not so extensive as to justify any general, abstract refusal of access to documents containing commercial information on the undertakings involved. Determining whether or not such information is confidential requires that the interests opposing disclosure be weighed against the public interest in the activities of the EU institutions taking place as openly as possible.

298 That case-law cannot, however, be applied to the present case.

299 In the context of the prudential supervision and resolution of credit institutions, the ECB is subject to rules of primary and secondary legislation interpreted by the Court of Justice in the judgment in *Baumeister* and the judgment in *Buccioni*. According to those judgments, Article 53(1) of Directive 2013/36 imposes, as a general rule, the obligation to maintain professional secrecy (the judgment in *Baumeister*, paragraph 33, and the judgment in *Buccioni*, paragraph 29). Against that background, the Court of Justice has established the conditions under which certain information is to be regarded as confidential and therefore covered by the obligation of professional secrecy. If those conditions are satisfied, the information concerned may, as in the present case, be covered by Article 4(1)(c) of Decision 2004/258, and no balancing exercise will have to be carried out in order for the ECB to be able to refuse access to it.

300 In addition, as the ECB correctly points out, the case-law cited by the applicant concerned cases in which Article 4(2) of Regulation No 1049/2001 applied, which, unlike Article 4(1)(c) of Decision 2004/258, provides for the relevant interests to be weighed against each other.

301 In light of the foregoing, the third complaint must be rejected.

302 It must therefore be held that since the requested documents contained confidential information (see paragraph 271 above) and the exemptions from the principle of confidentiality do not apply, the ECB was lawfully entitled to base the contested decisions on Article 4(1)(c) of Decision 2004/258. Accordingly, the first plea must be dismissed.

303 It is clear from all the foregoing that, first, as regards the information concerning Banco Popular's liquidity situation and capital ratios, the second contested decision is justified in law by the grounds it contains relating to the exception laid down in Article 4(1)(c) of Decision 2004/258.

304 Second, as regards the documents to which access was refused in the third contested decision, that decision is justified in law by the grounds it contains relating to the exception laid down in Article 4(1)(c) of Decision 2004/258.

305 Third, with respect to the collateral provided, the second contested decision is justified in law by the grounds it contains relating to the exceptions laid down in the second and seventh indents of Article 4(1)(a) of Decision 2004/258 (see paragraph 170 above).

306 It follows from those findings that even if access to the documents and information referred to in paragraphs 303 to 305 above was also refused on the basis of the first indent of Article 4(2) of Decision 2004/258, there is no longer any need to rule on the merits of the third plea alleging infringement of that provision. The third plea must be dismissed as ineffective in any event since, in order for the contested decisions to be well founded in law, it is sufficient if one of the exceptions put forward by the ECB in order to refuse access to the requested documents was justified (see, to that effect, judgment of 25 November 2020, *Bronckers* v *Commission*, T-166/19, EU:T:2020:557, paragraph 78 and the case-law cited).

F. **Fourth plea in law: infringement of Article 47 of the Charter**

307 In support of its fourth plea, the applicant submits that the ECB infringed Article 47 of the Charter, inasmuch as the refusals to grant access contained in the contested decisions prevented it from gaining access to the documents on which the ECB relied to declare the resolution of Banco Popular. The applicant submits that there is settled case-law according to which effective judicial protection, enshrined in Article 47 of the Charter, requires that the person concerned must be able to ascertain the reasons for the decision taken in relation to him or her. The applicant further submits that in the light of the adversarial principle, which forms an integral part of the rights of the defence, the parties to proceedings have the right to be apprised of all the documents and observations submitted to the court with a view to influencing its decision as well as the right to discuss them. In the light of those considerations, the applicant asserts that the adoption of an administrative measure which deprives individuals of their property on the basis of documents of which they were unable to be apprised constitutes an infringement of their fundamental right to effective judicial protection.

308 The applicant accepts that, in certain proceedings, there is an exception to the general rule that documents should be accessible, where it is advisable that access be refused for overriding reasons relating to State security. It maintains, however, that that is not the case here. It adds that the requested documents are concerned with specific circumstances, namely Banco Popular's liquidity situation.

309 The applicant also argues that Article 53(1) of Directive 2013/36 and Article 84 of Directive 2014/59 permit the dissemination of confidential information in civil, commercial or criminal proceedings concerning the failure of credit institutions at national level. In that regard, it states that those exemptions from the principle of confidentiality should also be considered to apply to proceedings before the EU Courts under Article 47 of the Charter.

310 Lastly, the applicant submits that the classification of the requested documents as confidential documents is, on any view, a disproportionate measure that does not satisfy the conditions laid down in Article 52 of the Charter.

311 The ECB, supported in that regard by the Commission and Banco Santander, disputes the applicant's arguments.

312 The first paragraph of Article 47 of the Charter lays down the right to an effective remedy before a court and the second the right to a fair hearing.

313 It is settled case-law that the right to effective judicial protection requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him or her is based, either by reading the decision himself or herself, or by requesting and obtaining disclosure of those reasons, without prejudice to the power of the court having jurisdiction to require the authority concerned to disclose that information, so as to make it possible for him or her to defend his or her rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his or her applying to the court having jurisdiction, and in order to put the latter fully in a position to review the lawfulness of the decision in question (see judgment of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 100 and the case-law cited; judgment of 3 February 2021, *Ramazani Shadary* v *Council*, T-122/19, not published, EU:T:2021:61, paragraph 50).

314 In the present case, the only decisions adopted by the ECB in relation to the applicant are the three contested decisions. The applicant was able to ascertain the reasons for those decisions and was able to challenge them before the Court by means of this action, brought under Article 263 TFEU, which demonstrates the reality of its right to an effective remedy.

315 Contrary to the applicant's claims in paragraph 73 of the application, the ECB did not 'declare the resolution of Banco Popular', but rather found, in its FOLTF assessment, that that credit institution was failing or was likely to fail within the meaning of Article 18(4) of Regulation No 806/2014. That FOLTF assessment was in the nature of a preparatory act intended to enable the SRB to take a decision on the resolution of Banco Popular (see, to that effect, order of 6 May 2019, *ABLV Bank* v *ECB*, T-281/18, EU:T:2019:296, paragraph 36). Thus, and in any event, the FOLTF assessment did not, as such, produce any binding legal effect capable of affecting the applicant's interests by bringing about a distinct change in its legal position, since only the adoption and entry into force of a resolution scheme and the application of resolution tools, within the meaning of Article 22(2) of Regulation No 806/2014, are capable of altering that position.

316 If the present plea were to be construed as meaning that the applicant is in fact claiming that its right to an effective remedy was infringed because it was not apprised of the documents serving as the basis for the adoption of the decision pursuant to which Banco Popular's business was transferred to Banco Santander, namely Decision SRB/EES/2017/08 of the executive session of the SRB of 7 June 2017 concerning a resolution scheme in respect of Banco Popular, it must be recalled that that decision is the subject of the action for annulment brought by the applicant before the Court in Case T-628/17.

317 The case-law concerning the right to effective judicial protection does not require the ECB, in the context of an application made under Decision 2004/258, to grant access to certain documents which the persons requesting access claim to need for the purpose of preparing an action for annulment of a decision adopted by another institution. That finding follows from the characteristics of the rules on access to documents established by Decision 2004/258.

318 First, Article 1 of Decision 2004/258 provides that the purpose of that decision is to define the conditions governing applications for public access to documents held by the ECB. The purpose of Decision 2004/258 is not, therefore, to settle questions relating to the evidence to be produced by the parties in judicial proceedings (see, by analogy, judgments of 14 May 2019, *Commune de Fessenheim and Others* v *Commission*, T-751/17, EU:T:2019:330, paragraph 123, and of 30 January 2020, *CBA Spielapparate- und Restaurantbetrieb* v *Commission*, T-168/17, not published, EU:T:2020:20, paragraph 74).

319 Second, under Article 2(1) of Decision 2004/258, the beneficiaries of the right of access to the ECB's documents comprise 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State'. Accordingly, Decision 2004/258 is not intended to lay down rules designed to protect the particular interest which a specific individual may have in gaining access to a document (see, by analogy, judgments of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 43; of 30 January 2020, *CBA Spielapparate- und Restaurantbetrieb* v *Commission*, T-168/17, not published, EU:T:2020:20, paragraph 74; and of 6 February 2020, *Compañía de Tranvías de la Coruña* v *Commission*, T-485/18, EU:T:2020:35, paragraph 80).

320 Third, it must be borne in mind that if a document is disclosed following an application for access made on the basis of Decision 2004/258, it becomes public *erga omnes*, in the sense that it may be communicated to other applicants and every person has a right of access to it. Such an *erga omnes* effect would manifestly exceed the boundaries of the legitimate interests of a party seeking to rely on his or her right to an effective remedy for the purpose of making enquiries in connection with another case before the Court (see, to that effect, order of 1 September 2015, *Pari Pharma* v *EMA*, T-235/15 R, EU:T:2015:587, paragraph 71).

321 The question whether a person requires a document in order to prepare an action for annulment falls to be considered in this case (see, by analogy, judgments of 26 April 2005, *Sison* v *Council*, T-110/03, T-150/03 and T-405/03, EU:T:2005:143, paragraph 55, and of 26 May 2016, *International Management Group* v *Commission*, T-110/15, EU:T:2016:322, paragraph 57). It is therefore only in the action brought against the decision adopting a resolution scheme in respect of Banco Popular, namely in Case T-628/17, that the applicant could possibly and usefully raise a plea alleging infringement of Article 47 of the Charter. As the ECB and the Commission rightly point out, the Court may, in Case T-628/17, profitably have recourse to the specific and comprehensive rules on the production and use of documents laid down in the Rules of Procedure (see, in that regard, paragraph 296 above).

322 Having regard to the foregoing, it must be held that the ECB did not infringe Article 47 of the Charter. The fourth plea must accordingly be dismissed.

323 In the light of all the above considerations, the second contested decision must be annulled inasmuch as it refused access to the outcome of the vote in the Governing Council of the ECB recorded in the minutes of the 447th meeting of the Governing Council of the ECB and the action must be dismissed as to the remainder.

V. Costs

324 Under Article 134(2) of the Rules of Procedure, where there is more than one unsuccessful party the Court is to decide how the costs are to be shared. In the present case, since the ECB and the applicant have been

unsuccessful in part, the ECB is to bear one third of its own costs and the applicant two thirds of the ECB's costs in addition to its own costs.

325 Under Article 138(1) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs. Consequently, the Commission is to bear its own costs.

326 Under Article 138(3) of the Rules of Procedure, the Court may order an intervener other than those referred to in paragraphs 1 and 2 of that article to bear its own costs. In the present case, Banco Santander, which intervened in support of the form of order sought by the ECB, must be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition),

hereby:

1. **Annuls Decision LS/MD/17/406 of the European Central Bank (ECB) of 7 November 2017 inasmuch as it refused access to the outcome of the vote in the Governing Council of the ECB recorded in the minutes of the 447th meeting of the Governing Council of the ECB;**

2. **Dismisses the action as to the remainder;**

3. **Orders Aeris Invest Sàrl to bear its own costs and to pay two thirds of the costs incurred by the ECB;**

4. **Orders the ECB to bear one third of its own costs;**

5. **Orders the European Commission and Banco Santander, SA to bear their own costs.**

Case C-342/19 P, *De Masi and Varoufakis v European Central Bank*

In Case C-342/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 30 April 2019,

Fabio De Masi, residing in Hamburg (Germany),

Yanis Varoufakis, residing in Athens (Greece),

represented by A. Fischer-Lescano, Universitätsprofessor,

appellants,

the other party to the proceedings being:

European Central Bank (ECB), represented by F. von Lindeiner and A. Korb, acting as Agents, and by H.-G. Kamann, Rechtsanwalt,

defendant at first instance,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, L. Bay Larsen (Rapporteur), C. Toader, M. Safjan and N. Jääskinen, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 9 July 2020,

gives the following

Judgment

1 By their appeal, Mr Fabio De Masi and Mr Yanis Varoufakis seek to have set aside the judgment of the General Court of the European Union of 12 March 2019, *De Masi and Varoufakis* v *ECB* (T-798/17, EU:T:2019:154) ('the judgment under appeal'), by which the General Court dismissed their action seeking the annulment of the decision of the European Central Bank of 16 October 2017 ('the decision at issue') refusing them access to the document of 23 April 2015, drafted by an external service provider at the ECB's request, entitled 'Responses to questions concerning the interpretation of Article 14.4 of Protocol No 4 on the Statutes of the European System of Central Banks and of the European Central Bank' ('the document at issue').

Legal context

Decision 2004/258

2 Recitals 3 and 4 of Decision 2004/258/EC of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (OJ 2004 L 80, p. 42), as amended by the Decision (EU) of the European Central Bank of 21 January 2015 (OJ 2015 L 84, p. 64), ('Decision 2004/258') state as follows:

‘(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. …’

3 As set out in Article 3(a) of that decision, for the purpose of that decision, ‘document’ and ‘ECB document’ are to 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.

4 Under the heading ‘Exceptions’, Article 4(2), (3) and (5) of that decision provides:

‘2. The ECB shall refuse access to a document where disclosure would undermine the protection of:

…

– … legal advice,

– …

unless there is an overriding public interest in disclosure.

3. Access to a document drafted or received by the ECB for internal use as part of deliberations and preliminary consultations within the ECB, or for exchanges of views between the ECB and NCBs, NCAs or NDAs, shall be refused even after the decision has been taken, unless there is an overriding public interest in disclosure.

…

5. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.’

5 As set out in Article 7(2) of that decision:

‘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.’

Regulation (EC) No 1049/2001

6 Recitals 1 and 4 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), are worded as follows:

‘(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.

…

(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.'

7 Under the heading 'Exceptions', Article 4(2) and (3) of that regulation provides:

'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.

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.'

Background to the dispute and the decision at issue

8 The background to the dispute was set out by the General Court in paragraphs 1 to 6 of the judgment under appeal and may, for the purposes of the present proceedings, be summarised as follows.

9 By letter of 24 April 2017, Mr De Masi and Mr Varoufakis applied to the ECB, on the basis of Decision 2004/258, for access to any external legal advice the ECB had sought in order to review its decisions of 4 February and 28 June 2015 regarding the provision of emergency liquidity assistance to Greek banks by the Greek Central Bank.

10 By letter of 31 May 2017, the ECB informed the appellants that it had not sought legal advice for those decisions. It also informed them of the existence of the document at issue.

11 By letter of 7 July 2017, the appellants asked the ECB for access to that document.

12 By letter of 3 August 2017, the ECB refused to grant access to that document on the basis of (i) the exception relating to the protection of legal advice, provided for in the second indent of Article 4(2) of Decision 2004/258, and (ii) the exception relating to the protection of documents intended for internal use, provided for in the first subparagraph of Article 4(3) of that decision.

13 By letter of 30 August 2017, the appellants submitted a confirmatory application for access to the document at issue, under Article 7(2) of that decision.

14 By letter of 16 October 2017, the ECB confirmed its decision of 3 August 2017 refusing access to the document at issue on the basis of the same exceptions as those referred to in that decision.

The procedure before the General Court and the judgment under appeal

15 By application lodged at the Registry of the General Court on 8 December 2017, Mr De Masi and Mr Varoufakis brought an action for annulment of the decision at issue.

16 In support of that action, the appellants raised, in essence, two pleas in law, alleging infringement of the second indent of Article 4(2) of Decision 2004/258 and infringement of the first subparagraph of Article 4(3) of that decision, respectively.

17 By the judgment under appeal, the General Court dismissed the action brought by the appellants as unfounded. After examining the second plea in law, it held, in paragraph 74 of that judgment, that the ECB was fully entitled to base its refusal to grant access to the document at issue on the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258. As a result, it took the view that it was not necessary to examine the first plea in law, concerning the exception to the right of access provided for in the second indent of Article 4(2) of that decision.

18 As regards the first part of the second plea in law, alleging an incorrect application of the exception relating to the protection of documents intended for internal use, the General Court held that it was not necessary to prove that the decision-making process could be seriously undermined under the first subparagraph of Article 4(3) of that decision. In that regard, in paragraph 30 of the judgment under appeal, it stated that a refusal based on that provision requires only that it be established, first, that that document is for internal use as part of deliberations and preliminary consultations within the ECB, or for exchanges of views between the ECB and the national authorities concerned, and, second, that there is no overriding public interest in disclosure of that document.

19 It found that the ECB was fully entitled to take the view that the document at issue was a document for internal use within the meaning of the first subparagraph of Article 4(3) of that decision, in so far as the ECB considered that that document was intended to provide information and support to the deliberations of the Governing Council within the scope of the competences conferred on it by Article 14(4) of Protocol No 4 on the Statute of the European System of Central Banks (ESCB) and of the ECB.

20 The General Court thus rejected, in paragraphs 44 to 47 of the judgment under appeal, the argument of Mr De Masi and Mr Varoufakis that the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258 was not applicable to the document at issue because that document was a legal opinion which fell within the scope of the exception relating to the protection of legal advice, provided for in the second indent of Article 4(2) of that decision.

21 The General Court also rejected, in paragraphs 48 to 52 of the judgment under appeal, the appellants' argument that the conditions laid down in the first subparagraph of Article 4(3) of that decision were not satisfied since the document at issue, first, is not an internal document and, second, does not relate to a specific procedure.

22 Furthermore, the General Court analysed and rejected, in paragraphs 53 to 58 of the judgment under appeal, the plea alleging infringement of the obligation to state reasons.

23 In paragraphs 62 to 73 of the judgment under appeal, the General Court rejected the second part of the second plea, alleging that there is an overriding public interest in the disclosure of the document at issue.

Procedure before the Court and forms of order sought

24 By their appeal, the appellants claim that the Court should:

– set aside the judgment under appeal in its entirety;

– uphold the form of order sought by it at first instance, and

– order the ECB to pay the costs.

25 The ECB contends that the Court should:

– dismiss the appeal; and

– order the appellants to pay the costs.

The appeal

26 In support of their appeal, the appellants raise four grounds, alleging, first, infringement of Article 10(3) TEU, of Article 15(1) and Article 298(1) TFEU and of Article 42 of the Charter of Fundamental Rights of the European Union ('the Charter'), in conjunction with Article 52(1) of the Charter, second, failure to fulfil the obligation to state reasons, third, infringement of Article 4(2) and (3) of Decision 2004/258 and, fourth, infringement of Article 4(3) of that decision.

The first ground of appeal

Arguments of the parties

27 By their first ground of appeal, the appellants claim that the General Court failed to apply the principle of transparency laid down in Article 10(3) TEU, Article 15(1) and Article 298(1) TFEU and Article 42 of the Charter, in conjunction with Article 52(1) of the Charter, in the light of which the exceptions provided for by Decision 2004/258 should have been interpreted.

28 This ground of appeal is divided into two parts.

29 By the first part, the appellants criticise the General Court for having held, in paragraph 29 of the judgment under appeal, that the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258 does not require it to be established that the decision-making process could be seriously undermined. In that regard, the appellants claim that the General Court wrongly relied on the wording of that provision, and criticise it for having adopted an interpretation of that wording which is not consistent with Article 10(3) TEU, Article 15(1) and Article 298(1) TFEU and Article 42 of the Charter, in conjunction with Article 52(1) of the Charter. They assert that those provisions lay down the objective of broad transparency and a right to access to documents which the General Court failed to apply.

30 According to the appellants, since primary law sets the threshold for limiting the principle of transparency, the ECB cannot lower that threshold by failing to take into account the requirement that the decision-making process could be seriously undermined, even if such a requirement is not mentioned in the first subparagraph of Article 4(3) of that decision.

31 The ECB contends that the first part of the first ground of appeal must be rejected as inadmissible. In the alternative, it maintains that that part of the first ground of appeal is unfounded.

32 By the second part of the first ground of appeal, the appellants criticise the General Court for having, in paragraph 54 of the judgment under appeal, conferred on the ECB a broad discretion and thus reduced the scope of its judicial review, in breach of primary law, with the result that the assessment carried out in paragraph 43 et seq. of that judgment was flawed. They take the view that, on account of the dimension of the principle of transparency, access to documents is not a matter for assessment. Article 52 of the Charter requires that any restrictions on that principle be proportionate and that the conditions for applying such restrictions be amenable to full judicial review.

33 The ECB contends that this part is inadmissible and, in any event, unfounded.

Findings of the Court

34 As regards the first part of the first ground of appeal, it should be borne in mind that, under the second sentence of Article 170(1) of the Rules of Procedure of the Court of Justice, the subject matter of the proceedings before the General Court may not be changed in the appeal. In addition, as is apparent from the settled case-law of the Court, to allow a party to put forward for the first time before the Court a ground for complaint which it did not raise before the General Court would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court. In an appeal, the Court's jurisdiction is thus confined to examining the assessment by the General Court of the pleas and arguments discussed before it (see, inter alia, order of 15 January 2020, *BS* v *Parliament*, C-642/19 P, not published, EU:C:2020:32, paragraph 24).

35 The interpretation of the abovementioned provisions of primary law, as proposed by the appellants, may be usefully invoked only to support a plea of the illegality of the first subparagraph of Article 4(3) of Decision 2004/258. It follows from the wording of that provision that the ECB sought to refuse access to its documents where the conditions laid down in that provision are satisfied.

36 In that regard, it must be noted that that same provision makes no reference to a condition such as that relied on by the appellants. Consequently, to consider that refusal of access to ECB documents on the basis of the first subparagraph of Article 4(3) of Decision 2004/258 is subject to a condition other than that which is laid down therein constitutes a contra legem interpretation of that provision.

37 In those circumstances, and since the appellants did not expressly claim before the General Court that, for that reason, the first subparagraph of Article 4(3) of Decision 2004/258 undermined the principle of transparency, as laid down by the provisions of the FEU Treaty and the Charter that they rely on, it must be held that such a plea of illegality was not raised at first instance and cannot, subsequently, be relied upon for the first time in the appeal.

38 It is true that an argument which was not raised at first instance does not constitute a new plea that is inadmissible at the appeal stage if it is simply an amplification of an argument already developed in the context of a plea set out in the application before the General Court (judgment of 16 November 2017, *Ludwig-Bölkow-Systemtechnik* v *Commission*, C-250/16 P, EU:C:2017:871, paragraph 29). However, it is clear that that is not the case here.

39 In that regard, although the appellants cited those provisions of primary law in their application at first instance, they did not, in that application, expressly raise those provisions in support of an argument seeking to establish that the first subparagraph of Article 4(3) of Decision 2004/258 does not comply with the terms of those provisions.

40 It follows that, since the appellants' argument at first instance did not suggest that the first subparagraph of Article 4(3) of Decision 2004/258 is incompatible with those provisions of primary law and the compatibility of that former provision is being called into question for the first time before the Court, this part of the first ground of appeal cannot be considered to be an amplification of the pleas set out in the application initiating proceedings.

41 Consequently, the first part of the first ground of appeal must be rejected as inadmissible.

42 As regards the second part of that ground of appeal, it should be noted that the discretion that the General Court recognised the ECB as having, in paragraph 54 of the judgment under appeal, and the restricted scope of the review exercised by the General Court concerned only the matter of whether an overriding public interest could be affected by the disclosure of the document at issue. Those considerations therefore could not have resulted in the General Court having carried out a flawed assessment in paragraphs 43 to 52 of that judgment, which do not concern the risk of harm to the public interest but rather concern the grounds which may justify refusal to grant access to an ECB document and the nature of the document at issue. Therefore, the arguments put forward by the appellants on this point cannot succeed.

43 As regards paragraphs 53 to 58 of the judgment under appeal, it must be noted that, in those paragraphs, the General Court analysed the appellant's plea alleging failure to fulfil the obligation to state reasons regarding the possible harm to the decision-making process. Since, in respect of the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258, it is not a requirement to establish that the decision-making process could be seriously undermined, as the General Court held in paragraph 29 of the judgment under appeal, the considerations concerning the nature and intensity of the EU courts' review of whether there is a threat to the public interest were in any event irrelevant to the success or otherwise of that plea.

44 Consequently, the arguments raised by the appellants in the second part of the first ground of appeal must be rejected.

45 Having regard to the foregoing, the first ground of appeal must be rejected in its entirety as being in part inadmissible and in part unfounded.

The second ground of appeal

Arguments of the parties

46 By their second ground of appeal, the appellants criticise the General Court for having disregarded, in paragraphs 53 to 57 of the judgment under appeal, the requirements to state reasons established by the Court in relation to Regulation No 1049/2001. In particular, they criticise the General Court for having accepted that the ECB could rely on 'hypothetical effects' to justify refusing access to its documents. They claim that general and abstract risks are not sufficient to justify such refusal. The ECB thus did not explain how access to the document requested could restrict the ECB's 'space to think' and specifically and effectively undermine the interest protected by the exception provided for in Article 4 of Decision 2004/258 that it relies on.

47 The ECB claims that that ground of appeal should be rejected as inadmissible or, in the alternative, as unfounded.

Findings of the Court

48 It should be borne in mind, from the outset, that Regulation No 1049/2001 is not applicable to the document at issue, access to which is governed by Decision 2004/258.

49 In respect of the alleged infringement of the requirements as regards stating reasons for acts of the institutions established by the Court in relation to that regulation, pleaded by the appellants, it must be noted that, while the second subparagraph of Article 4(3) of that regulation requires it to be established that disclosure of the document would seriously undermine the institution's decision-making process, that is not a requirement in connection with the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258. It follows that the General Court was under no obligation to assess whether the ECB had provided explanations as to how granting access to the document at issue could lead to its decision-making process being seriously undermined.

50 Refusal to grant access to a document on the basis of the first subparagraph of Article 4(3) of Decision 2004/258 requires only that it be established, first, that that document is, inter alia, for internal use as part of deliberations and preliminary consultations within the ECB, and, secondly, that there is no overriding public interest in disclosure of that document.

51 Accordingly, the General Court did not infringe requirements as regards stating reasons for acts of the institutions of the European Union when, in paragraph 55 of the judgment under appeal, it undertook a review of the reasoning of the decision at issue, finding that that decision stated that the document at issue was intended for internal use as part of deliberations and preliminary consultations of the Governing Council, that disclosure of that document would undermine the possibility of an effective, informal and confidential discussion between the members of the decision-making bodies and, as a consequence, would restrict the ECB's 'space to think', and that, in addition, disclosure of the document at issue, in so far as it would be removed from its context, would risk undermining the independence of the members of the Governing Council.

52 The General Court was also fully entitled to hold, in paragraph 57 of the judgment under appeal, that the obligation to state reasons did not preclude the ECB from basing its reasoning on considerations which take account of hypothetical effects which disclosure of the document at issue might have on that institution's space to think.

53 Consequently, the second ground of appeal must be rejected as unfounded.

The third ground of appeal

Arguments of the parties

54 By their third ground of appeal, which is divided into two parts and refers in essence to paragraphs 43 to 50 of the judgment under appeal, the appellants complain that the General Court, first, misconstrued the scope of the first subparagraph of Article 4(3) of Decision 2004/258, concerning documents intended for internal use, and the scope of the second indent of Article 4(2) of that decision, concerning legal advice, and, second, misinterpreted that first provision by finding that the conditions for its application were satisfied in the present case.

55 More specifically, in the first part of this third ground of appeal, the appellants claim that, in the light of its wording, the second indent of Article 4(2) of Decision 2004/258 concerns 'legal advice', while the first subparagraph of Article 4(3) of that decision concerns only documents containing non-legal opinions. The appellants criticise the General Court for not having addressed the question as to whether or not the document at issue constituted legal advice within the meaning of that first provision.

56 They claim, in that regard, that, since the document at issue is an abstract and scientific response to a point of law and not legal advice, the document at issue cannot be classified as legal advice within the meaning of the second indent of Article 4(2) of Decision 2004/258.

57 As a result, in contrast to what the General Court ruled in paragraph 43 of the contested decision, the first subparagraph of Article 4(3) of Decision 2004/258 should not have been applied on account of the blocking effect of the second indent of Article 4(2) of that decision, which is a *lex specialis* with regard to the first provision, since the second indent of Article 4(2) of Decision 2004/258 exhaustively governs the exceptions to the principle of transparency applicable to that type of document.

58 In the second part of this ground of appeal, the appellants challenge the interpretation of the first subparagraph of Article 4(3) of Decision 2004/258 made by the General Court. In that regard, they reiterate that, like the second subparagraph of Article 4(3) of Regulation No 1049/2001, the first subparagraph of Article 4(3) of Decision 2004/258 seeks to protect the integrity of the ECB's internal decision-making process. The document the disclosure of which was requested does not come within the scope of the latter provision since it is not intended for internal use in relation to a specific decision-making process, but rather constitutes an external analysis seeking to define 'the external framework' of the ECB's competencies.

59 The ECB contests those arguments and claims that this ground of appeal should be rejected in its entirety.

Findings of the Court

60 As regards the first part, it is necessary, from the outset, to note that the wording of the second indent of Article 4(2) of Decision 2004/258 contains no indications which might confer on it the character of *lex specialis* in relation to the first subparagraph of Article 4(3) of that decision.

61 As is apparent from the first subparagraph of Article 4(3) of that decision, the exception provided for therein refers to documents drafted or received by the ECB for internal use as part of deliberations and preliminary consultations within the ECB, or for exchanges of views between the ECB and the national authorities.

62 Moreover, it should be noted that nothing in the wording of Article 4 of Decision 2004/248 precludes the same part of a document from being covered by 'any of the exceptions' referred to therein. It follows that it cannot reasonably be argued that the same document cannot be covered by more than one of the provisions of Article 4 of Decision 2004/258 relating to refusal to grant access to documents provided for in that decision.

63 The General Court was therefore fully entitled to rule, in paragraphs 44 to 47 of the judgment under appeal, that the ECB, when assessing a request for access to documents which it holds, may take into account more than one ground for refusal – in the present case both that set out in the second indent of Article 4(2) of Decision 2004/258 and that set out in the first subparagraph of Article 4(3) of that decision.

64 Moreover, it is irrelevant, for the purpose of applying the exception referred to in the first subparagraph of Article 4(3) of Decision 2004/258, that the document at issue may also be classified as 'legal advice' within the meaning of the second indent of Article 4(2) of that decision. The legislature of the European Union did not make the possibility of relying on the exception set out in the first subparagraph of Article 4(3) of Decision 2004/258 conditional on the documents referred to therein not being 'legal advice', within the meaning of the second indent of Article 4(2) of that decision.

65 In those circumstances, the first part of the third ground of appeal must be rejected as unfounded.

66 As regards the second part of the third ground of appeal, it must be noted that, in accordance with the first subparagraph of Article 4(3) of Decision 2004/258, access to a document drafted or received by the ECB for internal use as part of deliberations and preliminary consultations within the ECB, or for exchanges of views

between the ECB and the national authorities, are to be refused even after the decision has been taken, unless there is an overriding public interest in disclosure of that document.

67 As regards, first, the condition regarding internal use of the documents, it should be borne in mind that the document at issue was requested from an external service provider in order to enrich the internal considerations of the ECB's decision-making bodies and support their deliberations and discussions.

68 It must be noted that the first subparagraph of Article 4(3) of Decision 2004/258 is drafted with the effect of protecting internal preparatory documents, even if the document at issue was drafted by an external service provider, since that provision refers expressly to a document 'received' by the ECB.

69 In addition, as the General Court correctly stated in paragraph 49 of the judgment under appeal, it is stated in the decision at issue not that the document at issue is an internal document but that it is intended for internal use.

70 The General Court was therefore fully entitled to hold, in paragraph 41 of the judgment under appeal, that the ECB had validly been able to consider that the document at issue was a document intended for internal use, within the meaning of the first subparagraph of Article 4(3) of Decision 2004/258.

71 Second, the wording of the first subparagraph of Article 4(3) of Decision 2004/258 cannot be read as reserving the protection contained in it only to documents linked to a specific decision-making process. That provision requires only that a document be used 'as part of deliberations and preliminary consultations within the ECB'. As the ECB maintains, while its deliberations and preliminary consultations may concern a specific procedure, they can also have a broader purpose and concern general matters. In support of this, by also referring to documents intended for exchanges of views between the ECB and the national authorities, that provision has the effect of covering, in a broad manner, documents linked to the ECB's internal processes.

72 Such an interpretation of the first subparagraph of Article 4(3) of Decision 2004/258 cannot be called into question by the Court's findings in the judgment of 13 July 2017, *Saint-Gobain Glass Deutschland* v *Commission* (C-60/15 P, EU:C:2017:540), on which the appellants rely.

73 In that judgment, the Court, in essence, held that it was possible to refuse access to a document on the basis of the first subparagraph of Article 4(3) of Regulation No 1049/2001 only in so far as the decision-making process relates to taking a decision.

74 However, unlike that regulation, and contrary to what the appellants maintain in that regard, the purpose of the protection provided for in the first subparagraph of Article 4(3) of Decision 2004/258 is not the same as that provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001. Indeed, that provision of Decision 2004/258 refers to deliberations and preliminary consultations within the ECB, whereas such a reference does not appear in the first subparagraph of Article 4(3) of Regulation No 1049/2001.

75 Moreover, while Article 4(3) of that regulation makes refusal to grant access to a document conditional upon that document '[relating] to a matter where the decision has not been taken' by the institution, the first subparagraph of Article 4(3) of Decision 2004/258 does not contain such a precision. On the contrary, in the context of Decision 2004/258, the ECB thus sought to confer protection on its documents even in the case of an integrated decision-making process, given that, under that provision, access to the document is to be refused 'even after' the decision has been taken.

76 In addition, it must be borne in mind that the ECB, by Decision 2004/258, chose to confer a right of access to its documents subject to the conditions and limits defined by that decision. That decision thus aims to preserve that right of access while taking into account the specific nature of that institution which, in accordance with Article 130 TFEU, must be able effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by the Treaty and the Statute of the ESCB.

77 Moreover, it must be borne in mind that the legal framework concerning access to ECB documents provided for by the Treaties differs, under the fourth subparagraph of Article 15(3) TFEU, depending on whether or not the ECB is exercising its administrative tasks. While the rules on access to the documents of the institutions subject to that provision must be compliant with Regulation No 1049/2001, a document such as the document at issue,

which contains legal advice concerning the interpretation of Article 14.4 of Protocol No 4 on the Statutes of the European System of Central Banks and of the ECB, cannot be considered to be related to the exercise of the ECB's administrative tasks.

78 It follows that the second subparagraph of Article 4(3) of Regulation No 1049/2001 is designed so that access to a document is refused only where it is related to a specific decision, whereas, under the first subparagraph of Article 4(3) of Decision 2004/258, the protection of confidentiality of the ECB's documents is guaranteed even when those documents are not part of the process of adopting a specific decision.

79 It was thus on the basis of an interpretation of the first subparagraph of Article 4(3) of Decision 2004/258 free from error of law that the General Court rejected the appellants' arguments raised at first instance.

80 Therefore, the second part of the third ground of appeal must be rejected as unfounded and, as a result, the third ground of appeal must be rejected in its entirety.

The fourth ground of appeal

Arguments of the parties

81 By their fourth ground of appeal, the appellants criticise the General Court for having failed to have regard, in paragraphs 62 to 72 of the judgment under appeal, to the existence of an overriding public interest justifying disclosure of the document at issue.

82 In that regard, they claim that, even if the conditions for application of the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258 are satisfied, the fact remains that there is an overriding public interest in disclosure of the document at issue.

83 The appellants' submit that considerations related to the review of legality of the ECB's actions support that conclusion. In their view, the finding of a potential defect in a decision of the ECB is in the public interest. In addition, it is clear from recital 1 of Decision 2004/258 that greater transparency enables citizens to participate more closely in decision-making processes. Lastly, they criticise the General Court for having weighed the competing interests without indicating specifically and in a substantiated manner in what way the interests of the ECB would be undermined.

84 Moreover, the appellants take the view that, by holding that it was not necessary to prove that the decision-making process could be seriously undermined, and by thus reducing its judicial review to review of abuse of power, the General Court based its review of the existence of a public interest on an incorrect criterion. Indeed, it was not established that disclosure would undermine or risk undermining either the protection of legal advice or the protection of the internal decision-making process.

85 Therefore, according to the appellants, contrary what the General Court held, it is not sufficient to take abstract and purely hypothetical factors into consideration to justify the risk that a protected interest could be undermined.

86 The ECB argues that this ground of appeal should be rejected as inadmissible or, in the alternative, as unfounded.

Findings of the Court

87 As regards this ground of appeal, it must be stated that the appellants' arguments in relation to the General Court's rejection of the suggestion that there is an overriding public interest in disclosure are the same as those put forward at first instance. Accordingly, by their arguments, the appellants seek, in reality, reconsideration of the application submitted before the General Court, which falls outside the jurisdiction of the Court of Justice (see, inter alia, judgment of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562 paragraphs 62 and 63).

88 As regards the appellants' arguments that it is for the ECB to establish that the decision-making process would be seriously undermined, those arguments are based on an incorrect premiss since, in the context of the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258, that is not a requirement, as was already stated in paragraph 43 above. As is apparent from the present paragraph, the appellants' arguments concerning evidence that the decision-making process would be seriously undermined are ineffective.

89 Accordingly, this ground of appeal should be rejected as being in part inadmissible and in part ineffective.

90 It follows from all the foregoing considerations that none of the grounds put forward by the appellants in support of their appeal can succeed.

91 The appeal must therefore be dismissed in its entirety.

Costs

92 Under Article 138(1) of the Rules of Procedure of the Court of Justice, applicable to appeal proceedings 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. Since the ECB has applied for costs and the appellants have been unsuccessful, the appellants must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders Fabio de Masi and Yanis Varoufakis to pay the costs.**

LECTURE 7: 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, which entered into force on 25 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. Particular attention will also be paid to the increasingly complex definition of the notion of data controller, as apparent from recent Court of Justice case law.

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).
- Court of Justice, 10 July 2018, Case C-25/17, *Tietosuojavaltuutettu,* EU:C:2018:551.
- Court of Justice, 29 July 2019, Case C-40/17, *FashionID,* EU:C:2019:629.

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.

Case C-25/17, *Tietosuojavaltuutettu*

In Case C-25/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland), made by decision of 22 December 2016, received at the Court on 19 January 2017, in the proceedings

Tietosuojavaltuutettu

intervening parties:

Jehovan todistajat — uskonnollinen yhdyskunta,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, T. von Danwitz (Rapporteur), J.L. da Cruz Vilaça, J. Malenovský, E. Levits and C. Vajda, Presidents of Chambers, A. Borg Barthet, J.-C. Bonichot, A. Arabadjiev, S. Rodin, F. Biltgen, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: P. Mengozzi,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 28 November 2017,

after considering the observations submitted on behalf of:

– the tietosuojavaltuutettu, by R. Aarnio, acting as Agent,

– Jehovan todistajat — uskonnollinen yhdyskunta, by S.H. Brady, asianajaja, and by P. Muzny,

– the Finnish Government, by H. Leppo, acting as Agent,

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili, avvocato dello Stato,

– the European Commission, by P. Aalto, H. Kranenborg and D. Nardi, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 February 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(c) and (d) and Article 3 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) read in the light of Article 10 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2 The request has been made in proceedings brought by the tietosuojavaltuutettu (Data Protection Supervisor, Finland) concerning the legality of a decision of the tietosuojalautakunta (Data Protection Board, Finland) prohibiting the Jehovan todistajat — uskonnollinen yhdyskunta (Jehovah’s Witnesses religious community, ‘the

Jehovah's Witnesses Community') from collecting or processing personal data in the course of their door-to-door preaching unless the requirements of Finnish legislation relating to the processing of personal data are observed.

Legal context

European Union law

3 Recitals 10, 12, 15, 26 and 27 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[, 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;

(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;

(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;

(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; …

(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'.

4 Article 1(1) of Directive 95/46 provides:

'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.'

5 Article 2 of that directive provides:

'For the purpose 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;

(c) “personal data filing system” (“filing system”) shall mean any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised 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;

…’

6 Article 3 of the directive states:

‘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.’

Finnish law

7 Directive 95/46 was transposed into Finnish law by the henkilötietolaki 523/1999 (Law on personal data No 523/1999, ‘Law No 523/1999’).

8 Paragraph 2, first and second paragraphs, of that law, entitled ‘Soveltamisala’ (Scope), provides;

‘This Law applies to the automated processing of personal data. It also applies to other means of personal data processing where the personal data form part of a personal data filing system or a part of such a system or are intended to form part of a personal data filing system or a part of such a system.

This Law does not apply to the processing of personal data by a natural person for purely personal purposes or for comparable ordinary and private purposes.’

9 Paragraph 3(3) of Law No 523/1999 defines a ‘personal data filing system’ as a ‘set of personal data, connected by a common use and processed fully or partially by automated means or organised using data sheets or lists or any other comparable means permitting the retrieval of data relating to persons easily and without excessive cost’.

10 In accordance with Paragraph 44 of that law, at the request of the Data Protection Supervisor, the Data Protection Board may prohibit processing of personal data that is contrary to that law or to the rules and regulations issued on the basis thereof, and order the parties concerned to remedy the unlawful conduct or negligence within a prescribed period.

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

11 On 17 September 2013, at the request of the Data Protection Supervisor the Finnish Data Protection Board adopted a decision prohibiting the Jehovah’s Witnesses Community from collecting or processing personal data in the course of door-to-door preaching carried out by its members unless the legal requirements for processing such data laid down, in particular, in Paragraphs 8 and 12 of the Law No 523/1999 were satisfied. Furthermore, on the basis of Paragraph 44(2) of that law, the Data Protection Board imposed a ban on the collection of personal

data by the Jehovah's Witnesses Community for the purposes of that community for a period of six months unless those conditions were observed.

12 In the grounds for its decision, the Data Protection Board considered that the collection of the data at issue by members of the Jehovah's Witnesses Community constituted processing of personal data within the meaning of that law, and that the Jehovah's Witnesses Community and its members were both data controllers.

13 The Jehovah's Witnesses Community brought an action before the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland) against that decision. By judgment of 18 December 2014, that court annulled the decision on the ground, inter alia, that the Jehovah's Witnesses Community was not a controller of personal data within the meaning of Law No 523/1999 and that its activity did not constitute unlawful processing of such data.

14 The Data Protection Supervisor challenged that judgment before the Korkein hallinto-oikeus (Supreme Administrative Court, Finland).

15 According to the findings of that court, the members of the Jehovah's Witnesses Community take notes in the course of their door-to-door preaching about visits to persons who are unknown to themselves or that Community. The data collected may consist, among other things, of the name and addresses of persons contacted, together with information concerning their religious beliefs and their family circumstances. Those data are collected as a memory aid and in order to be retrieved for any subsequent visit without the knowledge or consent of the persons concerned.

16 The referring court also found that the Jehovah's Witnesses Community has given its members guidelines on the taking of such notes which appear in at least one of its magazines which is dedicated to preaching. That community and its congregations organise and coordinate the door-to-door preaching by their members, in particular by creating maps from which areas are allocated between the members who engage in preaching and by keeping records about preachers and the number of the Community's publications distributed by them. Furthermore, the congregations of the Jehovah's Witnesses Community maintain a list of persons who have requested not to receive visits from preachers and the personal data on that list, called the 'refusal register', are used by members of that community. Lastly, the Jehovah's Witnesses Community has, in the past, made forms available to its members for the purpose of collecting those data in the course of their preaching. However, the use of those forms was abandoned following a recommendation by the Data Protection Supervisor.

17 The referring court observes that, according to information from the Jehovah's Witnesses Community, it does not require members who engage in preaching to collect data, and that in cases in which such data has been collected it has no knowledge of either the nature of the notes taken which are, moreover, only informal personal notes nor of the identity of the preachers who collected those data.

18 As regards the need for the present request for a preliminary ruling, the Korkein hallinto-oikeus (Supreme Administrative Court) takes the view that the examination of the case in the main proceedings requires consideration to be given, on one hand, to the rights to privacy and protection of personal data and, on the other, to freedom of religion and association guaranteed by the Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as the Finnish Constitution.

19 The referring court considers that the door-to-door preaching practised by members of a religious community, such as the Jehovah's Witnesses Community, is not one of the activities excluded from the scope of Directive 95/46, by virtue of the first indent of Article 3(2) thereof. However, the question arises as to whether that activity is a purely personal or household activity within the meaning of the second indent of Article 3(2). In that regard, account must be taken of the fact that, in the present case, the data collected are more than informal notes in an address book, as the notes taken concern unknown persons and contain sensitive data relating to their religious beliefs. The fact that door-to-door preaching is an essential part of the Jehovah's Witnesses Community's activity, which is organised and coordinated by it and by its congregations, must also be taken into consideration.

20 Furthermore, since the collected data at issue in the main proceedings are processed otherwise than by automatic means, it must be determined, having regard to Article 3(1) of Directive 95/46 read together with Article 2(c) thereof, whether that set of data constitutes a filing system within the meaning of those provisions. According to the information provided by the Jehovah's Witnesses Community, those data are not shared, so that

it is impossible to know with certainty the nature and extent of the data collected. However, it may be assumed that the purpose of collecting and subsequent processing of the data at issue in the main proceedings is for the easy retrieval of that data concerning a specific person or address for the purposes of a subsequent visit. The data collected are not, however, structured in the form of data sheets.

21 If the data processing at issue in the main proceedings falls within the scope of Directive 95/46, the referring court notes that the question then arises as to whether the Jehovah's Witnesses Community must be regarded as a controller of that processing within the meaning of Article 2(d) thereof. The case-law of the Court deriving from the judgment of 13 May 2014, *Google Spain and Google* (C-131/12, EU:C:2014:317), broadly defines the concept of 'controller' within the meaning of those provisions. Furthermore, it is clear from Opinion 1/2010 of 16 February 2010 on the concepts of 'controller' and 'processor' produced by the Working Group set up pursuant to Article 29 of Directive 95/46, that, in particular, the 'effective control' and the conception that the data subject has of the controller must be taken into account.

22 In the present case, regard should be had to the fact that the Jehovah's Witnesses Community organises, coordinates and encourages door-to-door preaching, and that in its publications it has given guidelines on the collection of data in the course of that activity. Furthermore, the Data Protection Supervisor found that that community has effective control over the means of data processing and the power to prohibit or limit that processing, and that it previously defined the purpose and means of data collection by giving guidelines on collection. Furthermore, the forms previously used are also evidence of the active involvement of that community in data processing.

23 However, account should also be taken of the fact that the members of the Jehovah's Witnesses Community can decide themselves whether to collect data and to determine the means of doing so. Furthermore, that community does not itself collect data and does not have access to the data collected by its members, except that on the 'refusal' list. However, such circumstances do not preclude the potential for several data controllers, each with different roles and responsibilities.

24 In those circumstances the Korkein hallinto-oikeus (Supreme Administrative Court) decided to stay the proceedings before it and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the exceptions to the scope of [Directive 95/46] laid down in Article 3(2), first and second indents, thereof be interpreted as meaning that the collection and other processing of personal data carried out by the members of a religious community in connection with door-to-door preaching fall outside the scope of that directive? When assessing the applicability of [Directive 95/46], what significance is to be given, on one hand, to the fact that it is the religious community and its congregations which organise the preaching activity in the course of which the data is collected and, on the other, to the fact this also concerns the personal religious practice of the members of a religious community?

(2) Must the definition of a "filing system" in Article 2(c) of … Directive [95/46], examined in the light of recitals 26 and 27 of that directive, be interpreted as meaning that, taken as a whole, the personal data (consisting of names and addresses and other information about and characteristics of a person) collected otherwise than by automatic means in connection with the door-to-door preaching described above

(a) does not constitute such a filing system, because the data does not include specific lists or data sheets or any other comparable search method as provided for in the definition laid down in the [Law No 523/1999], or

(b) does constitute such a filing system, because, taking account of its intended purpose, the information required for later use may in practice be searched easily and without unreasonable expense in accordance with [Law No 523/1999]?

(3) Must the phrase "alone or jointly with others determines the purposes and means of the processing of personal data" appearing in Article 2(d) of … Directive [95/46] be interpreted as meaning that a religious community that organises an activity in the course of which personal data is collected (in particular, by allocating areas in which the activity is carried out among the various preachers, supervising the activity of those preachers and keeping a list of individuals who do not wish the preachers to visit them) may be regarded as a controller, in respect of the processing of personal data carried out by its members, even if the religious community claims that only the individual members who engage in preaching have access to the data that they gather?

(4) Must Article 2(d) of Directive [95/46] be interpreted to the effect that in order for a religious community to be considered a controller it must have taken other specific measures, such as giving written instructions or orders directing the collection of data, or is it sufficient that that religious community can be regarded as having de facto control of its members' activities?

It is necessary to answer Questions 3 and 4 only if, on the basis of the answers to Questions 1 and 2, [Directive 95/46] is applicable. It is necessary to answer Question 4 only if, on the basis of Question 3, the application of Article 2(d) of [Directive 95/46] to the Community cannot be regarded as being excluded.'

The request to have the oral procedure reopened

25 By two documents lodged at the Court Registry on 12 December 2017 and 15 February 2018 respectively, the Jehovah's Witnesses Community requested the Court to order the reopening of the oral part of the procedure pursuant to Article 83 of the Rules of Procedure of the Court. In support of the first of those requests, the Jehovah's Witnesses Community claims, in particular, that it did not have the opportunity at the hearing to respond to the observations submitted by the other parties, some of which did not reflect the facts in the main proceedings. As regards the second request, the Jehovah's Witnesses Community argues essentially that the Opinion of the Advocate General is based on inaccurate or potentially misleading facts, some of which are not mentioned in the request for a preliminary ruling.

26 Pursuant to Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to have a decisive bearing on the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

27 That is not the case here. In particular, the requests of the Jehovah's Witnesses Community seeking to have the oral procedure reopened do not contain any new argument on the basis of which the present case should be decided. Furthermore, that party and the other interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union submitted, both during the written phase and the oral phase of the proceedings, their observations concerning the interpretation of Article 2(c) and (d), and Article 3 of Directive 95/46, read in the light of Article 10 of the Charter, which is the subject of the questions referred for a preliminary ruling.

28 As regards the facts in the main proceedings, it must be recalled that in proceedings under Article 267 TFEU, only the court making the reference may define the factual context in which the questions which it asks arise or, at very least, explain the factual assumptions on which the questions are based. It follows that a party to the main proceedings cannot allege that certain factual premisses on which the arguments advanced by the other interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union are based, or the analysis of the Advocate General, are incorrect in order to justify the reopening of the oral procedure, on the basis of Article 83 of the Rules of Procedure (see, to that effect, judgment of 26 June 2008, *Burda*, C-284/06, EU:C:2008:365, paragraphs 44, 45 and 47).

29 Against that background, the Court, having heard the Advocate General, considers that it has all the evidence necessary to enable it to reply to the questions referred and that the present case does not thereby fall to be decided on the basis of an argument which has not been debated between the parties. The request to reopen the oral procedure must therefore be rejected.

Admissibility of the request for a preliminary ruling

30 The Jehovah's Witnesses Community claims that the request for a preliminary ruling is inadmissible. While challenging the main facts on which that request is based, it claims that the request for a preliminary ruling relates to the conduct of some of its members who are not parties to the main proceedings. Therefore, that request concerns a hypothetical problem.

31 In that connection, it is solely for the national court hearing the case, which has the responsibility of taking the subsequent judicial decision, to determine, with regard to the particular aspects 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 refers to

the Court. Consequently, where the questions put by national courts concern the interpretation of a provision of European Union law, the Court is, in principle, bound to give a ruling. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraphs 24 and 25 and the case-law cited).

32 In the present case, the order for reference contains sufficient factual and legal information to understand both the questions referred for a preliminary ruling and their scope. Further, and most importantly, nothing in the file leads to the conclusion that the interpretation requested of EU law is unrelated to the actual facts of the main action or its object, or that the problem is hypothetical, in particular on account of the fact that the members of the Jehovah's Witnesses Community whose collection of personal data is the basis for the questions referred are not parties to the main proceedings. It is clear from the order for reference that the questions referred are intended to assist the referring court to determine whether that community may itself be regarded as a controller, within the meaning of Directive 95/46, in connection with the collection of the personal data by its members in the course of their door-to-door preaching activities.

33 The reference for a preliminary ruling is therefore admissible.

Consideration of the questions referred

The first question

34 By its first question, the referring court asks essentially whether Article 3(2) of Directive 95/46, read in the light of Article 10(1) of the Charter, must be interpreted as meaning that the collection of personal data by members of a religious community in the course of door-to-door preaching and the subsequent processing of those data constitutes the processing of personal data carried out for the purposes of the activities referred to in Article 3(2), first indent, of that directive or the processing of personal data carried out by a natural person in the course of a purely personal or household activity within the meaning of Article 3(2), second indent, thereof.

35 In order to answer that question, it should be observed from the outset, as is clear from Article 1(1) and recital 10 of Directive 95/46, that 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 (judgments of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 66, and of 5 June 2018, *Wirtshaftsakademie Schleswig-Holstein*, C-210/16, EU:C:2018:388, paragraph 26).

36 Article 3 of Directive 95/46, which defines the scope of the directive, states in paragraph 1 that its provisions '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'.

37 However, Article 3(2) lays down two exceptions to the scope of application of that directive which must be strictly interpreted (see, to that effect, judgments of 11 December 2014, *Ryneš*, C-212/13, EU:C:2014:2428, paragraph 29, and of 27 September 2017, *Puškár*, C-73/16, EU:C:2017:725, paragraph 38). Furthermore, Directive 95/46 does not lay down any further limitation of its scope (judgment of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, paragraph 46).

38 First, as regards the exception in Article 3(2), first indent, of Directive 95/46, it has been held that the activities mentioned therein by way of exceptions are, in any event, activities of the State or of State authorities and are unrelated to fields in which individuals are active. Those activities are intended to define the scope of the exception provided for in that provision, with the result that that exception applies only to the activities which are expressly listed there or which can be classified in the same category (judgments of 6 November 2003, *Lindqist*, C-101/01, EU:C:2003:596, paragraphs 43 and 44; of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, paragraph 41; and of 27 September 2017, *Puškár*, C-73/16, EU:C:2017:725, paragraphs 36 and 37).

39 In the present case, the collection of personal data by members of the Jehovah's Witnesses Community in the course of door-to-door preaching is a religious procedure carried out by individuals. It follows that such activity is not an activity of the State authorities and cannot therefore be treated in the same way as the activities referred to in Article 3(2), first indent, of Directive 95/46.

40 Second, as regards the exception in Article 3(2), second indent, of Directive 95/46, that provision does not exclude from its scope data processing carried out in relation simply to an activity which is simply a personal or household activity, but only data processing carried out in relation to an activity that is 'purely' personal or household in nature (see, to that effect, judgment of 11 December 2014, *Ryneš*, C-212/13, EU:C:2014:2428, paragraphs 30).

41 The words 'personal or household', within the meaning of that provision, refer to the activity of the person processing the personal data and not to the person whose data are processed (see, to that effect, judgment of 11 December 2014, *Ryneš*, C-212/13, EU:C:2014:2428, paragraphs 31 and 33).

42 As the Court held, Article 3(2), second indent, of Directive 95/46 must be interpreted as covering only activities that are carried out in the context of the private or family life of individuals. In that connection, an activity cannot be regarded as being purely personal or domestic where its purpose is to make the data collected accessible to an unrestricted number of people or where that activity extends,even partially, to a public space and is accordingly directed outwards from the private setting of the person processing the data in that manner (see, to that effect, judgments of 6 November 2003, *Lindqvist*, C-101/01, EU:C:2003:596, paragraph 47; of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, paragraph 44; and of 11 December 2014, *Ryneš*, C-212/13, EU:C:2014:2428, paragraphs 31 and 33).

43 In so far as it appears that the personal data processing at issue in the main proceedings is carried out in the course of door-to-door preaching by members of the Jehovah's Witnesses Community, it must be determined whether such an activity is a purely personal or household activity within the meaning of Article 3(2), second indent, of Directive 95/46.

44 In that connection, it is clear from the order for reference that door-to-door preaching, in the course of which personal data are collected by members of the Jehovah's Witnesses Community, is, by its very nature, intended to spread the faith of the Jehovah's Witnesses Community among people who, as the Advocate General observed in point 40 of his Opinion, do not belong to the faith of the members who engage in preaching. Therefore, that activity is directed outwards from the private setting of the members who engage in preaching.

45 Furthermore, it is also clear from the order for reference that some of the data collected by the members of that community who engage in preaching are sent by them to the congregations of that community which compile lists from that data of persons who no longer wish to receive visits from those members. Thus, in the course of their preaching, those members make at least some of the data collected accessible to a potentially unlimited number of persons.

46 As to whether the fact that the processing of personal data is carried out in the course of an activity relating to a religious practice may confer a purely personal or household nature on that door-to-door preaching, it must be recalled that the right to freedom of conscience and religion, enshrined in Article 10(1) of the Charter, implies, in particular, the freedom for everyone to manifest his religion or belief, in worship, teaching, practice and observance.

47 The Charter adopts a broad understanding of the concept of 'religion' in that provision covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public (judgment of 29 May 2018, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW and Others*, C-426/16, EU:C:2018:335, paragraph 44 and the case-law cited).

48 Furthermore, the freedom to manifest one's religion individually or collectively in public or in private, since it may take various forms such as the teaching, practice and performance of rites, includes also the right to attempt to convince other persons, for example by means of preaching (ECtHR, 25 May 1993, *Kokkinakisv. Greece*, EC:ECHR:1993:0525JUD001430788, § 31, and ECtHR, 8 November 2007, *Perry v. Latvia*, CE:ECHR:2007:1108JUD003027303, § 52).

49 However, although the door-to-door preaching activities of the member of a religious community is thereby protected by Article 10(1) of the Charter as an expression of the faith of those preachers, that fact does not confer an exclusively personal or household character on that activity, within the meaning of Article 3(2), second indent, of Directive 95/46.

50 Taking account of the considerations set out in paragraphs 44 and 45 of the present judgment, the preaching extends beyond the private sphere of a member of a religious community who is a preacher.

51 Having regard to the foregoing considerations, the answer to Question 1 is that Article 3(2) of Directive 95/46, read in the light of Article 10(1) of the Charter, must be interpreted as meaning that the collection of personal data by members of a religious community in the course of door-to-door preaching and the subsequent processing of those data does not constitute either the processing of personal data for the purpose of activities referred to in Article 3(2), first indent, of that directive or the processing of personal data carried out by a natural person in the course of a purely personal or household activity, within the meaning of Article 3(2), second indent, thereof.

The second question

52 By its second question, the referring court asks essentially whether Article 2(c) of Directive 95/46 must be interpreted as meaning that the concept of a 'filing system' referred to in that provision covers a set of personal data collected in the course of door-to-door preaching, consisting of names and addresses as well as other information concerning persons contacted, if those data may, in practice, be easily retrieved for later use, or whether, in order to be covered by that definition, that set of data must include data sheets, specific lists or other search methods.

53 As is clear from Article 3(1) and recitals 15 and 27 of Directive 95/46, that directive covers both automatic processing of data and the manual processing of such data, so that the scope of the protection it confers on data subjects does not depend on the techniques used and avoids the risk of that protection being circumvented. However, it is also clear that that directive applies to the manual processing of personal data only where the data processed form part of a filing system or are intended to form part of a filing system.

54 In the present case, since the processing of the personal data at issue in the main proceedings is carried out otherwise than by automatic means, the question arises as to whether the data processed form part of or are intended to form part of a filing system within the meaning of Article 2(c) and Article 3(1) of Directive 95/46.

55 In that connection, it is stipulated in Article 2(c) of Directive 95/46 that the concept of a 'filing system' is 'any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis'.

56 In accordance with the objective set out in paragraph 53 of the present judgment, that provision broadly defines the concept of 'filing system', in particular by referring to 'any' structured set of personal data.

57 As is clear from recitals 15 and 27 of Directive 95/46, the content of a filing system must be structured in order to allow easy access to personal data. Furthermore, although Article 2(c) of that directive does not set out the criteria according to which that filing system must be structured, it is clear from those recitals that those criteria must be 'relat[ed] to individuals'. Therefore, it appears that the requirement that the set of personal data must be 'structured according to specific criteria' is simply intended to enable personal data to be easily retrieved.

58 Apart from that requirement, Article 2(c) of Directive 95/46 does not lay down the practical means by which a filing system is be structured or the form in which it is to be presented. In particular, it does not follow from that provision, or from any other provision of that directive, that the personal data at issue must be contained in data sheets or specific lists or in another search method, in order to establish the existence of a filing system within the meaning of that directive.

59 In the present case, it is clear from the findings of the referring court that the data collected in the course of the door-to-door preaching at issue in the main proceedings are collected as a memory aid, on the basis of an allocation by geographical sector, in order to facilitate the organisation of subsequent visits to persons who have already been contacted. They include not only information relating to the content of conversations concerning the

beliefs of the person contacted, but also his name and address. Furthermore, those data, or at least a part of them, are used to draw up lists kept by the congregations of the Jehovah's Witnesses Community of persons who no longer wish to receive visits by members who engage in the preaching of that community.

60 Thus, it appears that the personal data collected in the course of the door-to-door preaching at issue in the main proceedings are structured according to criteria chosen in accordance with the objective pursued by that collection, which is to prepare for subsequent visits and to keep lists of persons who no longer wish to be contacted. Thus, as it is apparent from the order for reference, those criteria, among which are the name and address of persons contacted, their beliefs or their wish not to receive further visits, are chosen so that they enable data relating to specific persons to be easily retrieved.

61 In that connection, the specific criterion and the specific form in which the set of personal data collected by each of the members who engage in preaching is actually structured is irrelevant, so long as that set of data makes it possible for the data relating to a specific person who has been contacted to be easily retrieved, which is however for the referring court to ascertain in the light of all the circumstances of the case in the main proceedings.

62 Therefore, the answer to Question 2 is that Article 2(c) of Directive 95/46 must be interpreted as meaning that the concept of a 'filing system', referred to by that provision, covers a set of personal data collected in the course of door-to-door preaching, consisting of the names and addresses and other information concerning the persons contacted, if those data are structured according to specific criteria which, in practice, enable them to be easily retrieved for subsequent use. In order for such a set of data to fall within that concept, it is not necessary that they include data sheets, specific lists or other search methods.

The third and fourth questions

63 By Questions 3 and 4, which it is appropriate to examine together, the referring court asks essentially whether Article 2(d) of Directive 95/46, read in the light of Article 10(1) of the Charter, must be interpreted as meaning that a religious community may be regarded as a controller, jointly with its members who engage in preaching, with regard to the processing of personal data carried out by the latter in the context of door-to-door preaching organised, coordinated and encouraged by that community, and whether it is necessary for that purpose for the community to have access to those data, or whether it must be established that the religious community has given its members written guidelines or instructions in relation to that processing.

64 In the present case, the Data Protection Board, in the decision at issue in the main proceedings, found that the Jehovah's Witnesses Community is a controller, jointly with its members who engage in preaching, of the processing of personal data carried out by the latter in the context of door-to-door preaching. In so far as only the responsibility of that community is challenged, the responsibility of the members who engage in preaching does not appear to be called into question.

65 As expressly provided in Article 2(d) of Directive 95/46, the concept of 'controller' refers to the natural or legal person who 'alone or jointly with others determines the purposes and means of the processing of personal data'. Therefore, that concept does not necessarily refer to a single natural or legal person and may concern several actors taking part in that processing, with each of them then being subject to the applicable data protection provisions (see, to that effect, judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, EU:C:2018:388, paragraph 29).

66 The objective of that provision being to ensure, through a broad definition of the concept of 'controller', effective and complete protection of the persons concerned, the existence of joint responsibility does not necessarily imply equal responsibility of the various operators engaged 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 (see, to that effect, judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, EU:C:2018:388, paragraphs 28, 43 and 44).

67 In that connection, neither the wording of Article 2(d) of Directive 95/46 nor any other provision of that directive supports a finding that the determination of the purpose and means of processing must be carried out by the use of written guidelines or instructions from the controller.

68 However, a natural or legal person who exerts influence over the processing of personal data, for his own purposes, and who participates, as a result, in the determination of the purposes and means of that processing, may be regarded as a controller within the meaning of Article 2(d) of Directive 95/46.

69 Furthermore, the joint responsibility of several actors for the same processing, under that provision, does not require each of them to have access to the personal data concerned (see, to that effect, judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, EU:C:2018:388, paragraph 38).

70 In the present case, as is clear from the order for reference, it is true that members of the Jehovah's Witnesses Community who engage in preaching determine in which specific circumstances they collect personal data relating to persons visited, which specific data are collected and how those data are subsequently processed. However, as set out in paragraphs 43 and 44 of the present judgment, the collection of personal data is carried out in the course of door-to-door preaching, by which members of the Jehovah's Witnesses Community who engage in preaching spread the faith of their community. That preaching activity is, as is apparent from the order for reference, organised, coordinated and encouraged by that community. In that context, the data are collected as a memory aid for later use and for a possible subsequent visit. Finally, the congregations of the Jehovah's Witnesses Community keep lists of persons who no longer wish to receive a visit, from those data which are transmitted to them by members who engage in preaching.

71 Thus, it appears that the collection of personal data relating to persons contacted and their subsequent processing help to achieve the objective of the Jehovah's Witnesses Community, which is to spread its faith and are, therefore, carried out by members who engage in preaching for the purposes of that community. Furthermore, not only does the Jehovah's Witnesses Community have knowledge on a general level of the fact that such processing is carried out in order to spread its faith, but that community organises and coordinates the preaching activities of its members, in particular, by allocating areas of activity between the various members who engage in preaching.

72 Such circumstances lead to the conclusion that the Jehovah's Witnesses Community encourages its members who engage in preaching to carry out data processing in the context of their preaching activity.

73 In the light of the file submitted to the Court, it appears that the Jehovah's Witnesses Community, by organising, coordinating and encouraging the preaching activities of its members intended to spread its faith, participates, jointly with its members who engage in preaching, in determining the purposes and means of processing of personal data of the persons contacted, which is, however, for the referring court to verify with regard to all of the circumstances of the case.

74 That finding cannot be called into question by the principle of organisational autonomy of religious communities which derives from Article 17 TFEU. The obligation for every person to comply with the rules of EU law on the protection of personal data cannot be regarded as an interference in the organisational autonomy of those communities (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 58).

75 Having regard to the foregoing considerations, the answer to Questions 3 and 4 is that Article 2(d) of Directive 95/46, read in the light of Article 10(1) of the Charter, must be interpreted as meaning that it supports the finding that a religious community is a controller, jointly with its members who engage in preaching, of the processing of personal data carried out by the latter in the context of door-to-door preaching organised, coordinated and encouraged by that community, without it being necessary that the community has access to those data, or to establish that that community has given its members written guidelines or instructions in relation to the data processing.

Costs

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

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

1. **Article 3(2) 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 the light of Article 10(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that the collection of personal data by members of a religious community in the course of door-to-door preaching and the subsequent processing of those data does not constitute either the processing of personal data for the purpose of activities referred to in Article 3(2), first indent, of that directive or the processing of personal data carried out by a natural person in the course of a purely personal or household activity, within the meaning of Article 3(2), second indent, thereof.**

2. **Article 2(c) of Directive 95/46 must be interpreted as meaning that the concept of a 'filing system', referred to by that provision, covers a set of personal data collected in the course of door-to-door preaching, consisting of the names and addresses and other information concerning the persons contacted, if those data are structured according to specific criteria which, in practice, enable them to be easily retrieved for subsequent use. In order for such a set of data to fall within that concept, it is not necessary that they include data sheets, specific lists or other search methods.**

3. **Article 2(d) of Directive 95/46, read in the light of Article 10(1) of the Charter of Fundamental Rights, must be interpreted as meaning that it supports the finding that a religious community is a controller, jointly with its members who engage in preaching, for the processing of personal data carried out by the latter in the context of door-to-door preaching organised, coordinated and encouraged by that community, without it being necessary that the community has access to those data, or to establish that that community has given its members written guidelines or instructions in relation to the data processing.**

Case C-40/17, *FashionID*

In Case C-40/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany), made by decision of 19 January 2017, received at the Court on 26 January 2017, in the proceedings

Fashion ID GmbH & Co. KG

v

Verbraucherzentrale NRW eV,

interveners:

Facebook Ireland Ltd,

Landesbeauftragte für Datenschutz und Informationsfreiheit Nordrhein-Westfalen,

THE COURT (Second Chamber),

composed of K. Lenaerts, President of the Court, acting as President of the Second Chamber, A. Prechal, C. Toader, A. Rosas (Rapporteur) and M. Ilešič, Judges,

Advocate General: M. Bobek,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 6 September 2018,

after considering the observations submitted on behalf of:

– Fashion ID GmbH & Co. KG, by C.-M. Althaus and J. Nebel, Rechtsanwälte,

– Verbraucherzentrale NRW eV, by K. Kruse, C. Rempe and S. Meyer, Rechtsanwälte,

– Facebook Ireland Ltd, by H.-G. Kamann, C. Schwedler and M. Braun, Rechtsanwälte, and by I. Perego, avvocatessa,

– Landesbeauftragte für Datenschutz und Informationsfreiheit Nordrhein-Westfalen, by U. Merger, acting as Agent,

– the German Government, initially by T. Henze and J. Möller, and subsequently by J. Möller, acting as Agents,

– the Belgian Government, by P. Cottin and L. Van den Broeck, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

– the Austrian Government, initially by C. Pesendorfer, and subsequently by G. Kunnert, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by H. Krämer and H. Kranenborg, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 December 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2, 7, 10 and 22 to 24 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 Fashion ID GmbH & Co. KG and Verbraucherzentrale NRW eV concerning Fashion ID's embedding of a social plugin provided by Facebook Ireland Ltd on the website of Fashion ID.

Legal context

European Union law

3 With effect from 25 May 2018, Directive 95/46 was repealed and replaced by Regulation (EU) 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 (OJ 2016 L 119, p. 1). However, in the light of the date of the facts in the dispute in the main proceedings, it is Directive 95/46 that is applicable to that dispute.

4 Recital 10 of Directive 95/46 states:

'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 [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]'.

5 Article 1 of Directive 95/46 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.'

6 Article 2 of that directive provides:

'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 [EU] laws or regulations, the controller or the specific criteria for his nomination may be designated by national or [EU] law;

…

(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;

(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.’

7 Article 7 of that directive states:

‘Member States shall provide that personal data may be processed only if:

(a) the data subject has unambiguously given his consent; 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 or fundamental rights and freedoms of the data subject which require protection under Article 1(1).’

8 Article 10 of Directive 95/46, headed ‘Information in cases of collection of data from the data subject’, provides:

‘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.’

9 Article 22 of Directive 95/46 is worded as follows:

‘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.’

10 Article 23 of that directive states:

‘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.’

11 Article 24 of that directive 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.’

12 Article 28 of Directive 95/46 states:

‘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.

…

3. Each authority shall in particular be endowed with:

…

– 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.

…

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.

…’

13 Article 5(3) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11), (‘Directive 2002/58’) provides:

‘Member States shall ensure that the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent, having been provided with clear and comprehensive information, in accordance with Directive [95/46], inter alia, about the purposes of the processing. This shall not prevent any technical storage or access for the sole purpose of carrying out the transmission of a communication over an electronic

communications network, or as strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service.'

14 Article 1(1) of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ 2009 L 110, p. 30), as amended by Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 (OJ 2013 L 165, p. 1), ('Directive 2009/22') provides:

'The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to actions for an injunction referred to in Article 2 aimed at the protection of the collective interests of consumers included in the Union acts listed in Annex I, with a view to ensuring the smooth functioning of the internal market.'

15 Article 2 of that directive provides:

'1. Member States shall designate the courts or administrative authorities competent to rule on proceedings commenced by qualified entities within the meaning of Article 3 seeking:

(a) an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement;

…'

16 Article 7 of that directive states:

'This Directive shall not prevent Member States from adopting or maintaining in force provisions designed to grant qualified entities and any other person concerned more extensive rights to bring action at national level.'

17 Article 80 of Regulation 2016/679 reads as follows:

'1. The data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf, to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law.

2. Member States may provide that any body, organisation or association referred to in paragraph 1 of this Article, independently of a data subject's mandate, has the right to lodge, in that Member State, a complaint with the supervisory authority which is competent pursuant to Article 77 and to exercise the rights referred to in Articles 78 and 79 if it considers that the rights of a data subject under this Regulation have been infringed as a result of the processing.'

German law

18 Paragraph 3(1) of the version of the Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition) applicable to the dispute in the main proceedings ('the UWG') provides:

'Unfair commercial practices shall be prohibited.'

19 Paragraph 3a of the UWG is worded as follows:

'A person shall be regarded as acting unfairly where he infringes a statutory provision that is also intended to regulate market behaviour in the interests of market participants and the infringement is liable to have a significantly adverse effect on the interests of consumers, other market participants or competitors.'

20 Paragraph 8 of the UWG provides:

‘(1) Any commercial practice which is unlawful under Paragraph 3 or Paragraph 7 may give rise to an order to cease and desist and, where there is a risk of recurrence, to a prohibition order. An application for a prohibition order may be made as from the time at which there is a risk of such unlawful practice within the meaning of Paragraph 3 or Paragraph 7 occurring.

…

(3) Applications for the orders referred to in subparagraph (1) may be lodged by:

…

3. qualified entities which prove that they are registered on the list of qualified entities pursuant to Paragraph 4 of the Unterlassungsklagegesetz [(Law on injunctions)] or on the list of the European Commission pursuant to Article 4(3) of Directive [2009/22];

…’

21 Paragraph 2 of the Law on injunctions provides:

‘(1) Any person who infringes the provisions in place to protect consumers (consumer-protection laws), other than in the application or recommendation of general conditions of sale, may have an order to cease and desist and a prohibition order imposed on him in the interests of consumer protection. …

(2) For the purposes of this provision, “consumer-protection laws” shall mean, in particular:

…

11. the provisions that regulate the lawfulness

(a) of the collection of a consumer’s personal data by a trader, or

(b) of the processing or use of personal data collected about a consumer by a trader

if the data are collected, processed or used for the purposes of publicity, market and opinion research, operation of a credit agency, preparation of personality and usage profiles, address trading, other data trading or comparable commercial purposes.’

22 Paragraph 12(1) of the Telemediengesetz (Law on telemedia) (‘the TMG’) is worded as follows:

‘A service provider may collect and use personal data to make telemedia available only in so far as this Law or another legislative provision expressly relating to telemedia so permits or the user has consented to it.’

23 Paragraph 13(1) of the TMG states:

‘At the beginning of the use operation the service provider shall inform the user, in a generally understandable way, regarding the nature, extent and purpose of the collection and use of personal data and the processing of his data in States outside the scope of application of Directive [95/46] unless the user has already been informed thereof. In the case of an automated process allowing subsequent identification of the user and which prepares the collection or use of personal data, the user shall be informed at the beginning of this process. The content of the information conveyed to the user must be retrievable for the user at any time.’

24 Paragraph 15(1) of the TMG provides:

‘A service provider may collect and use the personal data of a user only to the extent necessary in order to facilitate, and charge for, the use of telemedia (data concerning use). Data concerning use include, in particular:

1. features allowing identification of the user,

2. information about the beginning, end and extent of the particular use, and

3. information about the telemedia used by the user.’

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

25 Fashion ID, an online clothing retailer, embedded on its website the ‘Like’ social plugin from the social network Facebook (‘the Facebook “Like” button’).

26 It is apparent from the order for reference that one feature of the internet is that, when a website is visited, the browser allows content from different sources to be displayed. Thus, for example, photos, videos, news and the Facebook ‘Like’ button at issue in the present case can be linked to a website and appear there. If a website operator intends to embed such third-party content, he places a link to the external content on that website. When the browser of a visitor to that website encounters such a link, it requests the content from the third-party provider and adds it to the appearance of the website at the desired place. For this to occur, the browser transmits to the server of the third-party provider the IP address of that visitor’s computer, as well as the browser’s technical data, so that the server can establish the format in which the content is to be delivered to that address. In addition, the browser transmits information relating to the desired content. The operator of a website embedding third-party content onto that website cannot control what data the browser transmits or what the third-party provider does with those data, in particular whether it decides to save and use them.

27 With regard, in particular, to the Facebook ‘Like’ button, it seems to be apparent from the order for reference that, when a visitor consults the website of Fashion ID, that visitor’s personal data are transmitted to Facebook Ireland as a result of that website including that button. It seems that that transmission occurs without that visitor being aware of it regardless of whether or not he or she is a member of the social network Facebook or has clicked on the Facebook ‘Like’ button.

28 Verbraucherzentrale NRW, a public-service association tasked with safeguarding the interests of consumers, criticises Fashion ID for transmitting to Facebook Ireland personal data belonging to visitors to its website, first, without their consent and, second, in breach of the duties to inform set out in the provisions relating to the protection of personal data.

29 Verbraucherzentrale NRW brought legal proceedings for an injunction before the Landgericht Düsseldorf (Regional Court, Düsseldorf, Germany) against Fashion ID to force it to stop that practice.

30 By decision of 9 March 2016, the Landgericht Düsseldorf (Regional Court, Düsseldorf) upheld in part the requests made by Verbraucherzentrale NRW, after having found that it has standing to bring proceedings under Paragraph 8(3)(3) of the UWG.

31 Fashion ID brought an appeal against that decision before the referring court, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany). Facebook Ireland intervened in that appeal in support of Fashion ID. Verbraucherzentrale NRW brought a cross-appeal seeking an extension of the ruling made against Fashion ID at first instance.

32 Fashion ID argues before the referring court that the decision of the Landgericht Düsseldorf (Regional Court, Düsseldorf) is incompatible with Directive 95/46.

33 First, Fashion ID claims that Articles 22 to 24 of that directive envisage granting legal remedies only to data subjects whose personal data are processed and the competent supervising authorities. Consequently, it argues, the action brought by Verbraucherzentrale NRW is inadmissible due to the fact that that association does not have standing to bring or defend legal proceedings under Directive 95/46.

34 Second, Fashion ID asserts that the Landgericht Düsseldorf (Regional Court, Düsseldorf) erred in finding that it was a controller, within the meaning of Article 2(d) of Directive 95/46, since it has no influence either over the data transmitted by the visitor's browser from its website or over whether and, where applicable, how Facebook Ireland uses those data.

35 In the first place, the referring court has doubts whether Directive 95/46 gives public-service associations the right to bring or defend legal proceedings in order to defend the interests of persons who have suffered harm. It takes the view that Article 24 of that directive does not preclude associations from being a party to legal proceedings, since, pursuant to that article, Member States are required to adopt 'suitable measures' to ensure the full implementation of that directive. Thus, the referring court concludes that national legislation allowing associations to bring legal proceedings in the interest of consumers may constitute such a 'suitable measure'.

36 That court notes, in this regard, that Article 80(2) of Regulation 2016/679, which repealed and replaced Directive 95/46, expressly authorises the bringing of legal proceedings by such an association, which would tend to confirm that the latter directive did not preclude such an action.

37 Further, that court is uncertain whether the operator of a website, such as Fashion ID, that embeds on that website a social plugin allowing personal data to be collected can be considered to be a controller within the meaning of Article 2(d) of Directive 95/46 despite the latter having no control over the processing of the data transmitted to the provider of that plugin. In this context, the referring court refers to the case that gave rise to the judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein* (C-210/16, EU:C:2018:388), which dealt with a similar question.

38 In the alternative, in the event that Fashion ID is not to be considered to be a controller, the referring court is uncertain whether that directive exhaustively regulates that notion, such that it precludes national legislation that establishes civil liability for a third party who infringes data protection rights. The referring court asserts that it would be possible to envisage Fashion ID being liable on this basis under national law as a 'disrupter' ('*Störer*').

39 If Fashion ID had to be considered to be a controller or was at least liable as a 'disrupter' for any data protection infringements by Facebook Ireland, the referring court is uncertain whether the processing of the personal data at issue in the main proceedings is lawful and whether the duty to inform the data subject under Article 10 of Directive 95/46 rests with Fashion ID or with Facebook Ireland.

40 Thus, first, with regard to the conditions for the lawfulness of the processing of data as provided for in Article 7(f) of Directive 95/46, the referring court expresses uncertainty as to whether, in a situation such as that at issue in the main proceedings, it is appropriate to take into account the legitimate interest of the operator of the website or that of the provider of the social plugin.

41 Second, that court is unsure who is required to obtain the consent of and inform the data subjects whose personal data are processed in a situation such as that at issue in the main proceedings. The referring court takes the view that the matter of who is obliged to inform the persons concerned, as provided for in Article 10 of Directive 95/46, is particularly important given that any embedding of third-party content on a website gives rise, in principle, to the processing of personal data, the scope and purpose of which are, however, unknown to the person embedding that content, namely the operator of the website concerned. That operator could not, therefore, provide the information required, to the extent that it is required to, meaning that the imposition of an obligation on the operator to inform the data subjects would, in practice, amount to a prohibition on the embedding of third-party content.

42 In those circumstances, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the rules in Articles 22, 23 and 24 of Directive [95/46] preclude national legislation which, in addition to the powers of intervention conferred on the data-protection authorities and the remedies available to the data subject, grants public-service associations the power to take action against the infringer in the event of an infringement in order to safeguard the interests of consumers?

If Question 1 is answered in the negative:

(2) In a case such as the present one, in which someone has embedded a programming code in his website which causes the user's browser to request content from a third party and, to this end, transmits personal data to the third party, is the person embedding the content the "controller" within the meaning of Article 2(d) of Directive [95/46] if that person is himself unable to influence this data-processing operation?

(3) If Question 2 is answered in the negative: Is Article 2(d) of Directive [95/46] to be interpreted as meaning that it definitively regulates liability and responsibility in such a way that it precludes civil claims against a third party who, although not a "controller", nonetheless creates the cause for the processing operation, without influencing it?

(4) Whose "legitimate interests", in a situation such as the present one, are the decisive ones in the balancing of interests to be undertaken pursuant to Article 7(f) of Directive [95/46]? Is it the interests in embedding third-party content or the interests of the third party?

(5) To whom must the consent to be declared under Articles 7(a) and 2(h) of Directive [95/46] be given in a situation such as that in the present case?

(6) Does the duty to inform under Article 10 of Directive [95/46] also apply in a situation such as that in the present case to the operator of the website who has embedded the content of a third party and thus creates the cause for the processing of personal data by the third party?'

Consideration of the questions referred

The first question

43 By its first question the referring court asks, in essence, whether Articles 22 to 24 of Directive 95/46 must be interpreted as precluding national legislation which allows consumer-protection associations to bring or defend legal proceedings against a person allegedly responsible for an infringement of the laws protecting personal data.

44 As a preliminary point, it should be noted that, under Article 22 of Directive 95/46, Member States are required to 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.

45 The third indent of Article 28(3) of Directive 95/46 states that a supervisory authority that is responsible under Article 28(1) of that directive for monitoring the application within the territory of a Member State of the provisions adopted by that Member State pursuant to that directive is endowed with, inter alia, the power to engage in legal proceedings where the national provisions adopted pursuant to that directive have been violated or to bring those violations to the attention of the judicial authorities.

46 Article 28(4) of Directive 95/46 provides that a supervisory authority is to hear claims lodged by an association representing a data subject, within the meaning of Article 2(a) of that directive, concerning the protection of his rights and freedoms in regard to the processing of personal data.

47 However, no provision of that directive obliges Member States to provide, or expressly empowers them to provide, in their national law that an association can represent a data subject in legal proceedings or commence legal proceedings on its own initiative against the person allegedly responsible for an infringement of the laws protecting personal data.

48 Nevertheless, it does not follow from the above that Directive 95/46 precludes national legislation allowing consumer-protection associations to bring or defend legal proceedings against the person allegedly responsible for such an infringement.

49 Under the third paragraph of Article 288 TFEU, the Member States are required, when transposing a directive, to ensure that it is fully effective, but they retain a broad discretion as to the choice of ways and means of ensuring that it is implemented. That freedom of choice does not affect the obligation imposed on all Member States to which the directive is addressed to adopt all the measures necessary to ensure that the directive concerned is fully effective in accordance with the objective which it seeks to attain (judgments of 6 October 2010, *Base and*

Others, C-389/08, EU:C:2010:584, paragraphs 24 and 25, and of 22 February 2018, *Porras Guisado*, C-103/16, EU:C:2018:99, paragraph 57).

50 In this regard, it must be noted that one of the underlying objectives of Directive 95/46 is to ensure 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 (see, to that effect, judgments of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 53, and of 27 September 2017, *Puškár*, C-73/16, EU:C:2017:725, paragraph 38). Recital 10 of Directive 95/46 adds that the approximation of the national laws applicable in this area must not result in any lessening of the protection which they afford but must, on the contrary, seek to ensure a high level of protection in the European Union (judgments of 6 November 2003, *Lindqvist*, C-101/01, EU:C:2003:596, paragraph 95, of 16 December 2008, *Huber*, C-524/06, EU:C:2008:724, paragraph 50, and of 24 November 2011, *Asociación Nacional de Establecimientos Financieros de Crédito*, C-468/10 and C-469/10, EU:C:2011:777, paragraph 28).

51 The fact that a Member State provides in its national legislation that it is possible for a consumer-protection association to commence legal proceedings against a person who is allegedly responsible for an infringement of the laws protecting personal data in no way undermines the objectives of that protection and, in fact, contributes to the realisation of those objectives.

52 Nevertheless, Fashion ID and Facebook Ireland submit that, since Directive 95/46 fully harmonised national provisions on data protection, any legal proceedings not expressly provided for by that directive are precluded. They argue that Articles 22, 23 and 28 of Directive 95/46 provide for legal proceedings brought only by data subjects and data protection supervisory authorities.

53 That argument, however, cannot be accepted.

54 Directive 95/46 does indeed amount to a harmonisation of national legislation on the protection of personal data that is generally complete (see, to that effect, judgments of 24 November 2011, *Asociación Nacional de Establecimientos Financieros de Crédito*, C-468/10 and C-469/10, EU:C:2011:777, paragraph 29, and of 7 November 2013, *IPI*, C-473/12, EU:C:2013:715, paragraph 31).

55 The Court has thus held that Article 7 of that directive sets out an exhaustive and restrictive list of cases in which the processing of personal data can be regarded as being lawful and that Member States cannot add new principles relating to the lawfulness of the processing of personal data to that article or impose additional requirements that have the effect of amending the scope of one of the six principles provided for in that article (judgments of 24 November 2011, *Asociación Nacional de Establecimientos Financieros de Crédito*, C-468/10 and C-469/10, EU:C:2011:777, paragraphs 30 and 32, and of 19 October 2016, *Breyer*, C-582/14, EU:C:2016:779, paragraph 57).

56 The Court has, however, also held that Directive 95/46 lays down rules that are relatively general since it has to be applied to a large number of very different situations. Those rules have a degree of flexibility and, in many instances, leave to the Member States the task of deciding the details or choosing between options, meaning that, in many respects, Member States have a margin of discretion in implementing that directive (see, to that effect, judgments of 6 November 2003, *Lindqvist*, C-101/01, EU:C:2003:596, paragraphs 83, 84 and 97, and of 24 November 2011, *Asociación Nacional de Establecimientos Financieros de Crédito*, C-468/10 and C-469/10, EU:C:2011:777, paragraph 35).

57 This is also the case for Articles 22 to 24 of Directive 95/46, which, as the Advocate General noted in point 42 of his Opinion, are worded in general terms and do not amount to an exhaustive harmonisation of the national provisions stipulating the judicial remedies that can be brought against a person allegedly responsible for an infringement of the laws protecting personal data (see, by analogy, judgment of 26 October 2017, *I*, C-195/16, EU:C:2017:815, paragraphs 57 and 58).

58 In particular, although Article 22 of that directive requires Member States to 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 personal data processing in question, that directive does not, however, contain any provisions specifically governing the conditions under which that remedy may be exercised (see, to that effect, judgment of 27 September 2017, *Puškár*, C-73/16, EU:C:2017:725, paragraphs 54 and 55).

59 In addition, Article 24 of Directive 95/46 provides that Member States are to adopt 'suitable measures' to ensure the full implementation of the provisions of that directive, without defining such measures. It seems that a provision making it possible for a consumer-protection association to commence legal proceedings against a person who is allegedly responsible for an infringement of the laws protecting personal data may constitute a suitable measure, within the meaning of that provision, that contributes, as observed in paragraph 51 above, to the realisation of the objectives of that directive, in accordance with the Court's case-law (see, to that effect, judgment of 6 November 2003, *Lindqvist*, C-101/01, EU:C:2003:596, paragraph 97).

60 Moreover, contrary to what is claimed by Fashion ID, the fact that a Member State can provide for such a possibility in its national legislation does not appear to be such as to undermine the independence with which the supervisory authorities must perform the functions entrusted to them under Article 28 of Directive 95/46, since that possibility affects neither those authorities' freedom to take decisions nor their freedom to act.

61 In addition, although it is true that Directive 95/46 does not appear among the measures listed in Annex I to Directive 2009/22, the fact nonetheless remains that, under Article 7 of the latter directive, that directive did not provide for an exhaustive harmonisation in that respect.

62 Last, the fact that Regulation 2016/679, which repealed and replaced Directive 95/46 and has been applicable since 25 May 2018, expressly authorises, in Article 80(2) thereof, Member States to allow consumer-protection associations to bring or defend legal proceedings against a person who is allegedly responsible for an infringement of the laws protecting personal data does not mean that Member States could not grant them that right under Directive 95/46, but confirms, rather, that the interpretation of that directive in the present judgment reflects the will of the EU legislature.

63 In the light of all the findings above, the answer to the first question is that Articles 22 to 24 of Directive 95/46 must be interpreted as not precluding national legislation which allows consumer-protection associations to bring or defend legal proceedings against a person allegedly responsible for an infringement of the protection of personal data.

The second question

64 By its second question, the referring court asks, in essence, whether the operator of a website, such as Fashion ID, that embeds on that website a social plugin causing the browser of a visitor to that website to request content from the provider of that plugin and, to that end, to transmit to that provider the personal data of the visitor can be considered to be a controller, within the meaning of Article 2(d) of Directive 95/46, despite that operator being unable to influence the processing of the data transmitted to that provider as a result.

65 In this regard, it should be noted that, in accordance with the aim pursued by Directive 95/46, namely 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, Article 2(d) of that 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 (see, to that effect, judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, EU:C:2018:388, paragraphs 26 and 27).

66 As the Court has held previously, the objective of that provision is to ensure, through a broad definition of the concept of 'controller', effective and complete protection of data subjects (judgments of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 34, and of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, EU:C:2018:388, paragraph 28).

67 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 (see, to that effect, judgments of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, EU:C:2018:388, paragraph 29, and of 10 July 2018, *Jehovan todistajat*, C-25/17, EU:C:2018:551, paragraph 65).

68 The Court has also held that a natural or legal person who exerts influence over the processing of personal data, for his own purposes, and who participates, as a result, in the determination of the purposes and means of that processing, may be regarded as a controller within the meaning of Article 2(d) of Directive 95/46 (judgment of 10 July 2018, *Jehovan todistajat*, C-25/17, EU:C:2018:551, paragraph 68).

69 Furthermore, the joint responsibility of several actors for the same processing, under that provision, does not require each of them to have access to the personal data concerned (see, to that effect, judgments of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, EU:C:2018:388, paragraph 38, and of 10 July 2018, *Jehovan todistajat*, C-25/17, EU:C:2018:551, paragraph 69).

70 That said, since the objective of Article 2(d) of Directive 95/46 is to ensure, through a broad definition of the concept of 'controller', the effective and comprehensive protection of the persons concerned, the existence of joint liability does not necessarily imply equal responsibility of the various operators engaged 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, with the result that the level of liability of each of them must be assessed with regard to all the relevant circumstances of the particular case (see, to that effect, judgment of 10 July 2018, *Jehovan todistajat*, C-25/17, EU:C:2018:551, paragraph 66).

71 In this regard, it should be pointed out, first, that 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'.

72 It is apparent from that definition that the processing of personal data may consist in one or a number of operations, each of which relates to one of the different stages that the processing of personal data may involve.

73 Second, it follows from the definition of the concept of 'controller' in Article 2(d) of Directive 95/46 that, as is noted in paragraph 65 above, where several operators determine jointly the purposes and means of the processing of personal data, they participate in that processing as controllers.

74 Accordingly, as the Advocate General noted, in essence, in point 101 of his Opinion, it appears that a natural or legal person may be a controller, within the meaning of Article 2(d) of Directive 95/46, jointly with others only in respect of operations involving the processing of personal data for which it determines jointly the purposes and means. By contrast, and without prejudice to any civil liability provided for in national law in this respect, that natural or legal person cannot be considered to be a controller, within the meaning of that provision, in the context of operations that precede or are subsequent in the overall chain of processing for which that person does not determine either the purposes or the means.

75 In this case, subject to the investigations that it is for the referring court to carry out, it is apparent from the documents before the Court that, by embedding on its website the Facebook 'Like' button, Fashion ID appears to have made it possible for Facebook Ireland to obtain personal data of visitors to its website and that such a possibility is triggered as soon as the visitor consults that website, regardless of whether or not the visitor is a member of the social network Facebook, has clicked on the Facebook 'Like' button or is aware of such an operation.

76 In view of that information, it should be pointed out that the operations involving the processing of personal data in respect of which Fashion ID is capable of determining, jointly with Facebook Ireland, the purposes and means are, for the purposes of the definition of the concept of 'processing of personal data' in Article 2(b) of Directive 95/46, the collection and disclosure by transmission of the personal data of visitors to its website. By contrast, in the light of that information, it seems, at the outset, impossible that Fashion ID determines the purposes and means of subsequent operations involving the processing of personal data carried out by Facebook Ireland after their transmission to the latter, meaning that Fashion ID cannot be considered to be a controller in respect of those operations within the meaning of Article 2(d).

77 With regard to the means used for the purposes of the collection and disclosure by transmission of certain personal data of visitors to its website, it is apparent from paragraph 75 above that Fashion ID appears to have embedded on its website the Facebook 'Like' button made available to website operators by Facebook Ireland

while fully aware of the fact that it serves as a tool for the collection and disclosure by transmission of the personal data of visitors to that website, regardless of whether or not the visitors are members of the social network Facebook.

78 Moreover, by embedding that social plugin on its website, Fashion ID exerts a decisive influence over the collection and transmission of the personal data of visitors to that website to the provider of that plugin, Facebook Ireland, which would not have occurred without that plugin.

79 In these circumstances, and subject to the investigations that it is for the referring court to carry out in this respect, it must be concluded that Facebook Ireland and Fashion ID determine jointly the means at the origin of the operations involving the collection and disclosure by transmission of the personal data of visitors to Fashion ID's website.

80 As to the purposes of those operations involving the processing of personal data, it appears that Fashion ID's embedding of the Facebook 'Like' button on its website allows it to optimise the publicity of its goods by making them more visible on the social network Facebook when a visitor to its website clicks on that button. The reason why Fashion ID seems to have consented, at least implicitly, to the collection and disclosure by transmission of the personal data of visitors to its website by embedding such a plugin on that website is in order to benefit from the commercial advantage consisting in increased publicity for its goods; those processing operations are performed in the economic interests of both Fashion ID and Facebook Ireland, for whom the fact that it can use those data for its own commercial purposes is the consideration for the benefit to Fashion ID.

81 In such circumstances, it can be concluded, subject to the investigations that it is for the referring court to perform, that Fashion ID and Facebook Ireland determine jointly the purposes of the operations involving the collection and disclosure by transmission of the personal data at issue in the main proceedings.

82 Further, as is apparent from the case-law referred to in paragraph 69 above, the fact that the operator of a website, such as Fashion ID, does not itself have access to the personal data collected and transmitted to the provider of the social plugin with which it determines jointly the means and purposes of the processing of personal data does not preclude it from being a controller within the meaning of Article 2(d) of Directive 95/46.

83 Moreover, it must be emphasised that a website, such as that of Fashion ID, is visited both by those who are members of the social network Facebook, and who therefore have an account on that social network, and by those who do not have one. In that latter case, the responsibility of the operator of a website, such as Fashion ID, for the processing of the personal data of those persons appears to be even greater, as the mere consultation of such a website featuring the Facebook 'Like' button appears to trigger the processing of their personal data by Facebook Ireland (see, to that effect. judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, EU:C:2018:388, paragraph 41).

84 Accordingly, it seems that Fashion ID can be considered to be a controller within the meaning of Article 2(d) of Directive 95/46, jointly with Facebook Ireland, in respect of the operations involving the collection and disclosure by transmission of the personal data of visitors to its website.

85 In the light of the findings above, the answer to the second question is that the operator of a website, such as Fashion ID, that embeds on that website a social plugin causing the browser of a visitor to that website to request content from the provider of that plugin and, to that end, to transmit to that provider the personal data of the visitor can be considered to be a controller, within the meaning of Article 2(d) of Directive 95/46. That liability is, however, limited to the operation or set of operations involving the processing of personal data in respect of which it actually determines the purposes and means, that is to say, the collection and disclosure by transmission of the data at issue.

The third question

86 In view of the answer given to the second question, there is no need to answer the third question.

The fourth question

87 By its fourth question, the referring court asks, in essence, whether, in a situation such as that at issue in the main proceedings, in which the operator of a website embeds on that website a social plugin causing the browser of a visitor to that website to request content from the provider of that plugin and, to that end, to transmit to that provider personal data of the visitor, it is appropriate, for the purposes of the application of Article 7(f) of Directive 95/46, to take into consideration a legitimate interest pursued by that operator or a legitimate interest pursued by that provider.

88 As a preliminary point, it should be noted that, according to the Commission, this question is irrelevant for the resolution of the dispute in the main proceedings, since consent was not obtained from the data subjects as is required by Article 5(3) of Directive 2002/58.

89 In that regard, it should be pointed out that Article 5(3) of Directive 2002/58 provides that Member States are to ensure that the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is allowed only on condition that the subscriber or user concerned has given his or her consent, having been provided with clear and comprehensive information, in accordance with Directive 95/46, inter alia, about the purposes of the processing.

90 It is for the referring court to investigate whether, in a situation such as that at issue in the main proceedings, the provider of a social plugin, such as Facebook Ireland, gains access, as is maintained by the Commission, from the operator of the website to information stored in the terminal equipment, within the meaning of Article 5(3) of Directive 2002/58, of a visitor to that website.

91 In such circumstances, and since the referring court seems to have concluded that, in the present case, the data transmitted to Facebook Ireland are personal data, within the meaning of Directive 95/46, which, moreover, are not necessarily limited to information stored in the terminal equipment, which it is for that court to confirm, the Commission's views are insufficient to call into question the relevance of the fourth question referred for the resolution of the dispute in the main proceedings, which concerns the potentially lawful processing of the data at issue in the main proceedings, as was pointed out by the Advocate General in point 115 of his Opinion.

92 Consequently, it is necessary to examine what legitimate interest must be taken into account for the purposes of the application of Article 7(f) of that directive to the processing of those data.

93 In this regard, it should be noted at the outset that, according to the provisions of Chapter II of Directive 95/46, headed 'General rules on the lawfulness of the processing of personal data', subject to the derogations permitted under Article 13 of that directive, all processing of personal data must comply, inter alia, with one of the criteria for making data processing legitimate listed in Article 7 of that directive (see, to that effect, judgments of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 71, and of 1 October 2015, *Bara and Others*, C-201/14, EU:C:2015:638, paragraph 30).

94 Under Article 7(f) of Directive 95/46, the interpretation of which is sought by the referring court, personal data may be processed if 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) of Directive 95/46.

95 Article 7(f) of that directive thus lays down three cumulative conditions for the processing of personal data to be lawful, namely, first, the pursuit of a legitimate interest by the data controller or by the third party or parties to whom the data are disclosed; second, the need to process personal data for the purposes of the legitimate interests pursued; and third, the condition that the fundamental rights and freedoms of the data subject whose data require protection do not take precedence (judgment of 4 May 2017, *Rīgas satiksme*, C-13/16, EU:C:2017:336, paragraph 28).

96 Given that, in the light of the answer to the second question, it seems that, in a situation such as that at issue in the main proceedings, the operator of a website that embeds on that website a social plugin causing the browser of a visitor to that website to request content from the provider of that plugin and, to that end, to transmit to that provider the personal data of the visitor can be considered to be a controller responsible, jointly with that provider, for operations involving the processing of the personal data of visitors to its website in the form of collection and disclosure by transmission, it is necessary that each of those controllers should pursue a legitimate interest, within

the meaning of Article 7(f) of Directive 95/46, through those processing operations in order for those operations to be justified in respect of each of them.

97 In the light of the findings above, the answer to the fourth question is that, in a situation such as that at issue in the main proceedings, in which the operator of a website embeds on that website a social plugin causing the browser of a visitor to that website to request content from the provider of that plugin and, to that end, to transmit to that provider personal data of the visitor, it is necessary that that operator and that provider each pursue a legitimate interest, within the meaning of Article 7(f) of Directive 95/46, through those processing operations in order for those operations to be justified in respect of each of them.

The fifth and sixth questions

98 By its fifth and sixth questions, which it is appropriate to examine together, the referring court wishes to know, in essence, first, whether Articles 2(h) and 7(a) of Directive 95/46 must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, in which the operator of a website embeds on that website a social plugin causing the browser of a visitor to that website to request content from the provider of that plugin and, to that end, to transmit to that provider personal data of the visitor, the consent referred to in those provisions must be obtained by that operator or by that provider and, second, whether Article 10 of that directive must be interpreted as meaning that, in such a situation, the duty to inform provided for in that provision is incumbent on that operator.

99 As is apparent from the answer to the second question, the operator of a website that embeds on that website a social plugin causing the browser of a visitor to that website to request content from the provider of that plugin and, to that end, to transmit to that provider personal data of the visitor can be considered to be a controller, within the meaning of Article 2(d) of Directive 95/46, despite that liability being limited to the operation or set of operations involving the processing of personal data in respect of which it actually determines the purposes and means.

100 It thus appears that the duties that may be incumbent on that controller under Directive 95/46, such as the duty to obtain the consent of the data subject under Articles 2(h) and 7(a) of that directive and the duty to inform under Article 10 thereof, must relate to the operation or set of operations involving the processing of personal data in respect of which it actually determines the purposes and means.

101 In the present case, while the operator of a website that embeds on that website a social plugin causing the browser of a visitor to that website to request content from the provider of that plugin and, to that end, to transmit to that provider the personal data of the visitor can be considered to be a controller, jointly with that provider, in respect of operations involving the collection and disclosure by transmission of the personal data of that visitor, its duty to obtain the consent from the data subject under Articles 2(h) and 7(a) of Directive 95/46 and its duty to inform under Article 10 of that directive relate only to those operations. By contrast, those duties do not cover operations involving the processing of personal data at other stages occurring before or after those operations which involve, as the case may be, the processing of personal data at issue.

102 With regard to the consent referred to in Articles 2(h) and 7(a) of Directive 95/46, it appears that such consent must be given prior to the collection and disclosure by transmission of the data subject's data. In such circumstances, it is for the operator of the website, rather than for the provider of the social plugin, to obtain that consent, since it is the fact that the visitor consults that website that triggers the processing of the personal data. As the Advocate General noted in point 132 of his Opinion, it would not be in line with efficient and timely protection of the data subject's rights if the consent were given only to the joint controller that is involved later, namely the provider of that plugin. However, the consent that must be given to the operator relates only to the operation or set of operations involving the processing of personal data in respect of which the operator actually determines the purposes and means.

103 The same applies in regard to the duty to inform under Article 10 of Directive 95/46.

104 In that regard, it follows from the wording of that provision that the controller or his representative must provide, as a minimum, the information referred to in that provision to the subject whose data are being collected. It thus appears that that information must be given by the controller immediately, that is to say, when the data are

collected (see, to that effect, judgments of 7 May 2009, *Rijkeboer*, C-553/07, EU:C:2009:293, paragraph 68, and of 7 November 2013, *IPI*, C-473/12, EU:C:2013:715, paragraph 23).

105 It follows that, in a situation such as that at issue in the main proceedings, the duty to inform under Article 10 of Directive 95/46 is incumbent also on the operator of the website, but the information that the latter must provide to the data subject need relate only to the operation or set of operations involving the processing of personal data in respect of which that operator actually determines the purposes and means.

106 In the light of the findings above, the answer to the fifth and sixth questions is that Articles 2(h) and 7(a) of Directive 95/46 must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, in which the operator of a website embeds on that website a social plugin causing the browser of a visitor to that website to request content from the provider of that plugin and, to that end, to transmit to that provider personal data of the visitor, the consent referred to in those provisions must be obtained by that operator only with regard to the operation or set of operations involving the processing of personal data in respect of which that operator determines the purposes and means. In addition, Article 10 of that directive must be interpreted as meaning that, in such a situation, the duty to inform laid down in that provision is incumbent also on that operator, but the information that the latter must provide to the data subject need relate only to the operation or set of operations involving the processing of personal data in respect of which that operator actually determines the purposes and means.

Costs

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

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

1. **Articles 22 to 24 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 not precluding national legislation which allows consumer-protection associations to bring or defend legal proceedings against a person allegedly responsible for an infringement of the protection of personal data.**

2. **The operator of a website, such as Fashion ID GmbH & Co. KG, that embeds on that website a social plugin causing the browser of a visitor to that website to request content from the provider of that plugin and, to that end, to transmit to that provider personal data of the visitor can be considered to be a controller, within the meaning of Article 2(d) of Directive 95/46. That liability is, however, limited to the operation or set of operations involving the processing of personal data in respect of which it actually determines the purposes and means, that is to say, the collection and disclosure by transmission of the data at issue.**

3. **In a situation such as that at issue in the main proceedings, in which the operator of a website embeds on that website a social plugin causing the browser of a visitor to that website to request content from the provider of that plugin and, to that end, to transmit to that provider personal data of the visitor, it is necessary that that operator and that provider each pursue a legitimate interest, within the meaning of Article 7(f) of Directive 95/46, through those processing operations in order for those operations to be justified in respect of each of them.**

4. **Articles 2(h) and 7(a) of Directive 95/46 must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, in which the operator of a website embeds on that website a social plugin causing the browser of a visitor to that website to request content from the provider of that plugin and, to that end, to transmit to that provider personal data of the visitor, the consent referred to in those provisions must be obtained by that operator only with regard to the operation or set of operations involving the processing of personal data in respect of which that operator determines the purposes and means. In addition, Article 10 of that directive must be interpreted as meaning that, in such a situation, the duty to inform laid down in that provision is incumbent also on that operator, but the information that the latter must provide to the data subject need relate only to the operation or set of operations involving the processing of personal data in respect of which that operator actually determines the purposes and means.**

LECTURE 8: 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 and the way in which it has to be balanced with other fundamental rights. Particular attention will be devoted to the right to be forgotten and the balance between data protection and and law enforcement.

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,* EU:C:2014:317.
- Court of Justice, 24 September 2019, Case C-507/17, *Google LLC v CNIL,* EU:C:2019:772.
- Court of Justice, 8 December 2022, Case C-460/20, *TU and RE v Google LLC*, EU:C:2022:962.

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-507/17, *Google LLC v CNIL*

In Case C-507/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decision of 19 July 2017, received at the Court on 21 August 2017, in the proceedings

Google LLC, successor in law to Google Inc.,

v

Commission nationale de l'informatique et des libertés (CNIL),

in the presence of:

Wikimedia Foundation Inc.,

Fondation pour la liberté de la presse,

Microsoft Corp.,

Reporters Committee for Freedom of the Press and Others,

Article 19 and Others,

Internet Freedom Foundation and Others,

Défenseur des droits,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Arabadjiev, E. Regan, T. von Danwitz, C. Toader and F. Biltgen, Presidents of Chambers, M. Ilešič (Rapporteur), L. Bay Larsen, M. Safjan, D. Šváby, C.G. Fernlund, C. Vajda and S. Rodin, judges,

Advocate General: M. Szpunar,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 11 September 2018,

after considering the observations submitted on behalf of:

– Google LLC, by P. Spinosi, Y. Pelosi and W. Maxwell, avocats,

– the Commission nationale de l'informatique et des libertés (CNIL), by I. Falque-Pierrotin, J. Lessi and G. Le Grand, acting as Agents,

– Wikimedia Foundation Inc., by C. Rameix-Seguin, avocate,

– the Fondation pour la liberté de la presse, by T. Haas, avocat,

– Microsoft Corp., by E. Piwnica, avocat,

– the Reporters Committee for Freedom of the Press and Others, by F. Louis, avocat, and by H.-G. Kamann, C. Schwedler and M. Braun, Rechtsanwälte,

– Article 19 and Others, by G. Tapie, avocat, G. Facenna QC, and E. Metcalfe, Barrister,

– Internet Freedom Foundation and Others, by T. Haas, avocat,

– the Défenseur des droits, by J. Toubon, acting as Agent,

– the French Government, by D. Colas, R. Coesme, E. de Moustier and S. Ghiandoni, acting as Agents,

– Ireland, by M. Browne, G. Hodge, J. Quaney and A. Joyce, acting as Agents, and by M. Gray, Barrister-at-Law,

– the Greek Government, by E.-M. Mamouna, G. Papadaki, E. Zisi and S. Papaioannou, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by R. Guizzi, avvocato dello Stato,

– the Austrian Government, by G. Eberhard and G. Kunnert, acting as Agents,

– the Polish Government, by B. Majczyna, M. Pawlicka and J. Sawicka, acting as Agents,

– the European Commission, by A. Buchet, H. Kranenborg and D. Nardi, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 January 2019,

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 Google LLC, successor in law to Google Inc., and the Commission nationale de l'informatique et des libertés (French Data Protection Authority, France) ('the CNIL') concerning a penalty of EUR 100 000 imposed by the CNIL on Google because of that company's refusal, when granting a de-referencing request, to apply it to all its search engine's domain name extensions.

Legal context

European Union law

Directive 95/46

3 According to Article 1(1) thereof, the purpose of Directive 95/46 is to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data, and to remove obstacles to the free movement of such data.

4 Recitals 2, 7, 10, 18, 20 and 37 of Directive 95/46 state:

'(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 … the well-being of individuals;

…

(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 …

…

(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;

…

(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; …

…

(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;

…

(37) Whereas the processing of personal data for purposes of journalism or for purposes of literary [or] 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 …'

5 Article 2 of that directive provides:

'For the purposes of this Directive:

(a) "personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); …

(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; …

…’

6 Article 4 of that directive, 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 Article 9 of Directive 95/46, entitled ‘Processing of personal data and freedom of expression’, states:

‘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.’

8 Article 12 of that directive, entitled ‘Right 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;

…’

9 Article 14 of that directive, 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;

…’

10 Article 24 of Directive 95/46, entitled ‘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.’

11 Article 28 of that directive, 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, [or] 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.

…’

Regulation (EU) 2016/679

12 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46 (General Data Protection Regulation) (OJ 2016 L 119, p. 1, and Corrigendum OJ 2018 L 127, p. 2), which is based on Article 16 TFEU, is applicable, pursuant to Article 99(2) thereof, from 25 May 2018. Article 94(1) of that regulation provides that Directive 95/46 is repealed with effect from that date.

13 Recitals 1, 4, 9 to 11, 13, 22 to 25 and 65 of that regulation state:

‘(1) The protection of natural persons in relation to the processing of personal data is a fundamental right. Article 8(1) of the Charter of Fundamental Rights of the European Union (“the Charter”) and Article 16(1) [TFEU] provide that everyone has the right to the protection of personal data concerning him or her.

…

(4) The processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against

other fundamental rights, in accordance with the principle of proportionality. This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, … the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information [and] freedom to conduct a business …

…

(9) … Directive 95/46 … has not prevented fragmentation in the implementation of data protection across the Union … Differences in the level of protection … in the Member States may prevent the free flow of personal data throughout the Union. Those differences may therefore constitute an obstacle to the pursuit of economic activities at the level of the Union …

(10) In order to ensure a consistent and high level of protection of natural persons and to remove the obstacles to flows of personal data within the Union, the level of protection of the rights and freedoms of natural persons with regard to the processing of such data should be equivalent in all Member States. …

(11) Effective protection of personal data throughout the Union requires the strengthening and setting out in detail of the rights of data subjects and the obligations of those who process and determine the processing of personal data, as well as equivalent powers for monitoring and ensuring compliance with the rules for the protection of personal data and equivalent sanctions for infringements in the Member States.

…

(13) In order to ensure a consistent level of protection for natural persons throughout the Union and to prevent divergences hampering the free movement of personal data within the internal market, a Regulation is necessary to provide legal certainty and transparency for economic operators, … and to provide natural persons in all Member States with the same level of legally enforceable rights and obligations and responsibilities for controllers and processors, to ensure consistent monitoring of the processing of personal data, and equivalent sanctions in all Member States as well as effective cooperation between the supervisory authorities of different Member States. The proper functioning of the internal market requires that the free movement of personal data within the Union is not restricted or prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data. …

…

(22) Any processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union should be carried out in accordance with this Regulation, regardless of whether the processing itself takes place within the Union. …

(23) In order to ensure that natural persons are not deprived of the protection to which they are entitled under this Regulation, the processing of personal data of data subjects who are in the Union by a controller or a processor not established in the Union should be subject to this Regulation where the processing activities are related to offering goods or services to such data subjects irrespective of whether connected to a payment. In order to determine whether such a controller or processor is offering goods or services to data subjects who are in the Union, it should be ascertained whether it is apparent that the controller or processor envisages offering services to data subjects in one or more Member States in the Union. …

(24) The processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union should also be subject to this Regulation when it is related to the monitoring of the behaviour of such data subjects in so far as their behaviour takes place within the Union. In order to determine whether a processing activity can be considered to monitor the behaviour of data subjects, it should be ascertained whether natural persons are tracked on the internet including potential subsequent use of personal data processing techniques which consist of profiling a natural person, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences, behaviours and attitudes.

(25) Where Member State law applies by virtue of public international law, this Regulation should also apply to a controller not established in the Union, such as in a Member State's diplomatic mission or consular post.

…

(65) A data subject should have … a "right to be forgotten" where the retention of such data infringes this Regulation or Union or Member State law to which the controller is subject … However, the further retention of the personal data should be lawful where it is necessary, for exercising the right of freedom of expression and information …'

14 Article 3 of Regulation 2016/679, entitled 'Territorial scope', is worded as follows:

'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.'

15 Article 4(23) of that regulation defines the concept of 'cross-border processing' as follows:

'(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'.

16 Article 17 of that regulation, entitled 'Right to erasure ("right to be forgotten")', is worded as follows:

'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).

…

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;

…’

17 Article 21 of that regulation, entitled ‘Right to object’, provides, in paragraph 1 thereof:

‘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.’

18 Article 55 of Regulation 2016/679, entitled ‘Competence’, which forms part of Chapter VI of that regulation, itself entitled ‘Independent supervisory authorities’, provides, in paragraph 1 thereof:

‘Each supervisory authority shall be competent for the performance of the tasks assigned to and the exercise of the powers conferred on it in accordance with this Regulation on the territory of its own Member State.’

19 Article 56 of that regulation, entitled ‘Competence of the lead supervisory authority’, states:

‘1. Without prejudice to Article 55, the supervisory authority of the main establishment or of the single establishment of the controller or processor shall be competent to act as lead supervisory authority for the cross-border processing carried out by that controller or processor in accordance with the procedure provided in Article 60.

2. By derogation from paragraph 1, each supervisory authority shall be competent to handle a complaint lodged with it or a possible infringement of this Regulation, if the subject matter relates only to an establishment in its Member State or substantially affects data subjects only in its Member State.

3. In the cases referred to in paragraph 2 of this Article, the supervisory authority shall inform the lead supervisory authority without delay on that matter. Within a period of three weeks after being informed the lead supervisory authority shall decide whether or not it will handle the case in accordance with the procedure provided in Article 60, taking into account whether or not there is an establishment of the controller or processor in the Member State of which the supervisory authority informed it.

4. Where the lead supervisory authority decides to handle the case, the procedure provided in Article 60 shall apply. The supervisory authority which informed the lead supervisory authority may submit to the lead supervisory authority a draft for a decision. The lead supervisory authority shall take utmost account of that draft when preparing the draft decision referred to in Article 60(3).

5. Where the lead supervisory authority decides not to handle the case, the supervisory authority which informed the lead supervisory authority shall handle it according to Articles 61 and 62.

6. The lead supervisory authority shall be the sole interlocutor of the controller or processor for the cross-border processing carried out by that controller or processor.’

20 Article 58 of that regulation, entitled ‘Powers’, provides, in paragraph 2 thereof:

‘Each supervisory authority shall have all of the following corrective powers:

…

(g) to order the … erasure of personal data … pursuant to … [Article] … 17 …;

…

(i) to impose an administrative fine … in addition to, or instead of measures referred to in this paragraph, depending on the circumstances of each individual case.'

21 Under Chapter VII of Regulation 2016/679, entitled 'Cooperation and consistency', Section I, entitled 'Cooperation', includes Articles 60 to 62 of that regulation. Article 60, entitled 'Cooperation between the lead supervisory authority and the other supervisory authorities concerned', provides:

'1. The lead supervisory authority shall cooperate with the other supervisory authorities concerned in accordance with this Article in an endeavour to reach consensus. The lead supervisory authority and the supervisory authorities concerned shall exchange all relevant information with each other.

2. The lead supervisory authority may request at any time other supervisory authorities concerned to provide mutual assistance pursuant to Article 61 and may conduct joint operations pursuant to Article 62, in particular for carrying out investigations or for monitoring the implementation of a measure concerning a controller or processor established in another Member State.

3. The lead supervisory authority shall, without delay, communicate the relevant information on the matter to the other supervisory authorities concerned. It shall without delay submit a draft decision to the other supervisory authorities concerned for their opinion and take due account of their views.

4. Where any of the other supervisory authorities concerned within a period of four weeks after having been consulted in accordance with paragraph 3 of this Article, expresses a relevant and reasoned objection to the draft decision, the lead supervisory authority shall, if it does not follow the relevant and reasoned objection or is of the opinion that the objection is not relevant or reasoned, submit the matter to the consistency mechanism referred to in Article 63.

5. Where the lead supervisory authority intends to follow the relevant and reasoned objection made, it shall submit to the other supervisory authorities concerned a revised draft decision for their opinion. That revised draft decision shall be subject to the procedure referred to in paragraph 4 within a period of two weeks.

6. Where none of the other supervisory authorities concerned has objected to the draft decision submitted by the lead supervisory authority within the period referred to in paragraphs 4 and 5, the lead supervisory authority and the supervisory authorities concerned shall be deemed to be in agreement with that draft decision and shall be bound by it.

7. The lead supervisory authority shall adopt and notify the decision to the main establishment or single establishment of the controller or processor, as the case may be and inform the other supervisory authorities concerned and the Board of the decision in question, including a summary of the relevant facts and grounds. The supervisory authority with which a complaint has been lodged shall inform the complainant on the decision.

8. By derogation from paragraph 7, where a complaint is dismissed or rejected, the supervisory authority with which the complaint was lodged shall adopt the decision and notify it to the complainant and shall inform the controller thereof.

9. Where the lead supervisory authority and the supervisory authorities concerned agree to dismiss or reject parts of a complaint and to act on other parts of that complaint, a separate decision shall be adopted for each of those parts of the matter. …

10. After being notified of the decision of the lead supervisory authority pursuant to paragraphs 7 and 9, the controller or processor shall take the necessary measures to ensure compliance with the decision as regards processing activities in the context of all its establishments in the Union. The controller or processor shall notify the measures taken for complying with the decision to the lead supervisory authority, which shall inform the other supervisory authorities concerned.

11. Where, in exceptional circumstances, a supervisory authority concerned has reasons to consider that there is an urgent need to act in order to protect the interests of data subjects, the urgency procedure referred to in Article 66 shall apply.

…'

22 Article 61 of that regulation, entitled 'Mutual assistance', states, in paragraph 1 thereof:

'Supervisory authorities shall provide each other with relevant information and mutual assistance in order to implement and apply this Regulation in a consistent manner, and shall put in place measures for effective cooperation with one another. Mutual assistance shall cover, in particular, information requests and supervisory measures, such as requests to carry out prior authorisations and consultations, inspections and investigations.'

23 Article 62 of that regulation, entitled 'Joint operations of supervisory authorities', provides:

'1. The supervisory authorities shall, where appropriate, conduct joint operations including joint investigations and joint enforcement measures in which members or staff of the supervisory authorities of other Member States are involved.

2. Where the controller or processor has establishments in several Member States or where a significant number of data subjects in more than one Member State are likely to be substantially affected by processing operations, a supervisory authority of each of those Member States shall have the right to participate in joint operations. …'

24 Section 2, entitled 'Consistency', of Chapter VII of Regulation 2016/679 includes Articles 63 to 67 of that regulation. Article 63, entitled 'Consistency mechanism', is worded as follows:

'In order to contribute to the consistent application of this Regulation throughout the Union, the supervisory authorities shall cooperate with each other and, where relevant, with the Commission, through the consistency mechanism as set out in this Section.'

25 Article 65 of that regulation, entitled 'Dispute resolution by the Board', provides, in paragraph 1 thereof:

'In order to ensure the correct and consistent application of this Regulation in individual cases, the Board shall adopt a binding decision in the following cases:

(a) where, in a case referred to in Article 60(4), a supervisory authority concerned has raised a relevant and reasoned objection to a draft decision of the lead supervisory authority and the lead supervisory authority has not followed the objection or has rejected such an objection as being not relevant or reasoned. The binding decision shall concern all the matters which are the subject of the relevant and reasoned objection, in particular whether there is an infringement of this Regulation;

(b) where there are conflicting views on which of the supervisory authorities concerned is competent for the main establishment;

…'

26 Article 66 of that regulation, entitled 'Urgency procedure', provides, in paragraph 1 thereof:

'In exceptional circumstances, where a supervisory authority concerned considers that there is an urgent need to act in order to protect the rights and freedoms of data subjects, it may, by way of derogation from the consistency mechanism referred to in Articles 63, 64 and 65 or the procedure referred to in Article 60, immediately adopt provisional measures intended to produce legal effects on its own territory with a specified period of validity which shall not exceed three months. The supervisory authority shall, without delay, communicate those measures and the reasons for adopting them to the other supervisory authorities concerned, to the Board and to the Commission.'

27 Article 85 of Regulation 2016/679, entitled 'Processing and freedom of expression and information', states:

‘1. Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.

2. For processing carried out for journalistic purposes or the purpose of academic, artistic or literary expression, Member States shall provide for exemptions or derogations from Chapter II (principles), Chapter III (rights of the data subject), Chapter IV (controller and processor), Chapter V (transfer of personal data to third countries or international organisations), Chapter VI (independent supervisory authorities), Chapter VII (cooperation and consistency) and Chapter IX (specific data processing situations) if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information.

…’

French law

28 Directive 95/46 is implemented in French law by loi n° 78-17, du 6 janvier 1978, relative à l’informatique, aux fichiers et aux libertés (Law No 78-17 of 6 January 1978 on information technology, data files and civil liberties), in the version applicable to the events in the main proceedings (‘the Law of 6 January 1978’).

29 Article 45 of that law specifies that where the controller fails to fulfil the obligations laid down in that law, the President of the CNIL may serve notice on him to bring the established infringement to an end within a period which the President is to determine. If the controller does not comply with the formal notice served on him, the Select Panel of the CNIL may, after hearing both parties, impose, inter alia, a financial penalty.

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

30 By decision of 21 May 2015, the President of the CNIL served formal notice on Google that, when granting a request from a natural person for links to web pages to be removed from the list of results displayed following a search conducted on the basis of that person’s name, it must apply that removal to all its search engine’s domain name extensions.

31 Google refused to comply with that formal notice, confining itself to removing the links in question from only the results displayed following searches conducted from the domain names corresponding to the versions of its search engine in the Member States.

32 The CNIL also regarded as insufficient Google’s further ‘geo-blocking’ proposal, made after expiry of the time limit laid down in the formal notice, whereby internet users would be prevented from accessing the results at issue from an IP (Internet Protocol) address deemed to be located in the State of residence of a data subject after conducting a search on the basis of that data subject’s name, no matter which version of the search engine they used.

33 By an adjudication of 10 March 2016, the CNIL, after finding that Google had failed to comply with that formal notice within the prescribed period, imposed a penalty on that company of EUR 100 000, which was made public.

34 By application lodged with the Conseil d’État (Council of State, France), Google seeks annulment of that adjudication.

35 The Conseil d’État notes that the processing of personal data carried out by the search engine operated by Google falls within the scope of the Law of 6 January 1978, in view of the activities of promoting and selling advertising space carried on in France by its subsidiary Google France.

36 The Conseil d’État also notes that the search engine operated by Google is broken down into different domain names by geographical extensions, in order to tailor the results displayed to the specificities, particularly the linguistic specificities, of the various States in which that company carries on its activities. Where the search is conducted from ‘google.com’, Google, in principle, automatically redirects that search to the domain name corresponding to the State from which that search is deemed to have been made, as identified by the internet user’s

IP address. However, regardless of his or her location, the internet user remains free to conduct his or her searches using the search engine's other domain names. Moreover, although the results may differ depending on the domain name from which the search is conducted on the search engine, it is common ground that the links displayed in response to a search derive from common databases and common indexing.

37 The Conseil d'État considers that, having regard, first, to the fact that Google's search engine domain names can all be accessed from French territory and, secondly, to the existence of gateways between those various domain names, as illustrated in particular by the automatic redirection mentioned above, as well as by the presence of cookies on extensions of that search engine other than the one on which they were initially deposited, that search engine, which, moreover, has been the subject of only one declaration to the CNIL, must be regarded as carrying out a single act of personal data processing for the purposes of applying the Law of 6 January 1978. As a result, the processing of personal data by the search engine operated by Google is carried out within the framework of one of its installations, Google France, established on French territory, and is therefore subject to the Law of 6 January 1978.

38 Before the Conseil d'État, Google maintains that the penalty at issue is based on a misinterpretation of the provisions of the Law of 6 January 1978, which transpose Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46, on the basis of which the Court, in its judgment of 13 May 2014, *Google Spain and Google* (C-131/12, EU:C:2014:317), recognised a 'right to de-referencing'. Google argues that this right does not necessarily require that the links at issue are to be removed, without geographical limitation, from all its search engine's domain names. In addition, by adopting such an interpretation, the CNIL disregarded the principles of courtesy and non-interference recognised by public international law and disproportionately infringed the freedoms of expression, information, communication and the press guaranteed, in particular, by Article 11 of the Charter.

39 Having noted that this line of argument raises several serious difficulties regarding the interpretation of Directive 95/46, the Conseil d'État has decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the "right to de-referencing", as established by the [Court] in its judgment of 13 May 2014, [*Google Spain and Google* (C-131/12, EU:C:2014:317),] on the basis of the provisions of [Article 12(b) and subparagraph (a) of the first paragraph of Article 14] of Directive [95/46], be interpreted as meaning that a search engine operator is required, when granting a request for de-referencing, to deploy the de-referencing to all of the domain names used by its search engine so that the links at issue no longer appear, irrespective of the place from where the search initiated on the basis of the requester's name is conducted, and even if it is conducted from a place outside the territorial scope of Directive [95/46]?

(2) In the event that Question 1 is answered in the negative, must the "right to de-referencing", as established by the [Court] in the judgment cited above, be interpreted as meaning that a search engine operator is required, when granting a request for de-referencing, only to remove the links at issue from the results displayed following a search conducted on the basis of the requester's name on the domain name corresponding to the State in which the request is deemed to have been made or, more generally, on the domain names distinguished by the national extensions used by that search engine for all of the Member States …?

3. Moreover, in addition to the obligation mentioned in Question 2, must the "right to de-referencing" as established by the [Court] in its judgment cited above, be interpreted as meaning that a search engine operator is required, when granting a request for de-referencing, to remove the results at issue, by using the "geo-blocking" technique, from searches conducted on the basis of the requester's name from an IP address deemed to be located in the State of residence of the person benefiting from the "right to de-referencing", or even, more generally, from an IP address deemed to be located in one of the Member States subject to Directive [95/46], regardless of the domain name used by the internet user conducting the search?'

Consideration of the questions referred

40 The case in the main proceedings is the result of a dispute between Google and the CNIL as to how a search engine operator, where it establishes that a data subject is entitled to have one or more links to web pages containing personal data concerning him or her removed from the list of results which is displayed following a search conducted on the basis of his or her name, is to give effect to that right to de-referencing. Although Directive

95/46 was applicable on the date the request for a preliminary ruling was made, it was repealed with effect from 25 May 2018, from which date Regulation 2016/679 is applicable.

41 The Court will examine the questions referred in the light of both that directive and that regulation in order to ensure that its answers will be of use to the referring court in any event.

42 During the proceedings before the Court, Google explained that, following the bringing of the request for a preliminary ruling, it has implemented a new layout for the national versions of its search engine, in which the domain name entered by the internet user no longer determines the national version of the search engine accessed by that user. Thus, the internet user is now automatically directed to the national version of Google's search engine that corresponds to the place from where he or she is presumed to be conducting the search, and the results of that search are displayed according to that place, which is determined by Google using a geo-location process.

43 In those circumstances, the questions referred, which must be dealt with together, should be understood as seeking to ascertain, in essence, whether Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 and Article 17(1) of Regulation 2016/679 are to be interpreted as meaning that, where a search engine operator grants a request for de-referencing pursuant to those provisions, that operator is required to carry out that de-referencing on all versions of its search engine, or whether, on the contrary, it is required to do so only on the versions of that search engine corresponding to all the Member States, or even only on the version corresponding to the Member State in which the request for de-referencing was made, using, where appropriate, the technique known as 'geo-blocking' in order to ensure that an internet user cannot, regardless of the national version of the search engine used, gain access to the links concerned by the de-referencing in the context of a search conducted from an IP address deemed to be located in the Member State of residence of the person benefiting from the right to de-referencing or, more broadly, in any Member State.

44 As a preliminary point, it should be borne in mind that the Court has held 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 (judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 88).

45 The Court has also stated that, when appraising the conditions for the application of those same provisions, it should inter alia be examined whether the data subject has a right that the information in question relating to him or her personally should, at that point in time, no longer be linked to his or her name by a list of results displayed following a search made on the basis of his or her 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 or her 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 or her 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 (judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 99).

46 In the context of Regulation 2016/679, that right of a data subject to de-referencing is now based on Article 17 of that regulation, which specifically governs the 'right to erasure', also referred to, in the heading of that article, as the 'right to be forgotten'.

47 Pursuant to Article 17(1) of Regulation 2016/679, a data subject has the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller has the obligation to erase personal data without undue delay where one of the grounds listed in that provision applies. Article 17(3) of that regulation specifies that Article 17(1) does not apply to the extent that processing is necessary for one of

the reasons listed in the former provision. Those reasons include, in particular, under Article 17(3)(a) of that regulation, the exercise of the right of, inter alia, freedom of information of internet users.

48 It follows from Article 4(1)(a) of Directive 95/46 and Article 3(1) of Regulation 2016/679 that both that directive and that regulation permit data subjects to assert their right to de-referencing against a search engine operator who has one or more establishments in the territory of the Union in the context of activities involving the processing of personal data concerning those data subjects, regardless of whether that processing takes place in the Union or not.

49 In that regard, the Court has held that the 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 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 search engine and which orientates its activity towards the inhabitants of that Member State (judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 60).

50 In such circumstances, the activities of the operator of the search engine and those of its establishment situated in the Union 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 search engine is, at the same time, the means enabling those activities to be performed, the display of the list of results being accompanied, on the same page, by the display of advertising linked to the search terms (see, to that effect, judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraphs 56 and 57).

51 That being so, the fact that the search engine is operated by an undertaking that has its seat in a third State cannot result in the processing of personal data carried out for the purposes of the operation of that search engine in the context of the advertising and commercial activity of an establishment of the controller on the territory of a Member State escaping the obligations and guarantees laid down by Directive 95/46 and Regulation 2016/679 (see, to that effect, judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 58).

52 In the present case, it is apparent from the information provided in the order for reference, first, that Google's establishment in French territory carries on, inter alia, commercial and advertising activities, which are inextricably linked to the processing of personal data carried out for the purposes of operating the search engine concerned, and, second, that that search engine must, in view of, inter alia, the existence of gateways between its various national versions, be regarded as carrying out a single act of personal data processing. The referring court considers that, in those circumstances, that act of processing is carried out within the framework of Google's establishment in French territory. It thus appears that such a situation falls within the territorial scope of Directive 95/46 and Regulation 2016/679.

53 By its questions, the referring court seeks to determine the territorial scope which must be conferred on a de-referencing in such a situation.

54 In that regard, it is apparent from recital 10 of Directive 95/46 and recitals 10, 11 and 13 of Regulation 2016/679, which was adopted on the basis of Article 16 TFEU, that the objective of that directive and that regulation is to guarantee a high level of protection of personal data throughout the European Union.

55 It is true that a de-referencing carried out on all the versions of a search engine would meet that objective in full.

56 The internet is a global network without borders and search engines render the information and links contained in a list of results displayed following a search conducted on the basis of an individual's name ubiquitous (see, to that effect, judgments of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 80, and of 17 October 2017, *Bolagsupplysningen and Ilsjan*, C-194/16, EU:C:2017:766, paragraph 48).

57 In a globalised world, internet users' access — including those outside the Union — to the referencing of a link referring to information regarding a person whose centre of interests is situated in the Union is thus likely to have immediate and substantial effects on that person within the Union itself.

58 Such considerations are such as to justify the existence of a competence on the part of the EU legislature to lay down the obligation, for a search engine operator, to carry out, when granting a request for de-referencing made by such a person, a de-referencing on all the versions of its search engine.

59 That being said, it should be emphasised that numerous third States do not recognise the right to de-referencing or have a different approach to that right.

60 Moreover, the right to the protection of personal data is not an absolute right, but must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality (see, to that effect, judgment of 9 November 2010, *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraph 48, and Opinion 1/15 *(EU-Canada PNR Agreement)* of 26 July 2017, EU:C:2017:592, point 136). Furthermore, the balance between the right to privacy and the protection of personal data, on the one hand, and the freedom of information of internet users, on the other, is likely to vary significantly around the world.

61 While the EU legislature has, in Article 17(3)(a) of Regulation 2016/679, struck a balance between that right and that freedom so far as the Union is concerned (see, to that effect, today's judgment, *GC and Others (De-referencing of sensitive data)*, C-136/17, paragraph 59), it must be found that, by contrast, it has not, to date, struck such a balance as regards the scope of a de-referencing outside the Union.

62 In particular, it is in no way apparent from the wording of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 or Article 17 of Regulation 2016/679 that the EU legislature would, for the purposes of ensuring that the objective referred to in paragraph 54 above is met, have chosen to confer a scope on the rights enshrined in those provisions which would go beyond the territory of the Member States and that it would have intended to impose on an operator which, like Google, falls within the scope of that directive or that regulation a de-referencing obligation which also concerns the national versions of its search engine that do not correspond to the Member States.

63 Moreover, although Regulation 2016/679 provides the supervisory authorities of the Member States, in Articles 56 and 60 to 66 thereof, with the instruments and mechanisms enabling them, where appropriate, to cooperate in order to come to a joint decision based on weighing a data subject's right to privacy and the protection of personal data concerning him or her against the interest of the public in various Member States in having access to information, it must be found that EU law does not currently provide for such cooperation instruments and mechanisms as regards the scope of a de-referencing outside the Union.

64 It follows that, currently, there is no obligation under EU law, for a search engine operator who grants a request for de-referencing made by a data subject, as the case may be, following an injunction from a supervisory or judicial authority of a Member State, to carry out such a de-referencing on all the versions of its search engine.

65 Having regard to all of the foregoing, a search engine operator cannot be required, under Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 and Article 17(1) of Regulation 2016/679, to carry out a de-referencing on all the versions of its search engine.

66 Regarding the question whether such a de-referencing is to be carried out on the versions of the search engine corresponding to the Member States or only on the version of that search engine corresponding to the Member State of residence of the person benefiting from the de-referencing, it follows from, inter alia, the fact that the EU legislature has now chosen to lay down the rules concerning data protection by way of a regulation, which is directly applicable in all the Member States, which has been done, as is emphasised by recital 10 of Regulation 2016/679, in order to ensure a consistent and high level of protection throughout the European Union and to remove the obstacles to flows of personal data within the Union, that the de-referencing in question is, in principle, supposed to be carried out in respect of all the Member States.

67 However, it should be pointed out that the interest of the public in accessing information may, even within the Union, vary from one Member State to another, meaning that the result of weighing up that interest, on the one hand, and a data subject's rights to privacy and the protection of personal data, on the other, is not necessarily the same for all the Member States, especially since, under Article 9 of Directive 95/46 and Article 85 of Regulation 2016/679, it is for the Member States, in particular as regards processing undertaken solely for

journalistic purposes or for the purpose of artistic or literary expression, to provide for the exemptions and derogations necessary to reconcile those rights with, inter alia, the freedom of information.

68 It follows from, inter alia, Articles 56 and 60 of Regulation 2016/679 that, for cross-border processing as defined in Article 4(23) of that regulation, and subject to Article 56(2) thereof, the various national supervisory authorities concerned must cooperate, in accordance with the procedure laid down in those provisions, in order to reach a consensus and a single decision which is binding on all those authorities and with which the controller must ensure compliance as regards processing activities in the context of all its establishments in the Union. Moreover, Article 61(1) of Regulation 2016/679 obliges the supervisory authorities, in particular, to provide each other with relevant information and mutual assistance in order to implement and to apply that regulation in a consistent manner throughout the Union, and Article 63 of that regulation specifies that it is for this purpose that provision has been made for the consistency mechanism set out in Articles 64 and 65 thereof. Lastly, the urgency procedure provided for in Article 66 of Regulation 2016/679 permits the immediate adoption, in exceptional circumstances, where a supervisory authority concerned considers that there is an urgent need to act in order to protect the rights and freedoms of data subjects, of provisional measures intended to produce legal effects on its own territory with a specified period of validity which is not to exceed three months.

69 That regulatory framework thus provides the national supervisory authorities with the instruments and mechanisms necessary to reconcile a data subject's rights to privacy and the protection of personal data with the interest of the whole public throughout the Member States in accessing the information in question and, accordingly, to be able to adopt, where appropriate, a de-referencing decision which covers all searches conducted from the territory of the Union on the basis of that data subject's name.

70 In addition, it is for the search engine operator to take, if necessary, sufficiently effective measures to ensure the effective protection of the data subject's fundamental rights. Those measures must themselves meet all the legal requirements and have the effect of preventing or, at the very least, seriously discouraging internet users in the Member States from gaining access to the links in question using a search conducted on the basis of that data subject's name (see, by analogy, judgments of 27 March 2014, *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, paragraph 62, and of 15 September 2016, *McFadden*, C-484/14, EU:C:2016:689, paragraph 96).

71 It is for the referring court to ascertain whether, also having regard to the recent changes made to its search engine as set out in paragraph 42 above, the measures adopted or proposed by Google meet those requirements.

72 Lastly, it should be emphasised that, while, as noted in paragraph 64 above, EU law does not currently require that the de-referencing granted concern all versions of the search engine in question, it also does not prohibit such a practice. Accordingly, a supervisory or judicial authority of a Member State remains competent to weigh up, in the light of national standards of protection of fundamental rights (see, to that effect, judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 29, and of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraph 60), a data subject's right to privacy and the protection of personal data concerning him or her, on the one hand, and the right to freedom of information, on the other, and, after weighing those rights against each other, to order, where appropriate, the operator of that search engine to carry out a de-referencing concerning all versions of that search engine.

73 In the light of all of the foregoing, the answer to the questions referred is that, on a proper construction of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 and Article 17(1) of Regulation 2016/679, where a search engine operator grants a request for de-referencing pursuant to those provisions, that operator is not required to carry out that de-referencing on all versions of its search engine, but on the versions of that search engine corresponding to all the Member States, using, where necessary, measures which, while meeting the legal requirements, effectively prevent or, at the very least, seriously discourage an internet user conducting a search from one of the Member States on the basis of a data subject's name from gaining access, via the list of results displayed following that search, to the links which are the subject of that request.

Costs

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

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

On a proper construction of 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, and of Article 17(1) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46 (General Data Protection Regulation), where a search engine operator grants a request for de-referencing pursuant to those provisions, that operator is not required to carry out that de-referencing on all versions of its search engine, but on the versions of that search engine corresponding to all the Member States, using, where necessary, measures which, while meeting the legal requirements, effectively prevent or, at the very least, seriously discourage an internet user conducting a search from one of the Member States on the basis of a data subject's name from gaining access, via the list of results displayed following that search, to the links which are the subject of that request.

Case C-460/20, *TU and RE v Google LLC*

In Case C-460/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 27 July 2020, received at the Court on 24 September 2020, in the proceedings

TU,

RE

v

Google LLC

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Prechal, K. Jürimäe, C. Lycourgos, P.G. Xuereb, L.S. Rossi and D. Gratsias, Presidents of Chambers, M. Ilešič (Rapporteur), F. Biltgen, N. Piçarra, N. Jääskinen, N. Wahl, I. Ziemele and J. Passer, Judges,

Advocate General: G. Pitruzzella,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 24 January 2022,

after considering the observations submitted on behalf of:

– TU and RE, by M. Siegmann and T. Stöber, Rechtsanwälte,

– Google LLC, by B. Heymann, J. Spiegel and J. Wimmers, Rechtsanwälte,

– the Greek Government, by S. Charitaki, A. Magrippi and M. Tassopoulou, acting as Agents,

– the Austrian Government, by G. Kunnert, A. Posch and J. Schmoll, acting as Agents,

– the Romanian Government, by E. Gane and L. Liţu, acting as Agents,

– the European Commission, by A. Bouchagiar, F. Erlbacher, H. Kranenborg and D. Nardi, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 April 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 17(3)(a) of Regulation (EU) 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) (OJ 2016 L 119, p. 1; 'the GDPR') and Article 12(b) and point (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 L281, p.31), read in the light of Articles 7, 8, 11 and 16 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between TU and RE, of the one part, and Google LLC, of the other part, concerning a request seeking, first, that articles in which they are identified be de-referenced from the results of a search carried out on the basis of their names and, second, that photographs representing them, displayed in the form of preview images ('thumbnails'), be removed from the results of an image search.

Legal context

Directive 95/46

3 Article 1 of Directive 95/46, entitled 'Object of the Directive', provided in paragraph 1 thereof:

'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.'

4 Article 2 of that directive, entitled 'Definitions', provided:

'For the purposes of this Directive:

(a) "personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); …

(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, …

(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; …'

5 In Section I of Chapter II of that directive, entitled 'Principles relating to data quality', Article 6 was worded as follows:

'1. Member States shall provide that personal data must be:

…

(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;

…'

6 In Section V of Chapter II of that directive, entitled 'The data subject's right of access to data', Article 12 thereof, itself entitled 'Right of access', stated:

'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;

…’

7 In Section VII of Chapter II of Directive 95/46, entitled ‘The data subject’s right to object’, the first paragraph of Article 14 of that directive provided:

‘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;

…’

The GDPR

8 As provided in Article 94(1) thereof, the GDPR repealed Directive 95/46 with effect from 25 May 2018. By virtue of Article 99(2), the GDPR applies from that date.

9 Recitals 4, 39 and 65 of that regulation state:

‘4. The processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity.

…

39. … Every reasonable step should be taken to ensure that personal data which are inaccurate are rectified or deleted. …

65. A data subject should have the right to have personal data concerning him or her rectified and a “right to be forgotten” where the retention of such data infringes this Regulation or Union or Member State law to which the controller is subject. … However, the further retention of the personal data should be lawful where it is necessary, for exercising the right of freedom of expression and information …’

10 In Chapter I of that regulation, entitled ‘General provisions’, Article 4 thereof, itself entitled ‘Definitions’, is worded as follows:

‘For the purposes of this Regulation:

(1) “personal data” means any information relating to an identified or identifiable natural person (“data subject”); …

(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 …

(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; …’

11 In Chapter II of that regulation, entitled ‘Principles’, Article 5, itself entitled ‘Principles relating to the processing of personal data’, provides:

‘1. Personal data shall be:

…

(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”);

…

2. The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 (“accountability”).’

12 Section 3 of Chapter III of the GDPR, entitled ‘Rectification and erasure’, includes, inter alia, Articles 16 and 17 of that regulation.

13 Article 16 of the GDPR, entitled ‘Right of rectification’, provides:

‘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.’

14 Article 17 of that regulation, entitled ‘Right to erasure (“right to be forgotten”)’, is worded as follows:

‘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;

…'

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

15 TU is a member of the board of directors and the only shareholder of an investment company as well as chairman of a subsidiary of that company, which, together with other companies, constitute a group of companies. He is also the sole shareholder in a third company, which is the sole shareholder in a fourth company, which in turn holds 60% of the shares in a fifth company.

16 RE was TU's cohabiting partner and, until May 2015, held general commercial power of representation in that fourth company.

17 On 27 April, 4 June and 16 June 2015, three articles which criticised the investment model implemented by the fifth company and the group of companies referred to in paragraph 15 of the present judgment were published on the website www.g …net ('the g-net website'). The 4 June 2015 article was also illustrated by three photographs of TU driving a luxury car, in a helicopter and in front of an airplane, respectively, as well as a photograph of RE in a convertible car.

18 The operator of the g-net website is, according to the imprint, G-LLC, whose registered office is in New York (United States). The corporate purpose of G-LLC is, according to its own statement, 'to contribute consistently towards fraud prevention in the economy and society by means of active investigation and constant transparency'. Various publications criticised G-LLC's business model, in particular accusing it of attempting to 'blackmail' companies by first publishing negative reports regarding those companies and then offering to delete them or prevent their publication, in exchange for a sum of money.

19 Google displayed the articles of 4 June 2015 and 16 June 2015 when the names and forenames of the applicants in the main proceedings, both on their own and in conjunction with certain company names, were entered in its search engine, as well as the 27 April 2015 article when certain company names were entered, and included a link to those articles. In addition, when an image search was conducted on that search engine, Google displayed in the list of results, in the form of thumbnails, the photographs of the applicants in the main proceedings contained in the article of 4 June 2015. Those photographs ceased being displayed in September 2017, at the latest. The articles ceased to be accessible on the g-net website from 28 June 2018 at the latest.

20 The applicants in the main proceedings requested Google, as the controller of personal data processed by its search engine, first, to de-reference the links to the articles at issue in the main proceedings from the list of search results, on the ground that they contained inaccurate claims and defamatory opinions, and, second, to remove the thumbnails from the list of search results. They also claimed to have been victims of 'blackmail' by G-LLC.

21 Google refused to comply with that request, referring to the professional context in which the articles and photographs at issue in the main proceedings were set and arguing that it was unaware of the alleged inaccuracy of the information contained in those articles.

22 In 2015, the applicants in the main proceedings brought an action before the Landgericht Köln (Regional Court, Cologne, Germany) seeking an order requiring Google to de-reference the links to the articles at issue in the main proceedings from its lists of search results and to put an end to the display, in the form of thumbnails, of the photographs representing them. By judgment of 22 November 2017, that court dismissed the action.

23 The applicants in the main proceedings lodged an appeal against that judgment before the Oberlandesgericht Köln (Higher Regional Court, Cologne, Germany). That appeal was dismissed by judgment of 8 November 2018. That court stated that the specific method of functioning of a search engine and the particular importance it has for the functioning of the internet must be accorded particular importance in the context of the weighing-up of competing rights and interests which is to be undertaken. Given that the operator of the search engine generally has no legal relationship with those providing the content shown, and given that it is impossible for that operator

to investigate the facts and assess them while also taking account of the opinions of those providers, the operator of the search engine is subject to specific obligations to act only when it becomes aware, following a specific notification from the data subject, of a prima facie flagrant and clearly discernible infringement of the law. Those principles also apply where the search engine is used solely to search for images, given that the relevant interests involved are comparable.

24 The appeal court added that, in so far as it is necessary conclusively to take account of the accuracy of the alleged fact, the burden of proof in that regard lies with the person requesting the de-referencing. In the present case, since the applicants in the main proceedings have not proven that the facts reported in relation to them are inaccurate, Google is unable to carry out a final assessment of the articles at issue in the main proceedings and, consequently, is not required to de-reference them. As regards the photographs displayed in the form of thumbnails, they could, in so far as they accompany one of those articles, be regarded as being news images.

25 The applicants in the main proceedings brought an appeal on a point of law before the Bundesgerichtshof (Federal Court of Justice, Germany), the referring court.

26 That court observes that the outcome of that action depends on the interpretation of EU law, in particular Article 17(3)(a) of the GDPR and Article 12(b) and point (a) of the first paragraph of Article 14 of Directive 95/46.

27 As a preliminary point, the referring court states that, from its point of view, the request that Google be ordered to de-reference the links to the articles at issue in the main proceedings from the list of search results falls ratione temporis within the scope of the GDPR, whereas the request that Google be ordered to remove the thumbnails from the list of results of an image search falls ratione temporis within the scope of Directive 95/46, given that those thumbnails were no longer displayed by the search engine operated by Google on the date when the GDPR entered into force. However, as regards the request to have the thumbnails removed, the referring court requests the Court to provide an answer on that point which also takes account of that regulation.

28 The referring court then observes that the fact that the articles at issue in the main proceedings are no longer available on the g-net website and that Google no longer displays the thumbnails has not eliminated the interest the applicants in the main proceedings have in pursuing their request for de-referencing, given that the g-net website merely states that, for various reasons, those articles are ‘currently’ unavailable. In those circumstances, it cannot be ruled out that those articles may be re-posted online in the future and may once more be referenced by Google’s search engine, since it is noted, moreover, that Google continues to take the view that that request for de-referencing is unjustified and Google continues to refuse to accede to it.

29 As regards the substance, concerning, in the first place, the request for de-referencing of the links to the articles at issue in the main proceedings from the list of search results, the referring court notes that the applicants in the main proceedings justify that request by claiming, in particular, that some of the assertions in those articles are inaccurate. The question therefore arises as to whether it was for the applicants in the main proceedings to prove the alleged inaccuracy of those assertions or, at the very least, to furnish a certain degree of evidence of that inaccuracy or whether, on the contrary, Google ought either to have presumed that the claims of the applicants in the main proceedings were accurate or to have sought to clarify the facts itself.

30 According to the referring court, the requirement to strike an equal balance between competing fundamental rights arising from Articles 7 and 8 of the Charter, on the one hand, and Articles 11 and 16 of the Charter, on the other, is not satisfied if, in a situation such as that at issue in the case in the main proceedings, the burden of proof falls exclusively on one party or the other.

31 Consequently, that court proposes adopting a solution which seeks to require the data subject to resolve, at least provisionally, the question of the accuracy of the referenced content by pursuing in court his or her claim against the content provider, in so far as obtaining judicial protection at least provisionally is a reasonable option for the data subject taking account of the circumstances of the particular case. It is true that, in so far as it has no relationship with the content provider, the data subject could encounter the same difficulties as the operator of the search in making contact with the content provider. However, the data subject knows whether the referenced content is accurate or not. The question whether that data subject may reasonably be required to pursue in court his or her claim against the content supplier could depend, for example, on whether or not the content provider can be approached without particular difficulty within the European Union.

32 Accordingly, the referring court suggests that, as a general rule, the data subject may reasonably be required to bring an action for interim relief against a content supplier whose name is known, but not against an anonymous provider or a provider to whom it is impossible to make notifications. However, the actual likelihood of obtaining enforcement of any order against the content provider requiring erasure is irrelevant as regards the rights vis-à-vis the operator of the search engine.

33 In the second place, as regards the request that Google be ordered to put an end to the display, in the form of thumbnails, of the photographs of the applicants in the main proceedings contained in the 4 June 2015 article, the referring court observes, first of all, that those thumbnails do indeed contain a link allowing access to the third party's internet page on which the corresponding photograph was published and thereby to become aware of the context of that publication. However, in so far as the list of results of an image search displays only thumbnails, without reproducing information regarding the context of that publication on the third party's internet page, that list is, in itself, neutral and does not make it possible to ascertain the context surrounding the original publication.

34 Accordingly, the question arises whether, when conducting the weighing-up exercise under Article 12(b) and point (a) of the first paragraph of Article 14 of Directive 95/46 or Article 17(3)(a) of the GDPR, account must be taken solely of the thumbnail as such in the neutral context of the list of results or whether account must also be taken of the original context of the publication of the corresponding image.

35 In that regard, the referring court notes that, in the case in the main proceedings, which concerns persons who are not known to the general public, the photographs in question do not, in themselves, contribute to public debate and do not satisfy a compelling need for information in accordance with the provisions referred to in the preceding paragraph. However, in connection with the 4 June 2015 article published on the g-net website, the photographs play an important role in substantiating the message contained in that article, which is that the applicants in the main proceedings, by virtue of their position as founders and managers of the fourth company and of the group of companies referred to in paragraph 15 of the present judgment, enjoy a high standard of living and possess luxury goods, whilst the employees, distributors and customers of those companies are uncertain as to the safety of the investments made. Consequently, if account ought to be taken of the context in which those photographs were initially published, their publication as thumbnails in the list of results would have to be regarded as justified, provided that the text accompanying them is itself lawful.

36 According to the referring court, one factor militating in favour of taking account of the context of the original publication lies in the fact that, technically, thumbnails constitute links referring to the third party's internet page. Similarly, it is well known that the informed average user of an image search engine is aware of the fact that the thumbnails brought together by the search engine in a list of results are taken from third party publications and that the photographs corresponding to those thumbnails are displayed, in those publications, in a particular context.

37 However, account should be taken of the fact that the original context of the publication of the images is neither stated nor otherwise visible when the thumbnail is displayed, unlike in the case of other referenced results. A user who, from the outset, is interested only in displaying the image has, as a general rule, no reason to seek out the source and the original context of the publication.

38 According to the referring court, it therefore appears logical, for the purposes of assessing the lawfulness of the data processing by the search engine data controller concerned, to include in the weighing-up exercise referred to in point (a) of the first paragraph of Article 14 of Directive 95/46 or Article 17(3) of the GDPR only the rights and interests which are apparent from the thumbnail itself.

39 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is it compatible with the data subject's right to respect for private life (Article 7 of the [Charter]) and to protection of personal data (Article 8 of the Charter) if, within the context of the weighing-up of conflicting rights and interests arising from Articles 7, 8, 11 and 16 of the Charter, within the scope of the examination of his [or her] request for de-referencing brought against the data controller of an internet search engine, pursuant to Article 17(3)(a) of [the GDPR], when the link, the de-referencing of which [that person] is requesting, leads to content that includes factual claims and value judgments based on factual claims the truth of which is denied by the data subject, and the lawfulness of which depends on the question of the extent to which the factual claims

contained in that content are true, the national court also concentrates conclusively on the issue of whether the data subject could reasonably seek legal protection against the content provider, for instance by means of interim relief, and thus at least provisional clarification on the question of the truth of the content displayed by the search engine data controller could be provided?

(2) In the case of a request for de-referencing made against the data controller of an internet search engine, which in a name search searches for photos of natural persons which third parties have introduced into the internet in connection with the person's name, and which displays the photos which it has found in its search results as preview images (thumbnails), within the context of the weighing-up of the conflicting rights and interests arising from Articles 7, 8, 11 and 16 of the Charter pursuant to Article 12(b) and [point (a) of the first paragraph of Article 14] of Directive [95/46 or] Article 17(3)(a) of [the GDPR], should the context of the original third-party publication be conclusively taken into account, even if the third-party website is linked by the search engine when the preview image is displayed but is not specifically named, and the resulting context is not shown with it by the internet search engine?'

Consideration of the questions referred

The first question

Admissibility

40 Google expresses doubts as to whether the first question is admissible, on the ground that the problem which it raises is hypothetical in nature. In particular, the solution suggested by the referring court takes the form of an abstract construction which is unrelated to the facts at issue in the case in the main proceedings. In its view, the Court also does not have the necessary material to provide a useful answer to that question.

41 In that regard, it should be noted that, according to settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which 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. Consequently, where the questions submitted by the national court concern the interpretation of EU law, the Court of Justice is, in principle, bound to give a ruling (judgment of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, paragraph 54 and the case-law cited).

42 The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, paragraph 55 and the case-law cited).

43 In the present case, as the Advocate General observed in point 22 of his Opinion, the referring court has provided a sufficiently precise and comprehensive picture of the factual and legal context underlying the dispute in the main proceedings and has sufficiently substantiated the need, in that context, to obtain an answer to the question submitted.

44 In that 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 (judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 35). Where the data subject brings an action against the operator of the search engine, the rights, interests and restrictions involved are not, therefore, necessarily the same as in the context of an action brought against a content provider, with the result that a specific weighing-up exercise for the purposes of examining a request for de-referencing under Article 17 of the GDPR is necessary.

45 It is apparent from the considerations set out by the referring court that the Court's answer to the question concerning, first, the extent of the obligations and responsibilities incumbent on the operator of a search engine in processing a request for de-referencing based on the alleged inaccuracy of the information in the referenced

content and, second, the burden of proof imposed on the data subject as regards that inaccuracy is capable of having a direct impact on the assessment, by the referring court, of the action in the main proceedings, regardless of whether the applicants in the main proceedings are in a position to obtain effective judicial protection as against the content provider concerning publication on the internet of the allegedly inaccurate content.

46 As the Advocate General observed in point 22 of his Opinion, the fact that the referring court's questions regarding the methodology which it considers to be applicable in a situation such as that at issue in the main proceedings are expressed in general and abstract terms does not mean that the question referred to the Court in that regard is hypothetical.

47 It follows that the first question is admissible.

Substance

48 By its first question, the referring court asks, in essence, whether Article 17(3)(a) of the GDPR must be interpreted as meaning that, within the context of the weighing-up exercise which is to be undertaken between the rights referred to in Articles 7 and 8 of the Charter, on the one hand, and those referred to in Articles 11 and 16 of the Charter, on the other hand, for the purposes of examining a request for de-referencing made to the operator of a search engine seeking the removal of a link to content containing claims which the person who submitted the request regards as inaccurate from the list of search results, that de-referencing is subject to the condition that the question of the accuracy of the referenced content has been resolved, at least provisionally, in an action brought by that person against the provider of that content, where there is a reasonable possibility of obtaining such judicial protection.

49 As a preliminary point, it must be recalled, first, that 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) of Directive 95/46 and points 1 and 2 of Article 4 of the GDPR when that information contains personal data and, second, that the operator of the search engine must be regarded as the 'controller' in respect of that processing within the meaning of Article 2(d) of that directive and Article 4(7) of that regulation (see, to that effect, judgments of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 41, and of 24 September 2019, *GC and Others (De-referencing of sensitive data)*, C-136/17, EU:C:2019:773, paragraph 35).

50 Indeed, as recalled in paragraph 44 of the present judgment, 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. In addition, that activity 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 internet page on which those data are published. 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 (see, to that effect, judgments of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraphs 36 and 37, and of 24 September 2019, *GC and Others (De-referencing of sensitive data)*, C-136/17, EU:C:2019:773, paragraph 36).

51 Therefore, inasmuch as the activity of a search engine is 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 and of the GDPR in order that the guarantees laid down by that directive and that regulation may have full effect and that effective and complete protection of data subjects, in particular of their right to privacy, may actually be achieved (see, to that effect, judgments of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 38, and of 24 September 2019, *GC and Others (De-referencing of sensitive data)*, C-136/17, EU:C:2019:773, paragraph 37).

52 As regards the extent of the responsibility and specific obligations of the operator of a search engine, the Court has already stated that that operator is responsible not because personal data appear on an internet page published by a third party, but because of the referencing of that page and, in particular, the display of the link to that internet page in the list of results presented to internet users following a search carried out on the basis of an individual's name, since such a display of the link in such a list is liable significantly to affect the data subject's fundamental rights to privacy and to the protection of the personal data relating to him or her (see, to that effect, judgments of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 80, and of 24 September 2019, *GC and Others (De-referencing of sensitive data)*, C-136/17, EU:C:2019:773, paragraph 46).

53 In those circumstances, having regard to the responsibilities, powers and capabilities of the operator of a search engine as the controller of the processing carried out in connection with the activity of the search engine, the prohibitions and restrictions laid down by Directive 95/46 and by the GDPR can apply to that operator only by reason of that referencing and thus via a verification, under the supervision of the competent national authorities, on the basis of a request by the data subject (see, to that effect, judgment of 24 September 2019, *GC and Others (De-referencing of sensitive data)* (C-136/17, EU:C:2019:773, paragraph 47).

54 As regards such a request, the GDPR contains, in Article 17, a provision which specifically governs the 'right to erasure', also known as the 'right to be forgotten'. Although paragraph 1 of that article provides that the data subject has, in principle, for the reasons listed therein, the right to obtain the erasure of personal data relating to him or her by the controller, it states, in paragraph 3, that that right may not be relied on where the processing in question is necessary on account of one of the grounds listed, which include, in Article 17(3)(a), exercising the right relating, in particular, to freedom of information.

55 Accordingly, the operator of a search engine who receives a request for de-referencing must ascertain whether the inclusion of the link to the internet page in question in the list displayed following a search carried out on the basis of the data subject's name is necessary for exercising the right to freedom of information of internet users potentially interested in accessing that internet page by means of a search, a right protected by Article 11 of the Charter (see, by analogy, judgment of 24 September 2019, *GC and Others (De-referencing of sensitive data)* (C-136/17, EU:C:2019:773, paragraph 66).

56 The fact that Article 17(3)(a) of the GDPR expressly provides that the data subject's right to erasure is excluded where processing is necessary for the exercise of the right of information, guaranteed in Article 11 of the Charter, is an expression of the fact that the right to protection of personal data is not an absolute right but, as recital 4 of the regulation states, must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality (see, to that effect, judgment of 24 September 2019, *GC and Others (De-referencing of sensitive data),* C-136/17, EU:C:2019:773, paragraph 57 and the case-law cited).

57 In that context, it should be recalled that Article 52(1) of the Charter accepts that limitations may be imposed on the exercise of rights such as those set forth in Articles 7 and 8 of the Charter, as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others (judgment of 24 September 2019, *GC and Others (De-referencing of sensitive data)*, C-136/17, EU:C:2019:773, paragraph 58 and the case-law cited).

58 The GDPR, and in particular Article 17(3)(a), thus expressly lays down the requirement to strike a balance between the fundamental rights to privacy and protection of personal data guaranteed by Articles 7 and 8 of the Charter, on the one hand, and the fundamental right of freedom of information guaranteed by Article 11 of the Charter, on the other (judgment of 24 September 2019, *GC and Others (De-referencing of sensitive data)*, C-136/17, EU:C:2019:773, paragraph 59).

59 It should be added that Article 7 of the Charter, regarding the right to respect for private and family life, contains rights corresponding to those guaranteed in Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), and that the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the ECHR (ECtHR, 27 June 2017, *Satakunnan Markkinapörssi oy and satamedia oy v. Finland*, CE:ECHR:2017:0627JUD000093113, § 137). In accordance with Article 52(3) of the Charter, Article 7 of the Charter is thus to be given the same meaning and the same scope as Article 8(1) ECHR, as interpreted by the case-law of the European Court of Human Rights. The same is true of Article 11 of the

Charter and Article 10 ECHR (see to that effect, judgment of 14 February 2019, *Buivids*, (C-345/17, EU:C:2019:122, paragraph 65 and the case-law cited).

60 It is apparent from the case-law of the European Court of Human Rights that, as regards the publication of data, for the purposes of striking a balance between the right to respect for private life and the right of freedom of expression and information, a number of relevant criteria must be taken into consideration, such as contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, the form and consequences of the publication, the manner and circumstances in which the information was obtained as well and its veracity (see, to that effect, ECtHR, 27 June 2017, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, CE:ECHR:2017:0627JUD000093113, § 165).

61 It is in the light of those considerations that an examination must be made of the conditions in which the operator of a search engine is required to accede to a request for de-referencing and thus to remove from the list of results displayed following a search on the basis of the data subject's name, the link to an internet page on which that personal data specific to that person appear, on the ground that the referenced content contains claims which that person regards as inaccurate (see, to that effect, judgment of 24 September 2019, *GC and Others (De-referencing of sensitive data)* (C-136/17, EU:C:2019:773, paragraph 60).

62 In that regard, it should be noted, first of all, that, while the data subject's rights protected by Articles 7 and 8 of the Charter override, as a general rule, the legitimate interest of internet users who may be interested in accessing the information in question, that balance may, however, depend on the relevant circumstances of each case, in particular on the nature of that information 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 (judgments of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 81, and of 24 September 2019, *GC and Others (De-referencing of sensitive data)*, C-136/17, EU:C:2019:773, paragraph 66).

63 In particular, where the data subject plays a role in public life, that person must display a greater degree of tolerance, since he or she is inevitably and knowingly exposed to public scrutiny (see, to that effect, ECtHR, 6 October 2022, *Khural and Zeynalov v. Azerbaijan*, CE:ECHR:2022:1006JUD005506911, § 41 and the case-law cited).

64 The question of whether or not the referenced content is accurate also constitutes a relevant factor when assessing the conditions for application laid down in Article 17(3)(a) of the GDPR, for the purpose of assessing whether the right of internet users to information and the content provider's freedom of expression may override the rights of the person requesting de-referencing.

65 In that regard, and as stated, in essence, by the Advocate General in point 30 of his Opinion, while, in certain circumstances, the right to freedom of expression and information may override the rights to private life and to protection of personal data, in particular where the data subject plays a role in public life, that relationship is in any event reversed where, at the very least, a part – which is not minor in relation to the content as a whole – of the information referred to in the request for de-referencing proves to be inaccurate. In such a situation, the right to inform and the right to be informed cannot be taken into account, since they cannot include the right to disseminate and have access to such information.

66 It should be added that, while the issue of whether or not the assertions in the referenced content are accurate is relevant for the application of Article 17(3)(a) of the GDPR, a distinction must be drawn between factual assertions and value judgements. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof (see, to that effect, ECtHR, 23 April 2015, *Morice v. France*, CE:ECHR:2015:0423JUD002936910, § 126).

67 Next, it is necessary to determine, first, whether, and if so to what extent, it is for the person who has submitted the request for de-referencing to provide evidence to support his or her claim relating to the inaccuracy of the information in the referenced content and, second, whether the operator of the search engine must seek to clarify the facts itself in order to establish whether the allegedly inaccurate information is or is not accurate.

68 As regards, in the first place, the obligations of the person requesting de-referencing on account of the referenced content being inaccurate, it is for that person to establish the manifest inaccuracy of the information found in that content or, at the very least, of a part – which is not minor in relation to the content as a whole – of that information. However, in order to avoid imposing on that person an excessive burden which is liable to undermine the practical effect of the right to de-referencing, that person has to provide only evidence that, in the light of the circumstances of the particular case, can reasonably be required of him or her to try to find in order to establish that manifest inaccuracy. In that regard, that person cannot be required, in principle, to produce, as from the pre-litigation stage, in support of his or her request for de-referencing made to the operator of the search engine, a judicial decision made against the publisher of the website in question, even in the form of a decision given in interim proceedings. To impose such an obligation on that person would have the effect of imposing an unreasonable burden on him or her.

69 As regards, in the second place, the obligations and responsibilities incumbent on the operator of the search engine, it is true that the operator of the search engine must, in order to determine whether content may continue to be included in the list of search results carried out using its search engine following a request for de-referencing, take into account all the rights and interests involved and all the circumstances of the case.

70 However, when assessing the conditions for application laid down in Article 17(3)(a) of the GDPR, that operator cannot be required to play an active role in trying to find facts which are not substantiated by the request for de-referencing, for the purposes of determining whether that request is well founded.

71 Accordingly, when such a request is processed, the operator of the search engine concerned cannot be required to investigate the facts and, to that end, to organise an adversarial debate with the content provider seeking to obtain missing information concerning the accuracy of the referenced content. In so far as it would require the operator of the search engine to contribute to establishing itself whether or not the referenced content is accurate, such an obligation would impose on that operator a burden in excess of what can reasonably be expected of it in the light of its responsibilities, powers and capabilities, within the meaning of the case-law referred to in paragraph 53 of the present judgment. That obligation would thereby entail a serious risk that content meeting the public's legitimate and compelling need for information would be de-referenced and would thereby become difficult to find on the internet. In that regard, there would be a real risk of a deterrent effect on the exercise of freedom of expression and of information if the operator of the search engine undertook such a de-referencing exercise quasi-systematically, in order to avoid having to bear the burden of investigating the relevant facts for the purpose of establishing whether or not the referenced content was accurate.

72 Accordingly, where the person who has made a request for de-referencing submits relevant and sufficient evidence capable of substantiating his or her request and of establishing the manifest inaccuracy of the information found in the referenced content or, at the very least, of a part – which is not minor in relation to the content as a whole – of that information, the operator of the search engine is required to accede to that request for de-referencing. The same applies where the data subject submits a judicial decision made against the publisher of the website, which is based on the finding that information found in the referenced content – which is not minor in relation to that content as a whole – is, at least prima facie, inaccurate.

73 By contrast, where the inaccuracy of such information found in the referenced content is not obvious, in the light of the evidence provided by the data subject, the operator of the search engine is not required, where there is no such judicial decision, to accede to such a request for de-referencing. Where the information in question is likely to contribute to a debate of public interest, it is appropriate, in the light of all the circumstances of the case, to place particular importance on the right to freedom of expression and of information.

74 It should be added that, in accordance with what has been stated in paragraph 65 of the present judgment, it would also be disproportionate to de-reference articles, with the result that accessing all of them on the internet would be difficult, in a situation where only certain information of minor importance, in relation to the content found in those articles as a whole, proves to be inaccurate.

75 Lastly, it must be stated that, where the operator of a search engine does not grant the request for de-referencing, the data subject must be able to bring the matter before the supervisory authority or the judicial authority so that it carries out the necessary checks and orders that controller to adopt the necessary measures (see, to that effect, judgment of 13 May 2014, *Google Spain and Google* (C-131/12, EU:C:2014:317, paragraph 77). It is, in particular, for the judicial authorities to ensure a balance is struck between competing interests, since they are best placed to carry out a complex and detailed balancing exercise, which takes account of all the criteria and

all the factors established by the relevant case-law of the Court of Justice and of the European Court of Human Rights.

76 However, where administrative or judicial proceedings concerning the alleged inaccuracy of information found in referenced content are initiated and where the existence of those proceedings has been brought to the attention of the operator of the search engine concerned, it is for that operator, for the purposes, inter alia, of providing internet users with information which continues to be relevant and up-to-date, to add to the search results a warning concerning the existence of such proceedings.

77 In the light of all the foregoing, the answer to the first question is that Article 17(3)(a) of the GDPR must be interpreted as meaning that, within the context of the weighing-up exercise which is to be undertaken between the rights referred to in Articles 7 and 8 of the Charter, on the one hand, and those referred to in Article 11 of the Charter, on the other hand, for the purposes of examining a request for de-referencing made to the operator of a search engine seeking the removal of a link to content containing claims which the person who submitted the request regards as inaccurate from the list of search results, that de-referencing is not subject to the condition that the question of the accuracy of the referenced content has been resolved, at least provisionally, in an action brought by that person against the content provider.

The second question

The applicable law ratione temporis

78 By its second question, the referring court requests an interpretation of Article 12(b) and point (a) of the first paragraph of Article 14 of Directive 95/46 as well as of Article 17(3)(a) of the GDPR. It states, in that regard, that, while the request to have Google de-reference, on a long-term basis, the links to the articles at issue in the main proceedings falls ratione temporis within the scope of the GDPR, the request that Google put an end to the display, in the form of thumbnails, of photographs of the applicants in the main proceedings contained in the 4 June 2015 article falls ratione temporis within the scope of Directive 95/46, given that those photographs, unlike the links, were no longer displayed by the search engine operated by Google on the date when the GDPR entered into force.

79 In that regard, there is no need to distinguish between the provisions of Directive 95/46 and those of the GDPR referred to in the second question referred for a preliminary ruling, since the scope of all of those provisions must be regarded as similar for the purposes of the interpretation which the Court is required to give in the present case (see, by analogy, judgment of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, C-184/20, EU:C:2022:601, paragraph 58 and the case-law cited).

80 Consequently, in order to provide useful answers to the second question, it must be examined from the perspective of both Directive 95/46 and the GDPR.

Admissibility

81 Google also expresses doubts as to whether the second question is admissible, on the ground that the problem which it raises is hypothetical. First of all, Google takes the view that the subject matter of the dispute in the main proceedings is not a request to de-reference the results of an image search carried out on the basis of the names of the applicants in the main proceedings, but rather a general prohibition on displaying thumbnails corresponding to photographs illustrating one of the three articles at issue in the main proceedings. Next, Google argues that the thumbnails have not been available on the g-net website since September 2017 and the articles since 28 June 2018. Lastly, Google states that it introduced a new version of its image search engine as from 2018, in which the abbreviated title of the internet page specifically referenced and the internet address or a part of it are displayed on the results page under each thumbnail in the form of an additional link.

82 Pursuant to the principles identified by the case-law of the Court referred to in paragraphs 41 and 42 of the present judgment, it must be stated, first of all, that, in the present case, it is not obvious from the file before the Court that the interpretation of the provisions of Directive 95/46 and the GDPR, as sought by the referring court in the context of the assessment of the substance of the request seeking to have the display of the photographs brought to an end, bears no relation to the actual facts of the main action or its purpose.

83 As regards, in particular, the fact that the photographs and articles at issue in the main proceedings no longer appear on the g-net website, it is important to note, as the referring court has observed, that the removal of that content appears to be merely temporary, as shown by the statement on the g-net website that it is 'currently' impossible to access those articles. In those circumstances, it cannot be ruled out that those articles may be re-posted online in the future and may once again be referenced by Google's search engine. That is all the more so since Google continues to take the view that the request for de-referencing at issue in the main proceedings is unjustified and since Google continues to refuse to accede to that request.

84 Moreover, the interest in a response from the Court concerning the interpretation of the relevant provisions of Directive 95/46 and of the GDPR, in the context of the request seeking to have brought to an end the display, in the form of thumbnails, of the photographs at issue in the case in the main proceedings, cannot be called into question either by the fact, relied on by Google, that the applicants in the main proceedings have not limited their request to searches on the basis of their names, or by the fact that Google has introduced a new version of its image search engine in which the abbreviated title of the internet page specifically referenced and the internet address or a part of it are displayed on the results page under each thumbnail in the form of an additional link.

85 First, even if the request of the applicants in the main proceedings to bring to an end the display, in the form of thumbnails, of the photographs representing them were not limited to searches carried out on the basis of their names, the fact remains that that request covers a display resulting from such searches. In those circumstances, it cannot be held that the interpretation sought by virtue of the second question clearly bears no relation to the actual facts of the main action or its purpose.

86 Second, as regards the introduction in the image search of an additional link showing the internet page on which they were originally published, in accordance with the settled case-law of the Court, it is for the national courts to establish the facts on the basis of which the dispute in the main proceedings must be resolved and to decide the extent to which subsequent developments in the search engine concerned are relevant in that regard.

87 It follows that the second question is admissible.

Substance

88 By its second question, the referring court asks, in essence, whether Article 12(b) and point (a) of the first paragraph of Article 14 of Directive 95/46 as well as Article 17(3)(a) of the GDPR must be interpreted as meaning that, in the context of the weighing-up exercise which is to be undertaken between the rights referred to in Articles 7 and 8 of the Charter, on the one hand, and those referred to in Articles 11 and 16 of the Charter, on the other hand, for the purposes of examining a request for de-referencing made to the operator of a search engine seeking the removal from the results of an image search carried out on the basis of the name of a natural person of photographs displayed in the form of thumbnails representing that person, the original context of the publication of those photographs on the internet must be conclusively taken into account.

89 That question thereby referred to the Court involves a request which seeks the removal of the photographs displayed in the form of thumbnails, which illustrated the article published on the g-net website on 4 June 2015, from the results of the image search carried out on the basis of the names of the applicants in the main proceedings. In that regard, the referring court seeks, in particular, to ascertain whether, for the purposes of assessing whether that request is well founded, account should be taken solely of the informative value of the thumbnails as such, in the neutral context of the list of results, or whether regard must also be had to the original context of the publication of the photographs, which is not apparent solely from the display of thumbnails in the context of the list of results.

90 As a preliminary point, it should be noted, as the Advocate General did in point 53 of his Opinion, that image searches carried out by means of an internet search engine on the basis of a person's name are subject to the same principles as those which apply to internet page searches and the information contained in them. The Court's case-law referred to in paragraphs 49 to 61 of the present judgment therefore also applies to the processing of a request for de-referencing which seeks the removal of photographs displayed in the form of thumbnails from the results of an image search.

91 In that regard, it is important to state, first of all, that the display, in the results of an image search, of photographs of natural persons in the form of thumbnails constitutes processing of personal data in respect of which the operator of the search engine concerned, as 'controller' within the meaning of Article 2(d) of Directive

95/46 and Article 4(7) of the GDPR, must, within the framework of its responsibilities, powers and capabilities, ensure compliance with the requirements contained in those provisions.

92 Next, it should be noted that the question referred concerns the specific method of searching for images offered by certain search engines, such as the search engine at issue in the main proceedings, by means of which internet users can search for information of any kind which takes the form of graphic content (photographs, representations of paintings, designs, graphs, tables, and so forth). When conducting such a search, the search engine generates a list of results consisting of thumbnails providing a link to internet pages containing both the search terms used and the graphic content set out in that list.

93 In that regard, it has been held that, since the inclusion in the list of results, displayed following a search made on the basis of a person's name, of an internet 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 that person 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 internet page (judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 87).

94 That is all the more so where, following a search by name, photographs of the data subject are displayed in the form of thumbnails, that display being such as to constitute a particularly significant interference with the data subject's rights to private life and that person's personal data referred to in Articles 7 and 8 of the Charter.

95 A person's image constitutes one of the chief attributes of his or her personality as it reveals the person's unique characteristics and distinguishes the person from others. The right to the protection of one's image is thus one of the essential components of personal development and mainly presupposes that person's control over the use of that image, including the right to refuse publication of it. It follows that, while freedom of expression and of information undoubtedly includes the publication of photographs, the protection of the right to privacy takes on particular importance in that context since photographs are capable of conveying particularly personal or even intimate information about an individual or his or her family (see, to that effect, ECtHR, 7 February 2012, *Von Hannover v. Germany*, CE:ECHR:2012:0207JUD004066008, §§ 95, 96 and 103 and the case-law cited).

96 Consequently, when the operator of a search engine receives a request for de-referencing which seeks the removal, from the results of an image search carried out on the basis of the name of a person, of photographs displayed in the form of thumbnails representing that person, it must ascertain whether displaying the photographs in question is necessary for exercising the right to freedom of information of internet users who are potentially interested in accessing those photographs by means of such a search, a right protected by Article 11 of the Charter (see, by analogy, judgment of 24 September 2019, *GC and Others (De-referencing of sensitive data)* (C-136/17, EU:C:2019:773, paragraph 66).

97 In that regard, the contribution to a debate of public interest is an essential factor to be taken into consideration when striking a balance between competing fundamental rights, for the purposes of assessing whether what prevails are (i) the data subject's rights to respect for private life and to protection of his or her personal data or (ii) the rights to freedom of expression and information.

98 In so far as the search engine displays photographs of the data subject outside the context in which they are published on the referenced internet page, most often in order to illustrate the text elements contained in that page, it is necessary to establish whether that context must nevertheless be taken into consideration when striking a balance between the competing rights and interests.

99 In that context, as the Advocate General observed in point 54 of his Opinion, the question whether that assessment must also include the content of the internet page containing the photograph displayed in the form of a thumbnail, the removal of which is sought, depends on the purpose and nature of the processing at issue.

100 As regards, in the first place, the purpose of the processing at issue, it should be noted that the publication of photographs as a non-verbal means of communication is likely to have a stronger impact on internet users than text publications. Photographs are, as such, an important means of attracting internet users' attention and may encourage an interest in accessing the articles they illustrate. Since, in particular, photographs are often open to a number of interpretations, displaying them in the list of search results as thumbnails may, in accordance with what has been stated in paragraph 95 of the present judgment, result in a particularly serious interference with the data

subject's right to protection of his or her image, which must be taken into account when weighing-up competing rights and interests.

101 Consequently, a separate weighing-up of competing rights and interests is required depending on whether the case concerns, on the one hand, articles containing photographs which are published on an internet page and which, when placed into their original context, illustrate the information provided in those articles and the opinions expressed in them, or, on the other hand, photographs displayed in the list of results in the form of thumbnails by the operator of a search engine outside the context in which they were published on the original internet page.

102 In that regard, it must be recalled that not only does the ground 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-up of the rights and interests at issue may differ according to whether the processing carried out by the operator of a search engine or that carried out by the publisher of that internet 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 or her private life, are not necessarily the same (judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 86).

103 As regards, in the second place, the nature of the processing carried out by the operator of the search engine, it must be observed, as did the Advocate General in point 55 of his Opinion, that, by retrieving the photographs of natural persons published on the internet and displaying them separately, in the results of an image search, in the form of thumbnails, the operator of a search engine offers a service in which it carries out autonomous processing of personal data which is distinct both from that of the publisher of the internet page from which the photographs are taken and from that, for which the operator is also responsible, of referencing that page.

104 Therefore, an autonomous assessment of the activity of the operator of the search engine, which consists of displaying results of an image search, in the form of thumbnails, is necessary, given that the additional interference with fundamental rights resulting from such activity may be particularly intense owing to the aggregation, in a search by name, of all information concerning the data subject which is found on the internet. In the context of that autonomous assessment, account must be taken of the fact that the display of the photographs in the form of thumbnails on the internet constitutes, in itself, the result sought by the internet user, regardless of his or her subsequent decision to access the original internet page or not.

105 It should be added that such a specific weighing-up exercise, which takes account of the autonomous nature of the data processing performed by the operator of the search engine, is without prejudice to the possible relevance of text elements which may directly accompany the display of a photograph in the list of search results, since such elements are capable of casting light on the informative value of that photograph for the public and, consequently, of influencing the weighing-up of the rights and interests involved.

106 In the present case, it is apparent from the observations in the order for reference that, while the photographs of the applicants in the main proceedings contribute, in the context of the 4 June 2015 article of which they form part, to conveying the information and opinions expressed therein, those photographs, outside that context, when they appear solely in the form of thumbnails in the list of results displayed following a search carried out by the search engine, have little informative value. It follows that, if the request for de-referencing of that article were to be rejected, on the ground that freedom of expression and of information must prevail over the rights of the applicants in the main proceedings to respect for their private life and to protection of their personal data, that fact would be without prejudice to the appropriate outcome of the request for removal of those photographs displayed in the form of thumbnails in the list of results.

107 By contrast, if the request for de-referencing of the 4 June 2015 article at issue were to be granted, the display, in the form of thumbnails, of the photographs contained in that article would have to be removed. If that display were retained, the practical effect of de-referencing the article would be compromised since internet users would continue to have access to the entire article, by virtue of the link contained in the thumbnails which leads to the internet page on which the article from which the thumbnails are taken is published.

108 In the light of all the foregoing, the answer to the second question is that Article 12(b) and point (a) of the first paragraph of Article 14 of Directive 95/46 as well as Article 17(3)(a) of the GDPR must be interpreted as meaning that, in the context of the weighing-up exercise which is to be undertaken between the rights referred to

in Articles 7 and 8 of the Charter, on the one hand, and those referred to in Article 11 of the Charter, on the other hand, for the purposes of examining a request for de-referencing made to the operator of a search engine seeking the removal from the results of an image search carried out on the basis of the name of a natural person of photographs displayed in the form of thumbnails representing that person, account must be taken of the informative value of those photographs regardless of the context of their publication on the internet page from which they are taken, but taking into consideration any text element which accompanies directly the display of those photographs in the search results and which is capable of casting light on the informative value of those photographs.

Costs

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

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

1. **Article 17(3)(a) of Regulation (EU) 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),**

must be interpreted as meaning that within the context of the weighing-up exercise which is to be undertaken between the rights referred to in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, on the one hand, and those referred to in Article 11 of the Charter of Fundamental Rights, on the other hand, for the purposes of examining a request for de-referencing made to the operator of a search engine seeking the removal of a link to content containing claims which the person who submitted the request regards as inaccurate from the list of search results, that de-referencing is not subject to the condition that the question of the accuracy of the referenced content has been resolved, at least provisionally, in an action brought by that person against the content provider.

2. **Article 12(b) and point (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, as well as Article 17(3)(a) of Regulation 2016/679**

must be interpreted as meaning that in the context of the weighing-up exercise which is to be undertaken between the rights referred to in Articles 7 and 8 of the Charter of Fundamental Rights, on the one hand, and those referred to in Article 11 of the Charter of Fundamental Rights, on the other hand, for the purposes of examining a request for de-referencing made to the operator of a search engine seeking the removal from the results of an image search carried out on the basis of the name of a natural person of photographs displayed in the form of thumbnails representing that person, account must be taken of the informative value of those photographs regardless of the context of their publication on the internet page from which they are taken, but taking into consideration any text element which accompanies directly the display of those photographs in the search results and which is capable of casting light on the informative value of those photographs.

LECTURE 9: EU-SPECIFIC FUNDAMENTAL RIGHTS: DATA PROTECTION (III)

In this lecture, we will focus on the open questions that remain after the entry into force of the GDPR. Particular attention will be paid to the consent-based mechnanism and new technologies, as discussed in the Opinion of the Advocate General in the Planet49 case and the divergences between the EU and U.S. approaches to data protection and the implications this may have on U.S. businesses such as Facebook. To illustrate the stakes at hand, the Schrems cases will be discussed in that context. In both cases, we will relate the discussion to the fundamental right-status of data protection in EU law and question to what extent that status may influence the shaping and interpretation of the GDPR provisions in the years to come..

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, 16 July 2020, C-311/18, *Schrems*, EU:C:2020:559.
- Court of Justice, 22 June 2023, Case C-579/21, *Pankki S.*, EU:C:2023:501.

Case C-311/18, *Schrems*

In Case C-311/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 4 May 2018, received at the Court on 9 May 2018, in the proceedings

Data Protection Commissioner

v

Facebook Ireland Ltd,

Maximillian Schrems,

intervening parties:

The United States of America,

Electronic Privacy Information Centre,

BSA Business Software Alliance Inc.,

Digitaleurope,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev, A. Prechal, M. Vilaras, M. Safjan, S. Rodin, P.G. Xuereb, L.S. Rossi and I. Jarukaitis, Presidents of Chambers, M. Ilešič, T. von Danwitz (Rapporteur), and D. Šváby, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 9 July 2019,

after considering the observations submitted on behalf of:

– the Data Protection Commissioner, by D. Young, Solicitor, B. Murray and M. Collins, Senior Counsel, and C. Donnelly, Barrister-at-Law,

– Facebook Ireland Ltd, by P. Gallagher and N. Hyland, Senior Counsel, A. Mulligan and F. Kieran, Barristers-at-Law, and P. Nolan, C. Monaghan, C. O'Neill and R. Woulfe, Solicitors,

– Mr Schrems, by H. Hofmann, Rechtsanwalt, E. McCullough, J. Doherty and S. O'Sullivan, Senior Counsel, and G. Rudden, Solicitor,

– the United States of America, by E. Barrington, Senior Counsel, S. Kingston, Barrister-at-Law, S. Barton and B. Walsh, Solicitors,

– the Electronic Privacy Information Centre, by S. Lucey, Solicitor, G. Gilmore and A. Butler, Barristers-at-Law, and C. O'Dwyer, Senior Counsel,

– BSA Business Software Alliance Inc., by B. Van Vooren and K. Van Quathem, advocaten,

– Digitaleurope, by N. Cahill, Barrister, J. Cahir, Solicitor, and M. Cush, Senior Counsel,

– Ireland, by A. Joyce and M. Browne, acting as Agents, and D. Fennelly, Barrister-at-Law,

– the Belgian Government, by J.-C. Halleux and P. Cottin, acting as Agents,

– the Czech Government, by M. Smolek, J. Vláčil, O. Serdula and A. Kasalická, acting as Agents,

– the German Government, by J. Möller, D. Klebs and T. Henze, acting as Agents,

– the French Government, by A.-L. Desjonquères, acting as Agent,

– the Netherlands Government, by C.S. Schillemans, M.K. Bulterman and M. Noort, acting as Agents,

– the Austrian Government, by J. Schmoll and G. Kunnert, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Portuguese Government, by L. Inez Fernandes, A. Pimenta and C. Vieira Guerra, acting as Agents,

– the United Kingdom Government, by S. Brandon, acting as Agent, and J. Holmes QC, and C. Knight, Barrister,

– the European Parliament, by M.J. Martínez Iglesias and A. Caiola, acting as Agents,

– the European Commission, by D. Nardi, H. Krämer and H. Kranenborg, acting as Agents,

– the European Data Protection Board (EDPB), by A. Jelinek and K. Behn, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 December 2019,

gives the following

Judgment

1 This reference for a preliminary ruling, in essence, concerns:

– the interpretation of the first indent of Article 3(2), Articles 25 and 26 and Article 28(3) 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), read in the light of Article 4(2) TEU and of Articles 7, 8 and 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’);

– the interpretation and validity of Commission Decision 2010/87/EU of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46 (OJ 2010 L 39, p. 5), as amended by Commission Implementing Decision (EU) 2016/2297 of 16 December 2016 (OJ 2016 L 344, p. 100) (‘the SCC Decision’); and

– the interpretation and validity of Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46 on the adequacy of the protection provided by the EU-US Privacy Shield (OJ 2016 L 207, p. 1; ‘the Privacy Shield Decision’).

2 The request has been made in proceedings between the Data Protection Commissioner (Ireland) (‘the Commissioner’), on the one hand, and Facebook Ireland Ltd and Maximillian Schrems, on the other, concerning a complaint brought by Mr Schrems concerning the transfer of his personal data by Facebook Ireland to Facebook Inc. in the United States.

Legal context

Directive 95/46

3 Article 3 of Directive 95/46, under the heading 'Scope', stated, in paragraph 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,

– …'

4 Article 25 of that directive provided:

'1. The Member States shall provide that the transfer to a third country of personal data … 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; …

…

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.'

5 Article 26(2) and (4) of the directive provided:

'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.

…

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.'

6 Pursuant to Article 28(3) of that directive:

'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 infringed or to bring those infringements to the attention of the judicial authorities.

…'

The GDPR

7 Directive 95/46 was repealed and replaced by Regulation (EU) 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 (General Data Protection Regulation) (OJ 2016 L 119, p. 1; 'the GDPR').

8 Recitals 6, 10, 101, 103, 104, 107 to 109, 114, 116 and 141 of the GDPR state:

'(6) Rapid technological developments and globalisation have brought new challenges for the protection of personal data. The scale of the collection and sharing of personal data has increased significantly. Technology allows both private companies and public authorities to make use of personal data on an unprecedented scale in order to pursue their activities. Natural persons increasingly make personal information available publicly and globally. Technology has transformed both the economy and social life, and should further facilitate the free flow of personal data within the Union and the transfer to third countries and international organisations, while ensuring a high level of the protection of personal data.

…

(10) In order to ensure a consistent and high level of protection of natural persons and to remove the obstacles to flows of personal data within the Union, the level of protection of the rights and freedoms of natural persons with regard to the processing of such data should be equivalent in all Member States. Consistent and homogenous application of the rules for the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data should be ensured throughout the Union. Regarding the processing of personal data for compliance with a legal obligation, for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, Member States should be allowed to maintain or introduce national provisions to further specify the application of the rules of this Regulation. In conjunction with the general and horizontal law on data protection implementing Directive 95/46/EC, Member States have several sector-specific laws in areas that need more specific provisions. This Regulation also provides a margin of manoeuvre for Member States to specify its rules, including for the processing of special categories of personal data ("sensitive data"). To that extent, this Regulation does not exclude Member State law that sets out the circumstances for specific processing situations, including determining more precisely the conditions under which the processing of personal data is lawful.

…

(101) Flows of personal data to and from countries outside the Union and international organisations are necessary for the expansion of international trade and international cooperation. The increase in these flows has raised new challenges and concerns with regard to the protection of personal data. However, when personal data are transferred from the Union to controllers, processors or other recipients in third countries or to international organisations, the level of protection of natural persons ensured in the Union by this Regulation should not be undermined, including in cases of onward transfers of personal data from the third country or international organisation to controllers, processors in the same or another third country or international organisation. In any event, transfers to third countries and international organisations may only be carried out in full compliance with this Regulation. A transfer could take place only if, subject to the other provisions of this Regulation, the conditions laid down in the provisions of this Regulation relating to the transfer of personal data to third countries or international organisations are complied with by the controller or processor.

…

(103) The Commission may decide with effect for the entire Union that a third country, a territory or specified sector within a third country, or an international organisation, offers an adequate level of data protection, thus providing legal certainty and uniformity throughout the Union as regards the third country or international organisation which is considered to provide such level of protection. In such cases, transfers of personal data to that third country or international organisation may take place without the need to obtain any further authorisation. The Commission may also decide, having given notice and a full statement setting out the reasons to the third country or international organisation, to revoke such a decision.

(104) In line with the fundamental values on which the Union is founded, in particular the protection of human rights, the Commission should, in its assessment of the third country, or of a territory or specified sector within a third country, take into account how a particular third country respects the rule of law, access to justice as well as international human rights norms and standards and its general and sectoral law, including legislation concerning public security, defence and national security as well as public order and criminal law. The adoption of an adequacy decision with regard to a territory or a specified sector in a third country should take into account clear and objective criteria, such as specific processing activities and the scope of applicable legal standards and legislation in force in the third country. The third country should offer guarantees ensuring an adequate level of protection essentially equivalent to that ensured within the Union, in particular where personal data are processed in one or several specific sectors. In particular, the third country should ensure effective independent data protection supervision and should provide for cooperation mechanisms with the Member States' data protection authorities, and the data subjects should be provided with effective and enforceable rights and effective administrative and judicial redress.

…

(107) The Commission may recognise that a third country, a territory or a specified sector within a third country, or an international organisation no longer ensures an adequate level of data protection. Consequently the transfer of personal data to that third country or international organisation should be prohibited, unless the requirements in this Regulation relating to transfers subject to appropriate safeguards, including binding corporate rules, and derogations for specific situations are fulfilled. In that case, provision should be made for consultations between the Commission and such third countries or international organisations. The Commission should, in a timely manner, inform the third country or international organisation of the reasons and enter into consultations with it in order to remedy the situation.

(108) In the absence of an adequacy decision, the controller or processor should take measures to compensate for the lack of data protection in a third country by way of appropriate safeguards for the data subject. Such appropriate safeguards may consist of making use of binding corporate rules, standard data protection clauses adopted by the Commission, standard data protection clauses adopted by a supervisory authority or contractual clauses authorised by a supervisory authority. Those safeguards should ensure compliance with data protection requirements and the rights of the data subjects appropriate to processing within the Union, including the availability of enforceable data subject rights and of effective legal remedies, including to obtain effective administrative or judicial redress and to claim compensation, in the Union or in a third country. They should relate in particular to compliance with the general principles relating to personal data processing, the principles of data protection by design and by default. …

(109) The possibility for the controller or processor to use standard data-protection clauses adopted by the Commission or by a supervisory authority should prevent controllers or processors neither from including the standard data-protection clauses in a wider contract, such as a contract between the processor and another processor, nor from adding other clauses or additional safeguards provided that they do not contradict, directly or indirectly, the standard contractual clauses adopted by the Commission or by a supervisory authority or prejudice the fundamental rights or freedoms of the data subjects. Controllers and processors should be encouraged to provide additional safeguards via contractual commitments that supplement standard protection clauses.

…

(114) In any case, where the Commission has taken no decision on the adequate level of data protection in a third country, the controller or processor should make use of solutions that provide data subjects with enforceable and effective rights as regards the processing of their data in the Union once those data have been transferred so that that they will continue to benefit from fundamental rights and safeguards.

…

(116) When personal data moves across borders outside the Union it may put at increased risk the ability of natural persons to exercise data protection rights in particular to protect themselves from the unlawful use or disclosure of that information. At the same time, supervisory authorities may find that they are unable to pursue complaints or conduct investigations relating to the activities outside their borders. Their efforts to work together in the cross-border context may also be hampered by insufficient preventative or remedial powers, inconsistent legal regimes, and practical obstacles like resource constraints. …

…

(141) Every data subject should have the right to lodge a complaint with a single supervisory authority, in particular in the Member State of his or her habitual residence, and the right to an effective judicial remedy in accordance with Article 47 of the Charter if the data subject considers that his or her rights under this Regulation are infringed or where the supervisory authority does not act on a complaint, partially or wholly rejects or dismisses a complaint or does not act where such action is necessary to protect the rights of the data subject. …'

9 Article 2(1) and (2) of the GDPR provides:

'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.'

10 Article 4 of the GDPR provides:

'For the purposes of this Regulation:

…

(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;

…

(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;

…’

11 Article 23 of the GDPR states:

‘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;

…

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.’

12 Chapter V of the GDPR, under the heading ‘Transfers of personal data to third countries or international organisations’, contains Articles 44 to 50 of that regulation. According to Article 44 thereof, under the heading ‘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.'

13 Article 45 of the GDPR, under the heading 'Transfers on the basis of an adequacy decision', provides, in paragraphs 1 to 3:

'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).'

14 Article 46 of the GDPR, under the heading 'Transfers subject to appropriate safeguards', provides, in paragraphs 1 to 3:

'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.'

15 Article 49 of the GDPR, under the heading 'Derogations for specific situations', states:

'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.'

16 Under Article 51(1) of the GDPR:

'Each Member State shall provide for one or more independent public authorities to be responsible for monitoring the application of this Regulation, in order to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the Union ("supervisory authority").'

17 In accordance with Article 55(1) of the GDPR, 'each supervisory authority shall be competent for the performance of the tasks assigned to and the exercise of the powers conferred on it in accordance with this Regulation on the territory of its own Member State'.

18 Article 57(1) of that regulation states as follows:

'Without prejudice to other tasks set out under this Regulation, each supervisory authority shall on its territory:

(a) monitor and enforce the application of this Regulation;

…

(f) handle complaints lodged by a data subject … and investigate, to the extent appropriate, the subject matter of the complaint and inform the complainant of the progress and the outcome of the investigation within a reasonable period, in particular if further investigation or coordination with another supervisory authority is necessary;

…'

19 According to Article 58(2) and (4) of the GDPR:

'2. Each supervisory authority shall have all of the following corrective powers:

…

(f) to impose a temporary or definitive limitation including a ban on processing;

…

(j) to order the suspension of data flows to a recipient in a third country or to an international organisation.

…

4. The exercise of the powers conferred on the supervisory authority pursuant to this Article shall be subject to appropriate safeguards, including effective judicial remedy and due process, set out in Union and Member State law in accordance with the Charter.'

20 Article 64(2) of the GDPR states:

'Any supervisory authority, the Chair of the [European Data Protection Board (EDPB)] or the Commission may request that any matter of general application or producing effects in more than one Member State be examined by the Board with a view to obtaining an opinion, in particular where a competent supervisory authority does not comply with the obligations for mutual assistance in accordance with Article 61 or for joint operations in accordance with Article 62.'

21 Under Article 65(1) of the GDPR:

'In order to ensure the correct and consistent application of this Regulation in individual cases, the Board shall adopt a binding decision in the following cases:

…

(c) where a competent supervisory authority does not request the opinion of the Board in the cases referred to in Article 64(1), or does not follow the opinion of the Board issued under Article 64. In that case, any supervisory authority concerned or the Commission may communicate the matter to the Board.'

22 Article 77 of the GDPR, under the heading 'Right to lodge a complaint with a supervisory authority', states:

'1. Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with a supervisory authority, in particular in the Member State of his or her habitual residence, place of work or place of the alleged infringement if the data subject considers that the processing of personal data relating to him or her infringes this Regulation.

2. The supervisory authority with which the complaint has been lodged shall inform the complainant on the progress and the outcome of the complaint including the possibility of a judicial remedy pursuant to Article 78.'

23 Article 78 of the GDPR, under the heading 'Right to an effective judicial remedy against a supervisory authority', provides, in paragraphs 1 and 2:

'1. Without prejudice to any other administrative or non-judicial remedy, each natural or legal person shall have the right to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them.

2. Without prejudice to any other administrative or non-judicial remedy, each data subject shall have the right to [an] effective judicial remedy where the supervisory authority which is competent pursuant to Articles 55 and 56 does not handle a complaint or does not inform the data subject within three months on the progress or outcome of the complaint lodged pursuant to Article 77.'

24 Article 94 of the GDPR provides:

'1. Directive [95/46] is repealed with effect from 25 May 2018.

2. References to the repealed Directive shall be construed as references to this Regulation. References to the Working Party on the Protection of Individuals with regard to the Processing of Personal Data established by

Article 29 of Directive [95/46] shall be construed as references to the European Data Protection Board established by this Regulation.'

25 Pursuant to Article 99 of the GDPR:

'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.'

The SCC Decision

26 Recital 11 of the SCC Decision reads as follows:

'Supervisory authorities of the Member States play a key role in this contractual mechanism in ensuring that personal data are adequately protected after the transfer. In exceptional cases where data exporters refuse or are unable to instruct the data importer properly, with an imminent risk of grave harm to the data subjects, the standard contractual clauses should allow the supervisory authorities to audit data importers and sub-processors and, where appropriate, take decisions which are binding on data importers and sub-processors. The supervisory authorities should have the power to prohibit or suspend a data transfer or a set of transfers based on the standard contractual clauses in those exceptional cases where it is established that a transfer on contractual basis is likely to have a substantial adverse effect on the warranties and obligations providing adequate protection for the data subject.'

27 Article 1 of the SCC Decision states:

'The standard contractual clauses set out in the Annex are considered as offering 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 as required by Article 26(2) of Directive [95/46].'

28 In accordance with the second paragraph of Article 2 of the SCC Decision, that decision 'shall apply to the transfer of personal data by controllers established in the European Union to recipients established outside the territory of the European Union who act only as data processors'.

29 Article 3 of the SCC Decision provides:

'For the purposes of this Decision, the following definitions shall apply:

…

(c) "data exporter" means the controller who transfers the personal data;

(d) "data importer" means the processor established in a third country who agrees to receive from the data exporter personal data intended for processing on the data exporter's behalf after the transfer in accordance with his instructions and the terms of this Decision and who is not subject to a third country's system ensuring adequate protection within the meaning of Article 25(1) of Directive [95/46];

…

(f) "applicable data protection law" means the legislation protecting the fundamental rights and freedoms of individuals and, in particular, their right to privacy with respect to the processing of personal data applicable to a data controller in the Member State in which the data exporter is established;

…'

30 According to its original wording, prior to the entry into force of Implementing Decision 2016/2297, Article 4 of Decision 2010/87 provided:

‘1. ‘Without prejudice to their powers to take action to ensure compliance with national provisions adopted pursuant to Chapters II, III, V and VI of Directive [95/46], the competent authorities in the Member States may exercise their existing powers to prohibit or suspend data flows to third countries in order to protect individuals with regard to the processing of their personal data in cases where:

(a) it is established that the law to which the data importer or a sub-processor is subject imposes upon him requirements to derogate from the applicable data protection law which go beyond the restrictions necessary in a democratic society as provided for in Article 13 of Directive [95/46] where those requirements are likely to have a substantial adverse effect on the guarantees provided by the applicable data protection law and the standard contractual clauses;

(b) a competent authority has established that the data importer or a sub-processor has not respected the standard contractual clauses in the Annex; or

(c) there is a substantial likelihood that the standard contractual clauses in the Annex are not being or will not be complied with and the continuing transfer would create an imminent risk of grave harm to the data subjects.

2. The prohibition or suspension pursuant to paragraph 1 shall be lifted as soon as the reasons for the suspension or prohibition no longer exist.

3. When Member States adopt measures pursuant to paragraphs 1 and 2, they shall, without delay, inform the Commission which will forward the information to the other Member States.’

31 Recital 5 of Implementing Decision 2016/2297, adopted after the judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650) was handed down, reads as follows:

‘*Mutatis mutandis*, a Commission decision adopted pursuant to Article 26(4) of Directive [95/46] is binding on all organs of the Member States to which it is addressed, including their independent supervisory authorities, in so far as it has the effect of recognising that transfers taking place on the basis of standard contractual clauses set out therein offer sufficient safeguards as required by Article 26(2) of that Directive. This does not prevent a national supervisory authority from exercising its powers to oversee data flows, including the power to suspend or ban a transfer of personal data when it determines that the transfer is carried out in violation of EU or national data protection law, such as, for instance, when the data importer does not respect the standard contractual clauses.’

32 According to its current wording, resulting from Implementing Decision 2016/2297, Article 4 of the SCC Decision states:

‘Whenever the competent authorities in Member States exercise their powers pursuant to Article 28(3) of Directive [95/46] leading to the suspension or definitive ban of data flows to third countries in order to protect individuals with regard to the processing of their personal data, the Member State concerned shall, without delay, inform the Commission which will forward the information to the other Member States.’

33 The annex to the SCC Decision, under the heading ‘Standard Contractual Clauses (Processors)’, is comprised of 12 standard clauses. Clause 3 thereof, itself under the heading ‘Third-party beneficiary clause’, provides:

‘1. The data subject can enforce against the data exporter this Clause, Clause 4(b) to (i), Clause 5(a) to (e), and (g) to (j), Clause 6(1) and (2), Clause 7, Clause 8(2), and Clauses 9 to 12 as third-party beneficiary.

2. The data subject can enforce against the data importer this Clause, Clause 5(a) to (e) and (g), Clause 6, Clause 7, Clause 8(2), and Clauses 9 to 12, in cases where the data exporter has factually disappeared or has ceased to exist in law unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law, as a result of which it takes on the rights and obligations of the data exporter, in which case the data subject can enforce them against such entity.

…’

34 According to Clause 4 in that annex, under the heading ‘Obligations of the data exporter’:

‘The data exporter agrees and warrants:

(a) that the processing, including the transfer itself, of the personal data has been and will continue to be carried out in accordance with the relevant provisions of the applicable data protection law (and, where applicable, has been notified to the relevant authorities of the Member State where the data exporter is established) and does not violate the relevant provisions of that State;

(b) that it has instructed and throughout the duration of the personal data-processing services will instruct the data importer to process the personal data transferred only on the data exporter’s behalf and in accordance with the applicable data protection law and the Clauses;

…

(f) that, if the transfer involves special categories of data, the data subject has been informed or will be informed before, or as soon as possible after, the transfer that its data could be transmitted to a third country not providing adequate protection within the meaning of Directive [95/46];

(g) to forward any notification received from the data importer or any sub-processor pursuant to Clause 5(b) and Clause 8(3) to the data protection supervisory authority if the data exporter decides to continue the transfer or to lift the suspension;

…’

35 Clause 5 in that annex, under the heading ‘Obligations of the data importer …’, provides:

‘The data importer agrees and warrants:

(a) to process the personal data only on behalf of the data exporter and in compliance with its instructions and the Clauses; if it cannot provide such compliance for whatever reasons, it agrees to inform promptly the data exporter of its inability to comply, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;

(b) that it has no reason to believe that the legislation applicable to it prevents it from fulfilling the instructions received from the data exporter and its obligations under the contract and that in the event of a change in this legislation which is likely to have a substantial adverse effect on the warranties and obligations provided by the Clauses, it will promptly notify the change to the data exporter as soon as it is aware, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;

…

(d) that it will promptly notify the data exporter about:

(i) any legally binding request for disclosure of the personal data by a law enforcement authority unless otherwise prohibited, such as a prohibition under criminal law to preserve the confidentiality of a law enforcement investigation;

(ii) any accidental or unauthorised access; and

(iii) any request received directly from the data subjects without responding to that request, unless it has been otherwise authorised to do so;

…’

36 The footnote to the heading of Clause 5 states:

‘Mandatory requirements of the national legislation applicable to the data importer which do not go beyond what is necessary in a democratic society on the basis of one of the interests listed in Article 13(1) of Directive [95/46], that is, if they constitute a necessary measure to safeguard national security, defence, public security, the prevention, investigation, detection and prosecution of criminal offences or of breaches of ethics for the regulated professions, an important economic or financial interest of the State or the protection of the data subject or the rights and freedoms of others, are not in contradiction with the standard contractual clauses. …’

37 Clause 6 in the annex to the SCC Decision, under the heading ‘Liability’, provides:

‘1. The parties agree that any data subject, who has suffered damage as a result of any breach of the obligations referred to in Clause 3 or in Clause 11 by any party or sub-processor is entitled to receive compensation from the data exporter for the damage suffered.

2. If a data subject is not able to bring a claim for compensation in accordance with paragraph 1 against the data exporter, arising out of a breach by the data importer or his sub-processor of any of their obligations referred to in Clause 3 or in Clause 11, because the data exporter has factually disappeared or ceased to exist in law or has become insolvent, the data importer agrees that the data subject may issue a claim against the data importer as if it were the data exporter …

…’

38 Clause 8 in that annex, under the heading ‘Cooperation with supervisory authorities’, stipulates, in paragraph 2 thereof:

‘The parties agree that the supervisory authority has the right to conduct an audit of the data importer, and of any sub-processor, which has the same scope and is subject to the same conditions as would apply to an audit of the data exporter under the applicable data protection law.’

39 Clause 9 in that annex, under the heading ‘Governing law’, specifies that the clauses are to be governed by the law of the Member State in which the data exporter is established.

40 According to Clause 11 in that annex, under the heading ‘Sub-processing’:

‘1. The data importer shall not subcontract any of its processing operations performed on behalf of the data exporter under the Clauses without the prior written consent of the data exporter. Where the data importer subcontracts its obligations under the Clauses, with the consent of the data exporter, it shall do so only by way of a written agreement with the sub-processor which imposes the same obligations on the sub-processor as are imposed on the data importer under the Clauses …

2. The prior written contract between the data importer and the sub-processor shall also provide for a third-party beneficiary clause as laid down in Clause 3 for cases where the data subject is not able to bring the claim for compensation referred to in paragraph 1 of Clause 6 against the data exporter or the data importer because they have factually disappeared or have ceased to exist in law or have become insolvent and no successor entity has assumed the entire legal obligations of the data exporter or data importer by contract or by operation of law. Such third-party liability of the sub-processor shall be limited to its own processing operations under the Clauses.

…’

41 Clause 12 in the annex to the SCC Decision, under the heading ‘Obligation after the termination of personal data-processing services’, states, in paragraph 1 thereof:

‘The parties agree that on the termination of the provision of data-processing services, the data importer and the sub-processor shall, at the choice of the data exporter, return all the personal data transferred and the copies thereof to the data exporter or shall destroy all the personal data and certify to the data exporter that it has done so, unless legislation imposed upon the data importer prevents it from returning or destroying all or part of the personal data transferred. …’

The Privacy Shield Decision

42 In the judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650), the Court declared Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council 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), in which the Commission had found that that third country ensured an adequate level of protection, invalid.

43 Following the delivery of that judgment, the Commission adopted the Privacy Shield Decision, after having, for the purposes of adopting that decision, assessed the US legislation, as stated in recital 65 of the decision:

'The Commission has assessed the limitations and safeguards available in U.S. law as regards access and use of personal data transferred under the EU-U.S. Privacy Shield by U.S. public authorities for national security, law enforcement and other public interest purposes. In addition, the U.S. government, through its Office of the Director of National Intelligence (ODNI) …, has provided the Commission with detailed representations and commitments that are contained in Annex VI to this decision. By letter signed by the Secretary of State and attached as Annex III to this decision the U.S. government has also committed to create a new oversight mechanism for national security interference, the Privacy Shield Ombudsperson, who is independent from the Intelligence Community. Finally, a representation from the U.S. Department of Justice, contained in Annex VII to this decision, describes the limitations and safeguards applicable to access and use of data by public authorities for law enforcement and other public interest purposes. In order to enhance transparency and to reflect the legal nature of these commitments, each of the documents listed and annexed to this decision will be published in the U.S. Federal Register.'

44 The Commission's assessment of those limitations and guarantees is summarised in recitals 67 to 135 of the Privacy Shield Decision, while the Commission's conclusions on the adequate level of protection in the context of the EU-US Privacy Shield are set out in recitals 136 to 141 thereof.

45 In particular, Recitals 68, 69, 76, 77, 109, 112 to 116, 120, 136 and 140 of the Privacy Shield Decision state:

'(68) Under the U.S. Constitution, ensuring national security falls within the President's authority as Commander in Chief, as Chief Executive and, as regards foreign intelligence, to conduct U.S. foreign affairs … While Congress has the power to impose limitations, and has done so in various respects, within these boundaries the President may direct the activities of the U.S. Intelligence Community, in particular through Executive Orders or Presidential Directives. … At present, the two central legal instruments in this regard are Executive Order 12333 ("E.O. 12333") … and Presidential Policy Directive 28.

(69) Presidential Policy Directive 28 ("PPD-28"), issued on 17 January 2014, imposes a number of limitations for "signals intelligence" operations … This presidential directive has binding force for U.S. intelligence authorities … and remains effective upon change in the U.S. Administration … PPD-28 is of particular importance for non-US persons, including EU data subjects. …

…

(76) Although not phrased in … legal terms, [the] principles [of PPD-28] capture the essence of the principles of necessity and proportionality. …

(77) As a directive issued by the President as the Chief Executive, these requirements bind the entire Intelligence Community and have been further implemented through agency rules and procedures that transpose the general principles into specific directions for day-to-day operations. …

…

(109) Conversely, under Section 702 [of the Foreign Intelligence Surveillance Act (FISA)], the [United States Foreign Intelligence Surveillance Court (FISC)] does not authorise individual surveillance measures; rather, it authorises surveillance programs (like PRISM, UPSTREAM) on the basis of annual certifications prepared by the [US] Attorney General and the Director of National Intelligence [(DNI)]. … As indicated, the certifications to be approved by the FISC contain no information about the individual persons to be targeted but rather identify categories of foreign intelligence information … While the FISC does not assess — under a probable cause or any

other standard — that individuals are properly targeted to acquire foreign intelligence information …, its control extends to the condition that "a significant purpose of the acquisition is to obtain foreign intelligence information" …

…

(112) First, the [FISA] provides a number of remedies, available also to non-U.S. persons, to challenge unlawful electronic surveillance … This includes the possibility for individuals to bring a civil cause of action for money damages against the United States when information about them has been unlawfully and wilfully used or disclosed …; to sue U.S. government officials in their personal capacity ("under colour of law") for money damages …; and to challenge the legality of surveillance (and seek to suppress the information) in the event the U.S. government intends to use or disclose any information obtained or derived from electronic surveillance against the individual in judicial or administrative proceedings in the United States …

(113) Second, the U.S. government referred the Commission to a number of additional avenues that EU data subjects could use to seek legal recourse against government officials for unlawful government access to, or use of, personal data, including for purported national security purposes …

(114) Finally, the U.S. government has pointed to the [Freedom of Information Act (FOIA)] as a means for non-U.S. persons to seek access to existing federal agency records, including where these contain the individual's personal data … Given its focus, the FOIA does not provide an avenue for individual recourse against interference with personal data as such, even though it could in principle enable individuals to get access to relevant information held by national intelligence agencies. …

(115) While individuals, including EU data subjects, therefore have a number of avenues of redress when they have been the subject of unlawful (electronic) surveillance for national security purposes, it is equally clear that at least some legal bases that U.S. intelligence authorities may use (e.g. E.O. 12333) are not covered. Moreover, even where judicial redress possibilities in principle do exist for non-U.S. persons, such as for surveillance under FISA, the available causes of action are limited … and claims brought by individuals (including U.S. persons) will be declared inadmissible where they cannot show "standing" …, which restricts access to ordinary courts …

(116) In order to provide for an additional redress avenue accessible for all EU data subjects, the U.S. government has decided to create a new Ombudsperson Mechanism as set out in the letter from the U.S. Secretary of State to the Commission which is contained in Annex III to this decision. This mechanism builds on the designation, under PPD-28, of a Senior Coordinator (at the level of Under-Secretary) in the State Department as a contact point for foreign governments to raise concerns regarding U.S. signals intelligence activities, but goes significantly beyond this original concept.

…

(120) … the U.S. government commits to ensure that, in carrying out its functions, the Privacy Shield Ombudsperson will be able to rely on the cooperation from other oversight and compliance review mechanisms existing in U.S. law. … Where any non-compliance has been found by one of these oversight bodies, the Intelligence Community element (e.g. an intelligence agency) concerned will have to remedy the non-compliance as only this will allow the Ombudsperson to provide a "positive" response to the individual (i.e. that any non-compliance has been remedied) to which the U.S. government has committed. …

…

(136) In the light of [those] findings, the Commission considers that the United States ensures an adequate level of protection for personal data transferred from the Union to self-certified organisations in the United States under the EU-U.S. Privacy Shield.

…

(140) Finally, on the basis of the available information about the U.S. legal order, including the representations and commitments from the U.S. government, the Commission considers that any interference by U.S. public authorities with the fundamental rights of the persons whose data are transferred from the Union to the United

States under the Privacy Shield for national security, law enforcement or other public interest purposes, and the ensuing restrictions imposed on self-certified organisations with respect to their adherence to the Principles, will be limited to what is strictly necessary to achieve the legitimate objective in question, and that there exists effective legal protection against such interference.'

46 Under Article 1 of the Privacy Shield Decision:

'1. For the purposes of Article 25(2) of [Directive 95/46], the United States ensures an adequate level of protection for personal data transferred from the Union to organisations in the United States under the EU-U.S. Privacy Shield.

2. The EU-U.S. Privacy Shield is constituted by the Principles issued by the U.S. Department of Commerce on 7 July 2016 as set out in Annex II and the official representations and commitments contained in the documents listed in Annexes I [and] III to VII.

3. For the purpose of paragraph 1, personal data are transferred under the EU-U.S. Privacy Shield where they are transferred from the Union to organisations in the United States that are included in the "Privacy Shield List", maintained and made publicly available by the U.S. Department of Commerce, in accordance with Sections I and III of the Principles set out in Annex II.'

47 Under the heading 'EU-U.S. Privacy Shield Framework Principles issued by the U.S. Department of Commerce', Annex II to the Privacy Shield Decision, provides, in paragraph I.5 thereof, that adherence to those principles may be limited, inter alia, 'to the extent necessary to meet national security, public interest, or law enforcement requirements'.

48 Annex III to that decision contains a letter from Mr John Kerry, then Secretary of State (United States), to the Commissioner for Justice, Consumers and Gender Equality from 7 July 2016, to which a memorandum, Annex A, was attached, entitled 'EU-U.S. Privacy Shield Ombudsperson mechanism regarding signals intelligence', the latter of which contains the following passage:

'In recognition of the importance of the EU-U.S. Privacy Shield Framework, this Memorandum sets forth the process for implementing a new mechanism, consistent with [PPD-28], regarding signals intelligence …

… President Obama announced the issuance of a new presidential directive — PPD-28 — to "clearly prescribe what we do, and do not do, when it comes to our overseas surveillance."

Section 4(d) of PPD-28 directs the Secretary of State to designate a "Senior Coordinator for International Information Technology Diplomacy" (Senior Coordinator) "to […] serve as a point of contact for foreign governments who wish to raise concerns regarding signals intelligence activities conducted by the United States." …

…

1. … The Senior Coordinator will serve as the Privacy Shield Ombudsperson and … will work closely with appropriate officials from other departments and agencies who are responsible for processing requests in accordance with applicable United States law and policy. The Ombudsperson is independent from the Intelligence Community. The Ombudsperson reports directly to the Secretary of State who will ensure that the Ombudsperson carries out its function objectively and free from improper influence that is liable to have an effect on the response to be provided.

…'

49 Annex VI to the Privacy Shield Decision contains a letter from the Office of the Director of National Intelligence to the United States Department of Commerce and to the International Trade Administration from 21 June 2016, in which it is stated that PPD-28 allows for '"bulk" collection … of a relatively large volume of signals intelligence information or data under circumstances where the Intelligence Community cannot use an identifier associated with a specific target … to focus the collection'.

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

50 Mr Schrems, an Austrian national residing in Austria, has been a user of the Facebook social network ('Facebook') since 2008.

51 Any person residing in the European Union who wishes to use Facebook is required to conclude, at the time of his or her 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.

52 On 25 June 2013, Mr Schrems filed a complaint with the Commissioner whereby he requested, in essence, that Facebook Ireland be prohibited from transferring his personal data to the United States, on the ground 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 in which the public authorities were engaged. That complaint was rejected on the ground, inter alia, that, in Decision 2000/520, the Commission had found that the United States ensured an adequate level of protection.

53 The High Court (Ireland), before which Mr Schrems had brought judicial review proceedings against the rejection of his complaint, made a request to the Court for a preliminary ruling on the interpretation and validity of Decision 2000/520. In a judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650), the Court declared that decision invalid.

54 Following that judgment, the referring court annulled the rejection of Mr Schrems's complaint and referred that decision back to the Commissioner. In the course of the Commissioner's investigation, Facebook Ireland explained that a large part of personal data was transferred to Facebook Inc. pursuant to the standard data protection clauses set out in the annex to the SCC Decision. On that basis, the Commissioner asked Mr Schrems to reformulate his complaint.

55 In his reformulated complaint lodged on 1 December 2015, Mr Schrems claimed, inter alia, that United States law requires Facebook Inc. to make the personal data transferred to it available to certain United States authorities, such as the National Security Agency (NSA) and the Federal Bureau of Investigation (FBI). He submitted that, since that data was used in the context of various monitoring programmes in a manner incompatible with Articles 7, 8 and 47 of the Charter, the SCC Decision cannot justify the transfer of that data to the United States. In those circumstances, Mr Schrems asked the Commissioner to prohibit or suspend the transfer of his personal data to Facebook Inc.

56 On 24 May 2016, the Commissioner published a 'draft decision' summarising the provisional findings of her investigation. In that draft decision, she took the provisional view that the personal data of EU citizens transferred to the United States were likely to be consulted and processed by the US authorities in a manner incompatible with Articles 7 and 8 of the Charter and that US law did not provide those citizens with legal remedies compatible with Article 47 of the Charter. The Commissioner found that the standard data protection clauses in the annex to the SCC Decision are not capable of remedying that defect, since they confer only contractual rights on data subjects against the data exporter and importer, without, however, binding the United States authorities.

57 Taking the view that, in those circumstances, Mr Schrems's reformulated complaint raised the issue of the validity of the SCC Decision, on 31 May 2016, the Commissioner brought an action before the High Court, relying on the case-law arising from the judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraph 65), in order for the High Court to refer a question on that issue to the Court. By order of 4 May 2018, the High Court made the present reference for a preliminary ruling to the Court.

58 In an annex to the order for reference, the High Court provided a copy of a judgment handed down on 3 October 2017, in which it had set out the results of an examination of the evidence produced before it in the national proceedings, in which the US Government had participated.

59 In that judgment, to which the request for a preliminary ruling refers on several occasions, the referring court stated that, as a matter of principle, it is not only entitled, but is obliged, to consider all of the facts and

arguments presented to it and to decide on the basis of those facts and arguments whether or not a reference is required. The High Court considers that, in any event, it is required to take into account any amendments that may have occurred in the interval between the institution of the proceedings and the hearing which it held. That court stated that, in the main proceedings, its own assessment is not confined to the grounds of invalidity put forward by the Commissioner, as a result of which it may of its own motion decide that there are other well-founded grounds of invalidity and, on those grounds, refer questions for a preliminary ruling.

60 According to the findings in that judgment, the US authorities' intelligence activities concerning the personal data transferred to the United States are based, inter alia, on Section 702 of the FISA and on E.O. 12333.

61 In its judgment, the referring court specifies that Section 702 of the FISA permits the Attorney General and the Director of National Intelligence to authorise jointly, following FISC approval, the surveillance of individuals who are not United States citizens located outside the United States in order to obtain 'foreign intelligence information', and provides, inter alia, the basis for the PRISM and UPSTREAM surveillance programmes. In the context of the PRISM programme, Internet service providers are required, according to the findings of that court, to supply the NSA with all communications to and from a 'selector', some of which are also transmitted to the FBI and the Central Intelligence Agency (CIA).

62 As regards the UPSTREAM programme, that court found that, in the context of that programme, telecommunications undertakings operating the 'backbone' of the Internet — that is to say, the network of cables, switches and routers — are required to allow the NSA to copy and filter Internet traffic flows in order to acquire communications from, to or about a non-US national associated with a 'selector'. Under that programme, the NSA has, according to the findings of that court, access both to the metadata and to the content of the communications concerned.

63 The referring court found that E.O. 12333 allows the NSA to access data 'in transit' to the United States, by accessing underwater cables on the floor of the Atlantic, and to collect and retain such data before arriving in the United States and being subject there to the FISA. It adds that activities conducted pursuant to E.O. 12333 are not governed by statute.

64 As regards the limits on intelligence activities, the referring court emphasises the fact that non-US persons are covered only by PPD-28, which merely states that intelligence activities should be 'as tailored as feasible'. On the basis of those findings, the referring court considers that the United States carries out mass processing of personal data without ensuring a level of protection essentially equivalent to that guaranteed by Articles 7 and 8 of the Charter.

65 As regards judicial protection, the referring court states that EU citizens do not have the same remedies as US citizens in respect of the processing of personal data by the US authorities, since the Fourth Amendment to the Constitution of the United States, which constitutes, in United States law, the most important cause of action available to challenge unlawful surveillance, does not apply to EU citizens. In that regard, the referring court states that there are substantial obstacles in respect of the causes of action open to EU citizens, in particular that of *locus standi*, which it considers to be excessively difficult to satisfy. Furthermore, according to the findings of the referring court, the NSA's activities based on E.O. 12333 are not subject to judicial oversight and are not justiciable. Lastly, the referring court considers that, in so far as, in its view, the Privacy Shield Ombudsperson is not a tribunal within the meaning of Article 47 of the Charter, US law does not afford EU citizens a level of protection essentially equivalent to that guaranteed by the fundamental right enshrined in that article.

66 In its request for reference preliminary ruling, the referring court also states that the parties to the main proceedings disagree, inter alia, on the applicability of EU law to transfers to a third country of personal data which are likely to be processed by the authorities of that country, inter alia, for purposes of national security and on the factors to be taken into consideration for the purposes of assessing whether that country ensures an adequate level of protection. In particular, that court notes that, according to Facebook Ireland, the Commission's findings on the adequacy of the level of protection ensured by a third country, such as those set out in the Privacy Shield Decision, are also binding on the supervisory authorities in the context of a transfer of personal data pursuant to the standard data protection clauses in the annex to the SCC Decision.

67 As regards those standard data protection clauses, that court asks whether the SCC Decision may be considered to be valid, despite the fact that, according to that court, those clauses are not binding on the State

authorities of the third country concerned and, therefore, are not capable of remedying a possible lack of an adequate level of protection in that country. In that regard, it considers that the possibility, afforded to the competent authorities in the Member States by Article 4(1)(a) of Decision 2010/87, in its version prior to the entry into force of Implementing Decision 2016/2297, of prohibiting transfers of personal data to a third country that imposes requirements on the importer that are incompatible with the guarantees contained in those clauses, demonstrates that the state of the law in the third country can justify prohibiting the transfer of data, even when carried out pursuant to the standard data protection clauses in the annex to the SCC Decision, and therefore makes clear that those requirements may be insufficient in ensuring an adequate level of protection. Nonetheless, the referring court harbours doubts as to the extent of the Commissioner's power to prohibit a transfer of data based on those clauses, despite taking the view that discretion cannot be sufficient to ensure adequate protection.

68 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) In circumstances in which personal data is transferred by a private company from a European Union (EU) Member State to a private company in a third country for a commercial purpose pursuant to [the SCC Decision] and may be further processed in the third country by its authorities for purposes of national security but also for purposes of law enforcement and the conduct of the foreign affairs of the third country, does EU law (including the Charter) apply to the transfer of the data notwithstanding the provisions of Article 4(2) TEU in relation to national security and the provisions of the first indent of Article 3(2) of Directive [95/46] in relation to public security, defence and State security?

(2) (a) In determining whether there is a violation of the rights of an individual through the transfer of data from the [European Union] to a third country under the [SCC Decision] where it may be further processed for national security purposes, is the relevant comparator for the purposes of [Directive 95/46]:

(i) the Charter, the EU Treaty, the FEU Treaty, [Directive 95/46], the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950] (or any other provision of EU law); or

(ii) the national laws of one or more Member States?

(b) If the relevant comparator is (ii), are the practices in the context of national security in one or more Member States also to be included in the comparator?

(3) When assessing whether a third country ensures the level of protection required by EU law to personal data transferred to that country for the purposes of Article 26 of [Directive 95/46], ought the level of protection in the third country be assessed by reference to:

(a) the applicable rules in the third country resulting from its domestic law or international commitments, and the practice designed to ensure compliance with those rules, to include the professional rules and security measures which are complied with in the third country;

or

(b) the rules referred to in (a) together with such administrative, regulatory and compliance practices and policy safeguards, procedures, protocols, oversight mechanisms and non-judicial remedies as are in place in the third country?

(4) Given the facts found by the High Court in relation to US law, if personal data is transferred from the European Union to the United States under [the SCC Decision] does this violate the rights of individuals under Articles 7 and/or 8 of the Charter?

(5) Given the facts found by the High Court in relation to US law, if personal data is transferred from the European Union to the United States under [the SCC Decision]:

(a) does the level of protection afforded by the United States respect the essence of an individual's right to a judicial remedy for breach of his or her data privacy rights guaranteed by Article 47 of the Charter?

If the answer to Question 5(a) is in the affirmative:

(b) are the limitations imposed by US law on an individual's right to a judicial remedy in the context of US national security proportionate within the meaning of Article 52 of the Charter and do not exceed what is necessary in a democratic society for national security purposes?

(6) (a) What is the level of protection required to be afforded to personal data transferred to a third country pursuant to standard contractual clauses adopted in accordance with a decision of the Commission under Article 26(4) [of Directive 95/46] in light of the provisions of [Directive 95/46] and in particular Articles 25 and 26 read in the light of the Charter?

(b) What are the matters to be taken into account in assessing whether the level of protection afforded to data transferred to a third country under [the SCC Decision] satisfies the requirements of [Directive 95/46] and the Charter?

(7) Does the fact that the standard contractual clauses apply as between the data exporter and the data importer and do not bind the national authorities of a third country who may require the data importer to make available to its security services for further processing the personal data transferred pursuant to the clauses provided for in [the SCC Decision] preclude the clauses from adducing adequate safeguards as envisaged by Article 26(2) of [Directive 95/46]?

(8) If a third country data importer is subject to surveillance laws that in the view of a data protection authority conflict with the [standard contractual clauses] or Article 25 and 26 of [Directive 95/46] and/or the Charter, is a data protection authority required to use its enforcement powers under Article 28(3) of [Directive 95/46] to suspend data flows or is the exercise of those powers limited to exceptional cases only, in light of recital 11 of [the SCC Decision], or can a data protection authority use its discretion not to suspend data flows?

(9) (a) For the purposes of Article 25(6) of [Directive 95/46], does [the Privacy Shield Decision] constitute a finding of general application binding on data protection authorities and the courts of the Member States to the effect that the United States ensures an adequate level of protection within the meaning of Article 25(2) of [Directive 95/46] by reason of its domestic law or of the international commitments it has entered into?

(b) If it does not, what relevance, if any, does the Privacy Shield Decision have in the assessment conducted into the adequacy of the safeguards provided to data transferred to the United States which is transferred pursuant to the [SCC Decision]?

(10) Given the findings of the High Court in relation to US law, does the provision of the Privacy Shield ombudsperson under Annex A to Annex III to the Privacy Shield Decision when taken in conjunction with the existing regime in the United States ensure that the US provides a remedy to data subjects whose personal data is transferred to the United States under the [SCC Decision] that is compatible with Article 47 of the Charter]?

(11) Does the [SCC Decision] violate Articles 7, 8 and/or 47 of the Charter?'

Admissibility of the request for a preliminary ruling

69 Facebook Ireland and the German and United Kingdom Governments claim that the request for a preliminary ruling is inadmissible.

70 With regard to the objection raised by Facebook Ireland, that company observes that the provisions of Directive 95/46, on which the questions referred for a preliminary ruling are based, were repealed by the GDPR.

71 In that regard, although Directive 95/46 was, under Article 94(1) of the GDPR, repealed with effect from 25 May 2018, that directive was still in force when, on 4 May 2018, the present request for a preliminary ruling, received at the Court on 9 May 2018, was made. In addition, the first indent of Article 3(2) and Articles 25, 26

and 28(3) of Directive 95/46 cited in the questions referred, were, in essence, reproduced in Article 2(2) and Articles 45, 46 and 58 of the GDPR, respectively. Furthermore, it must be borne in mind that the Court has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court of Justice by those courts (judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, EU:C:2020:262, paragraph 43 and the case-law cited). On those grounds, the fact that the referring court referred its questions by reference solely to the provisions of Directive 95/46 cannot render the present request for a preliminary ruling inadmissible.

72 For its part, the German Government bases its objection of inadmissibility on the fact, first, that the Commissioner merely expressed doubts, and not a definitive opinion, as to the validity of the SCC Decision and, second, that the referring court failed to ascertain whether Mr Schrems had unambiguously given his consent to the transfers of data at issue in the main proceedings, which, if that had been the case, would have the effect of rendering an answer to that question redundant. Lastly, the United Kingdom Government maintains that the questions referred for a preliminary ruling are hypothetical since that court did not find that that data had actually been transferred on the basis of that decision.

73 It follows from settled case-law of the Court that 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 referred concern the interpretation or the validity of a rule of EU law, the Court is in principle bound to give a ruling. It follows that questions referred by national courts enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it appears that the interpretation sought bears no relation to the actual facts of the main action or its object, 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 (judgments of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraphs 24 and 25; of 2 October 2018, *Ministerio Fiscal*, C-207/16, EU:C:2018:788, paragraph 45; and of 19 December 2019, *Dobersberger*, C-16/18, EU:C:2019:1110, paragraphs 18 and 19).

74 In the present case, the request for a preliminary ruling contains sufficient factual and legal material to understand the significance of the questions referred. Furthermore, and most importantly, nothing in the file before the Court leads to the conclusion that the interpretation of EU law that is requested is unrelated to the actual facts of the main action or its object, or that the problem is hypothetical, inter alia, on the basis that the transfer of the personal data at issue in the main proceedings may have been based on the express consent of the data subject of that transfer rather than based on the SCC Decision. As indicated in the request for a preliminary ruling, Facebook Ireland has acknowledged that it transfers the personal data of its subscribers residing in the European Union to Facebook Inc. and that those transfers, the lawfulness of which Mr Schrems disputes, were in large part carried out pursuant to the standard data protection clauses in the annex to the SCC Decision.

75 Moreover, it is irrelevant to the admissibility of the present request for a preliminary ruling that the Commissioner did not express a definitive opinion on the validity of that decision in so far as the referring court considers that an answer to the questions referred for a preliminary ruling concerning the interpretation and validity of rules of EU law is necessary in order to dispose of the case in the main proceedings.

76 It follows that the request for a preliminary ruling is admissible.

Consideration of the questions referred

77 As a preliminary matter, it must be borne in mind that the present request for a preliminary ruling has arisen following a complaint made by Mr Schrems requesting that the Commissioner order the suspension or prohibition, in the future, of the transfer by Facebook Ireland of his personal data to Facebook Inc. Although the questions referred for a preliminary ruling refer to the provisions of Directive 95/46, it is common ground that the Commissioner had not yet adopted a final decision on that complaint when that directive was repealed and replaced by the GDPR with effect from 25 May 2018.

78 That absence of a national decision distinguishes the situation at issue in the main proceedings from those which gave rise to the judgments of 24 September 2019, *Google (Territorial scope of de-referencing)* (C-507/17,

EU:C:2019:772), and of 1 October 2019, *Planet49* (C-673/17, EU:C:2019:801), in which decisions adopted prior to the repeal of that directive were at issue.

79 The questions referred for a preliminary ruling must therefore be answered in the light of the provisions of the GDPR rather than those of Directive 95/46.

The first question

80 By its first question, the referring court wishes to know, in essence, whether Article 2(1) and Article 2(2)(a), (b) and (d) of the GDPR, read in conjunction with Article 4(2) TEU, must be interpreted as meaning that that regulation applies to the transfer of personal data by an economic operator established in a Member State to another economic operator established in a third country, in circumstances where, at the time of that transfer or thereafter, that data is liable to be processed by the authorities of that third country for the purposes of public security, defence and State security.

81 In that regard, it should be made clear at the outset that the rule in Article 4(2) TEU, according to which, within the European Union, national security remains the sole responsibility of each Member State, concerns Member States of the European Union only. That rule is therefore irrelevant, in the present case, for the purposes of interpreting Article 2(1) and Article 2(2)(a), (b) and (d) of the GDPR.

82 Under Article 2(1) of the GDPR, that 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. Article 4(2) of that regulation defines 'processing' as 'any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means' and mentions, by way of example, 'disclosure by transmission, dissemination or otherwise making available', but does not distinguish between operations which take place within the European Union and those which are connected with a third country. Furthermore, the GDPR subjects transfers of personal data to third countries to specific rules in Chapter V thereof, entitled 'Transfers of personal data to third countries or international organisations', and also confers specific powers on the supervisory authorities for that purpose, which are set out in Article 58(2)(j) of that regulation.

83 It follows that the operation of having personal data transferred from a Member State to a third country constitutes, in itself, processing of personal data within the meaning of Article 4(2) of the GDPR, carried out in a Member State, and falls within the scope of that regulation under Article 2(1) thereof (see, by analogy, as regards Article 2(b) and Article 3(1) of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 45 and the case-law cited).

84 As to whether such an operation may be regarded as being excluded from the scope of the GDPR under Article 2(2) thereof, it should be noted that that provision lays down exceptions to the scope of that regulation, as defined in Article 2(1) thereof, which must be interpreted strictly (see, by analogy, as regards Article 3(2) of Directive 95/46, judgment of 10 July 2018, *Jehovan todistajat*, C-25/17, EU:C:2018:551, paragraph 37 and the case-law cited).

85 In the present case, since the transfer of personal data at issue in the main proceedings is from Facebook Ireland to Facebook Inc., namely between two legal persons, that transfer does not fall within Article 2(2)(c) of the GDPR, which refers to the processing of data by a natural person in the course of a purely personal or household activity. Such a transfer also does not fall within the exceptions laid down in Article 2(2)(a), (b) and (d) of that regulation, since the activities mentioned therein by way of example are, in any event, activities of the State or of State authorities and are unrelated to fields in which individuals are active (see, by analogy, as regards Article 3(2) of Directive 95/46, judgment of 10 July 2018, *Jehovan todistajat*, C-25/17, EU:C:2018:551, paragraph 38 and the case-law cited).

86 The possibility that the personal data transferred between two economic operators for commercial purposes might undergo, at the time of the transfer or thereafter, processing for the purposes of public security, defence and State security by the authorities of that third country cannot remove that transfer from the scope of the GDPR.

87 Indeed, by expressly requiring the Commission, when assessing the adequacy of the level of protection afforded by a third country, to take account, inter alia, of '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', it is patent from the very wording of Article 45(2)(a) of that regulation that no processing by a third country of personal data for the purposes of public security, defence and State security excludes the transfer at issue from the application of the regulation.

88 It follows that such a transfer cannot fall outside the scope of the GDPR on the ground that the data at issue is liable to be processed, at the time of that transfer or thereafter, by the authorities of the third country concerned, for the purposes of public security, defence and State security.

89 Therefore, the answer to the first question is that Article 2(1) and (2) of the GDPR must be interpreted as meaning that that regulation applies to the transfer of personal data for commercial purposes by an economic operator established in a Member State to another economic operator established in a third country, irrespective of whether, at the time of that transfer or thereafter, that data is liable to be processed by the authorities of the third country in question for the purposes of public security, defence and State security.

The second, third and sixth questions

90 By its second, third and sixth questions, the referring court seeks clarification from the Court, in essence, on the level of protection required by Article 46(1) and Article 46(2)(c) of the GDPR in respect of a transfer of personal data to a third country based on standard data protection clauses. In particular, the referring court asks the Court to specify which factors need to be taken into consideration for the purpose of determining whether that level of protection is ensured in the context of such a transfer.

91 As regards the level of protection required, it follows from a combined reading of those provisions that, in the absence of an adequacy decision under Article 45(3) of that regulation, a controller or processor may transfer personal data to a third country 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, such safeguards being able to be provided, inter alia, by the standard data protection clauses adopted by the Commission.

92 Although Article 46 of the GDPR does not specify the nature of the requirements which flow from that reference to 'appropriate safeguards', 'enforceable rights' and 'effective legal remedies', it should be noted that that article appears in Chapter V of that regulation and, accordingly, must be read in the light of Article 44 of that regulation, entitled 'General principle for transfers', which lays down that 'all provisions [in that chapter] shall be applied in order to ensure that the level of protection of natural persons guaranteed by [that regulation] is not undermined'. That level of protection must therefore be guaranteed irrespective of the provision of that chapter on the basis of which a transfer of personal data to a third country is carried out.

93 As the Advocate General stated in point 117 of his Opinion, the provisions of Chapter V of the GDPR are intended to ensure the continuity of that high level of protection where personal data is transferred to a third country, in accordance with the objective set out in recital 6 thereof.

94 The first sentence of Article 45(1) of the GDPR provides that a transfer of personal data to a third country may be authorised by a Commission decision to the effect that that third country, a territory or one or more specified sectors within that third country, ensures an adequate level of protection. In that regard, although not requiring a third country to ensure a level of protection identical to that guaranteed in the EU legal order, the term 'adequate level of protection' must, as confirmed by recital 104 of that regulation, 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 the regulation, read in the light of the Charter. If there were no such requirement, the objective referred to in the previous paragraph would be undermined (see, by analogy, as regards Article 25(6) of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 73).

95 In that context, recital 107 of the GDPR states that, where 'a third country, a territory or a specified sector within a third country … no longer ensures an adequate level of data protection. … the transfer of personal data to that third country … should be prohibited, unless the requirements [of that regulation] relating to transfers subject to appropriate safeguards … are fulfilled'. To that effect, recital 108 of the regulation states that, in the absence of an adequacy decision, the appropriate safeguards to be taken by the controller or processor in

accordance with Article 46(1) of the regulation must 'compensate for the lack of data protection in a third country' in order to 'ensure compliance with data protection requirements and the rights of the data subjects appropriate to processing within the Union'.

96 It follows, as the Advocate General stated in point 115 of his Opinion, that such appropriate guarantees must be capable of ensuring that data subjects whose personal data are transferred to a third country pursuant to standard data protection clauses are afforded, as in the context of a transfer based on an adequacy decision, a level of protection essentially equivalent to that which is guaranteed within the European Union.

97 The referring court also asks whether the level of protection essentially equivalent to that guaranteed within the European Union must be determined in the light of EU law, in particular the rights guaranteed by the Charter and/or the fundamental rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), or in the light of the national law of the Member States.

98 In that regard, it should be noted that, although, as Article 6(3) TEU confirms, the fundamental rights enshrined in the ECHR constitute general principles of EU law and although Article 52(3) of the Charter provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by that convention, 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 EU law (judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 44 and the case-law cited, and of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 22).

99 In those circumstances, the Court has held that the interpretation of EU law and examination of the legality of EU legislation must be undertaken in the light of the fundamental rights guaranteed by the Charter (see, by analogy, judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 24).

100 Furthermore, the Court has consistently held that the validity of provisions of EU law and, in the absence of an express reference to the national law of the Member States, their interpretation, cannot be construed in the light of national law, even national law of constitutional status, in particular fundamental rights as formulated in the national constitutions (see, to that effect, judgments of 17 December 1970, *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, paragraph 3; of 13 December 1979, *Hauer*, 44/79, EU:C:1979:290, paragraph 14; and of 18 October 2016, *Nikiforidis*, C-135/15, EU:C:2016:774, paragraph 28 and the case-law cited).

101 It follows that, since, first, a transfer of personal data, such as that at issue in the main proceedings, for commercial purposes by an economic operator established in one Member State to another economic operator established in a third country, falls, as is apparent from the answer to the first question, within the scope of the GDPR and, second, the purpose of that regulation is, inter alia, as is apparent from recital 10 thereof, to ensure a consistent and high level of protection of natural persons within the European Union and, to that end, to ensure a consistent and homogeneous application of the rules for the protection of the fundamental rights and freedoms of such natural persons with regard to the processing of personal data throughout the European Union, the level of protection of fundamental rights required by Article 46(1) of that regulation must be determined on the basis of the provisions of that regulation, read in the light of the fundamental rights enshrined in the Charter.

102 The referring court also seeks to ascertain what factors should be taken into consideration for the purposes of determining the adequacy of the level of protection where personal data is transferred to a third country pursuant to standard data protection clauses adopted under Article 46(2)(c) of the GDPR.

103 In that regard, although that provision does not list the various factors which must be taken into consideration for the purposes of assessing the adequacy of the level of protection to be observed in such a transfer, Article 46(1) of that regulation states that data subjects must be afforded appropriate safeguards, enforceable rights and effective legal remedies.

104 The assessment required for that purpose in the context of such a transfer must, in particular, take into consideration both the contractual clauses agreed between the controller or processor established in the European Union and the recipient of the transfer established in the third country concerned and, as regards any access by the public authorities of that third country to the personal data transferred, the relevant aspects of the legal system of that third country. As regards the latter, the factors to be taken into consideration in the context of Article 46 of that regulation correspond to those set out, in a non-exhaustive manner, in Article 45(2) of that regulation.

105 Therefore, the answer to the second, third and sixth questions is that Article 46(1) and Article 46(2)(c) of the GDPR must be interpreted as meaning that the appropriate safeguards, enforceable rights and effective legal remedies required by those provisions must ensure that data subjects whose personal data are transferred to a third country pursuant to standard data protection clauses are afforded a level of protection essentially equivalent to that guaranteed within the European Union by that regulation, read in the light of the Charter. To that end, the assessment of the level of protection afforded in the context of such a transfer must, in particular, take into consideration both the contractual clauses agreed between the controller or processor established in the European Union and the recipient of the transfer established in the third country concerned and, as regards any access by the public authorities of that third country to the personal data transferred, the relevant aspects of the legal system of that third country, in particular those set out, in a non-exhaustive manner, in Article 45(2) of that regulation.

The eighth question

106 By its eighth question, the referring court wishes to know, in essence, whether Article 58(2)(f) and (j) of the GDPR must be interpreted as meaning that the competent supervisory authority is required to suspend or prohibit a transfer of personal data to a third country pursuant to standard data protection clauses adopted by the Commission, if, in the view of that supervisory authority, those clauses are not or cannot be complied with in that third country and the protection of the data transferred that is required by EU law, in particular by Articles 45 and 46 of the GDPR and by the Charter, cannot be ensured, or as meaning that the exercise of those powers is limited to exceptional cases.

107 In accordance with Article 8(3) of the Charter and Article 51(1) and Article 57(1)(a) of the GDPR, the national supervisory authorities are responsible for monitoring compliance with the EU rules concerning the protection of natural persons with regard to the processing of personal data. Each of those authorities 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 in that regulation (see, by analogy, as regards Article 28 of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 47).

108 It follows from those provisions that the supervisory authorities' primary responsibility is to monitor the application of the GDPR and to ensure its enforcement. The exercise of that responsibility is of particular importance where personal data is transferred to a third country since, as is clear from recital 116 of that regulation, 'when personal data moves across borders outside the Union it may put at increased risk the ability of natural persons to exercise data protection rights in particular to protect themselves from the unlawful use or disclosure of that information'. In such cases, as is stated in that recital, 'supervisory authorities may find that they are unable to pursue complaints or conduct investigations relating to the activities outside their borders'.

109 In addition, under Article 57(1)(f) of the GDPR, each supervisory authority is required on its territory to handle complaints which, in accordance with Article 77(1) of that regulation, any data subject is entitled to lodge where that data subject considers that the processing of his or her personal data infringes the regulation, and is required to examine the nature of that complaint as necessary. The supervisory authority must handle such a complaint with all due diligence (see, by analogy, as regards Article 25(6) of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 63).

110 Article 78(1) and (2) of the GDPR recognises the right of each person to an effective judicial remedy, in particular, where the supervisory authority fails to deal with his or her complaint. Recital 141 of that regulation also refers to that 'right to an effective judicial remedy in accordance with Article 47 of the Charter' in circumstances where that supervisory authority 'does not act where such action is necessary to protect the rights of the data subject'.

111 In order to handle complaints lodged, Article 58(1) of the GDPR confers extensive investigative powers on each supervisory authority. If a supervisory authority takes the view, following an investigation, that a data subject whose personal data have been transferred to a third country is not afforded an adequate level of protection in that country, it is required, under EU law, to take appropriate action in order to remedy any findings of inadequacy, irrespective of the reason for, or nature of, that inadequacy. To that effect, Article 58(2) of that regulation lists the various corrective powers which the supervisory authority may adopt.

112 Although the supervisory authority must determine which action is appropriate and necessary and take into consideration all the circumstances of the transfer of personal data in question in that determination, the

supervisory authority is nevertheless required to execute its responsibility for ensuring that the GDPR is fully enforced with all due diligence.

113 In that regard, as the Advocate General also stated in point 148 of his Opinion, the supervisory authority is required, under Article 58(2)(f) and (j) of that regulation, to suspend or prohibit a transfer of personal data to a third country if, in its view, in the light of all the circumstances of that transfer, the standard data protection clauses are not or cannot be complied with in that third country and the protection of the data transferred that is required by EU law cannot be ensured by other means, where the controller or a processor has not itself suspended or put an end to the transfer.

114 The interpretation in the previous paragraph is not undermined by the Commissioner's reasoning that Article 4 of Decision 2010/87, in its version prior to the entry into force of Implementing Decision 2016/2297, read in the light of recital 11 of that decision, confined the power of supervisory authorities to suspend or prohibit a transfer of personal data to a third country to certain exceptional circumstances. As amended by Implementing Decision 2016/2297, Article 4 of the SCC Decision refers to the power of the supervisory authorities, now under Article 58(2)(f) and (j) of the GDPR, to suspend or ban such a transfer, without confining the exercise of that power to exceptional circumstances.

115 In any event, the implementing power which Article 46(2)(c) of the GDPR grants to the Commission for the purposes of adopting standard data protection clauses does not confer upon it competence to restrict the national supervisory authorities' powers on the basis of Article 58(2) of that regulation (see, by analogy, as regards Article 25(6) and Article 28 of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraphs 102 and 103). Moreover, as stated in recital 5 of Implementing Decision 2016/2297, the SCC Decision 'does not prevent a [supervisory authority] from exercising its powers to oversee data flows, including the power to suspend or ban a transfer of personal data when it determines that the transfer is carried out in violation of EU or national data protection law'.

116 It should, however, be pointed out that the powers of the competent supervisory authority are subject to full compliance with the decision in which the Commission finds, where relevant, under the first sentence of Article 45(1) of the GDPR, that a particular third country ensures an adequate level of protection. In such a case, it is clear from the second sentence of Article 45(1) of that regulation, read in conjunction with recital 103 thereof, that transfers of personal data to the third country in question may take place without requiring any specific authorisation.

117 Under the fourth paragraph of Article 288 TFEU, a Commission adequacy decision is, in its entirety, binding on all the Member States to which it is addressed and is therefore binding on all their organs in so far as it finds that the third country in question ensures an adequate level of protection and has the effect of authorising such transfers of personal data (see, by analogy, as regards Article 25(6) of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 51 and the case-law cited).

118 Thus, until such time as a Commission adequacy decision is declared invalid by the Court, the Member States and their organs, which include their independent supervisory authorities, 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 (judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 52 and the case-law cited) and, as a result, to suspend or prohibit transfers of personal data to that third country.

119 However, a Commission adequacy decision adopted pursuant to Article 45(3) of the GDPR cannot prevent persons whose personal data has been or could be transferred to a third country from lodging a complaint, within the meaning of Article 77(1) of the GDPR, with the competent national supervisory authority concerning the protection of their rights and freedoms in regard to the processing of that data. Similarly, 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 51(1) and Article 57(1)(a) of the GDPR (see, by analogy, as regards Article 25(6) and Article 28 of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 53).

120 Thus, even if the Commission has adopted a Commission adequacy decision, the competent national supervisory authority, when a complaint is lodged by a person concerning the protection of his or her rights and freedoms in regard to the processing of personal data relating to him or her, must be able to examine, with complete

independence, whether the transfer of that data complies with the requirements laid down by the GDPR and, where relevant, to bring an action before the national courts in order for them, if they share the doubts of that supervisory authority as to the validity of the Commission adequacy decision, to make a reference for a preliminary ruling for the purpose of examining its validity (see, by analogy, as regards Article 25(6) and Article 28 of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraphs 57 and 65).

121 In the light of the foregoing considerations, the answer to the eighth question is that Article 58(2)(f) and (j) of the GDPR must be interpreted as meaning that, unless there is a valid Commission adequacy decision, the competent supervisory authority is required to suspend or prohibit a transfer of data to a third country pursuant to standard data protection clauses adopted by the Commission, if, in the view of that supervisory authority and in the light of all the circumstances of that transfer, those clauses are not or cannot be complied with in that third country and the protection of the data transferred that is required by EU law, in particular by Articles 45 and 46 of the GDPR and by the Charter, cannot be ensured by other means, where the controller or a processor has not itself suspended or put an end to the transfer.

The7th and 11th questions

122 By its 7th and 11th questions, which it is appropriate to consider together, the referring court seeks clarification from the Court, in essence, on the validity of the SCC Decision in the light of Articles 7, 8 and 47 of the Charter.

123 In particular, as is clear from the wording of the seventh question and the corresponding explanations in the request for a preliminary ruling, the referring court asks whether the SCC Decision is capable of ensuring an adequate level of protection of the personal data transferred to third countries given that the standard data protection clauses provided for in that decision do not bind the supervisory authorities of those third countries.

124 Article 1 of the SCC Decision provides that the standard data protection clauses set out in its annex are considered to offer adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals in accordance with the requirements of Article 26(2) of Directive 95/46. The latter provision was, in essence, reproduced in Article 46(1) and Article 46(2)(c) of the GDPR.

125 However, although those clauses are binding on a controller established in the European Union and the recipient of the transfer of personal data established in a third country where they have concluded a contract incorporating those clauses, it is common ground that those clauses are not capable of binding the authorities of that third country, since they are not party to the contract.

126 Therefore, although there are situations in which, depending on the law and practices in force in the third country concerned, the recipient of such a transfer is in a position to guarantee the necessary protection of the data solely on the basis of standard data protection clauses, there are others in which the content of those standard clauses might not constitute a sufficient means of ensuring, in practice, the effective protection of personal data transferred to the third country concerned. That is the case, in particular, where the law of that third country allows its public authorities to interfere with the rights of the data subjects to which that data relates.

127 Thus, the question arises whether a Commission decision concerning standard data protection clauses, adopted pursuant to Article 46(2)(c) of the GDPR, is invalid in the absence, in that decision, of guarantees which can be enforced against the public authorities of the third countries to which personal data is or could be transferred pursuant to those clauses.

128 Article 46(1) of the GDPR provides that, in the absence of an adequacy decision, a controller or processor may transfer personal data to a third country 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. According to Article 46(2)(c) of the GDPR, those safeguards may be provided by standard data protection clauses drawn up by the Commission. However, those provisions do not state that all safeguards must necessarily be provided for in a Commission decision such as the SCC Decision.

129 It should be noted in that regard that such a standard clauses decision differs from an adequacy decision adopted pursuant to Article 45(3) of the GDPR, which seeks, following an examination of the legislation of the

third country concerned taking into account, inter alia, the relevant legislation on national security and public authorities' access to personal data, to find with binding effect that a third country, a territory or one or more specified sectors within that third country ensures an adequate level of protection and that the access of that third country's public authorities to such data does not therefore impede transfers of such personal data to the third country. Such an adequacy decision can therefore be adopted by the Commission only if it has found that the third country's relevant legislation in that field does in fact provide all the necessary guarantees from which it can be concluded that that legislation ensures an adequate level of protection.

130 By contrast, in the case of a Commission decision adopting standard data protection clauses, such as the SCC Decision, in so far as such a decision does not refer to a third country, a territory or one or more specific sectors in a third country, it cannot be inferred from Article 46(1) and Article 46(2)(c) of the GDPR that the Commission is required, before adopting such a decision, to assess the adequacy of the level of protection ensured by the third countries to which personal data could be transferred pursuant to such clauses.

131 In that regard, it must be borne in mind that, according to Article 46(1) of the GDPR, in the absence of a Commission adequacy decision, it is for the controller or processor established in the European Union to provide, inter alia, appropriate safeguards. Recitals 108 and 114 of the GDPR confirm that, where the Commission has not adopted a decision on the adequacy of the level of data protection in a third country, the controller or, where relevant, the processor 'should take measures to compensate for the lack of data protection in a third country by way of appropriate safeguards for the data subject' and that 'those safeguards should ensure compliance with data protection requirements and the rights of the data subjects appropriate to processing within the Union, including the availability of enforceable data subject rights and of effective legal remedies … in the Union or in a third country'.

132 Since by their inherently contractual nature standard data protection clauses cannot bind the public authorities of third countries, as is clear from paragraph 125 above, but that Article 44, Article 46(1) and Article 46(2)(c) of the GDPR, interpreted in the light of Articles 7, 8 and 47 of the Charter, require that the level of protection of natural persons guaranteed by that regulation is not undermined, it may prove necessary to supplement the guarantees contained in those standard data protection clauses. In that regard, recital 109 of the regulation states that 'the possibility for the controller … to use standard data-protection clauses adopted by the Commission … should [not] prevent [it] … from adding other clauses or additional safeguards' and states, in particular, that the controller 'should be encouraged to provide additional safeguards … that supplement standard [data] protection clauses'.

133 It follows that the standard data protection clauses adopted by the Commission on the basis of Article 46(2)(c) of the GDPR are solely intended to provide contractual guarantees that apply uniformly in all third countries to controllers and processors established in the European Union and, consequently, independently of the level of protection guaranteed in each third country. In so far as those standard data protection clauses cannot, having regard to their very nature, provide guarantees beyond a contractual obligation to ensure compliance with the level of protection required under EU law, they may require, depending on the prevailing position in a particular third country, the adoption of supplementary measures by the controller in order to ensure compliance with that level of protection.

134 In that regard, as the Advocate General stated in point 126 of his Opinion, the contractual mechanism provided for in Article 46(2)(c) of the GDPR is based on the responsibility of the controller or his or her subcontractor established in the European Union and, in the alternative, of the competent supervisory authority. It is therefore, above all, for that controller or processor to verify, on a case-by-case basis and, where appropriate, in collaboration with the recipient of the data, whether the law of the third country of destination ensures adequate protection, under EU law, of personal data transferred pursuant to standard data protection clauses, by providing, where necessary, additional safeguards to those offered by those clauses.

135 Where the controller or a processor established in the European Union is not able to take adequate additional measures to guarantee such protection, the controller or processor or, failing that, the competent supervisory authority, are required to suspend or end the transfer of personal data to the third country concerned. That is the case, in particular, where the law of that third country imposes on the recipient of personal data from the European Union obligations which are contrary to those clauses and are, therefore, capable of impinging on the contractual guarantee of an adequate level of protection against access by the public authorities of that third country to that data.

136 Therefore, the mere fact that standard data protection clauses in a Commission decision adopted pursuant to Article 46(2)(c) of the GDPR, such as those in the annex to the SCC Decision, do not bind the authorities of third countries to which personal data may be transferred cannot affect the validity of that decision.

137 That validity depends, however, on whether, in accordance with the requirement of Article 46(1) and Article 46(2)(c) of the GDPR, interpreted in the light of Articles 7, 8 and 47 of the Charter, such a standard clauses decision incorporates effective mechanisms that make it possible, in practice, to ensure compliance with the level of protection required by EU law and that transfers of personal data pursuant to the clauses of such a decision are suspended or prohibited in the event of the breach of such clauses or it being impossible to honour them.

138 As regards the guarantees contained in the standard data protection clauses in the annex to the SCC Decision, it is clear from Clause 4(a) and (b), Clause 5(a), Clause 9 and Clause 11(1) thereof that a data controller established in the European Union, the recipient of the personal data and any processor thereof mutually undertake to ensure that the processing of that data, including the transfer thereof, has been and will continue to be carried out in accordance with 'the applicable data protection law', namely, according to the definition set out in Article 3(f) of that decision, 'the legislation protecting the fundamental rights and freedoms of individuals and, in particular, their right to privacy with respect to the processing of personal data applicable to a data controller in the Member State in which the data exporter is established'. The provisions of the GDPR, read in the light of the Charter, form part of that legislation.

139 In addition, a recipient of personal data established in a third country undertakes, pursuant to Clause 5(a), to inform the controller established in the European Union promptly of any inability to comply with its obligations under the contract concluded. In particular, according to Clause 5(b), the recipient certifies that it has no reason to believe that the legislation applicable to it prevents it from fulfilling its obligations under the contract entered into and undertakes to notify the data controller about any change in the national legislation applicable to it which is likely to have a substantial adverse effect on the warranties and obligations provided by the standard data protection clauses in the annex to the SCC Decision, promptly upon notice thereof. Furthermore, although Clause 5(d)(i) allows a recipient of personal data not to notify a controller established in the European Union of a legally binding request for disclosure of the personal data by a law enforcement authority, in the event of legislation prohibiting that recipient from doing so, such as a prohibition under criminal law the aim of which is to preserve the confidentiality of a law enforcement investigation, the recipient is nevertheless required, pursuant to Clause 5(a) in the annex to the SCC Decision, to inform the controller of his or her inability to comply with the standard data protection clauses.

140 Clause 5(a) and (b), in both cases to which it refers, confers on the controller established in the European Union the right to suspend the transfer of data and/or to terminate the contract. In the light of the requirements of Article 46(1) and (2)(c) of the GDPR, read in the light of Articles 7 and 8 of the Charter, the controller is bound to suspend the transfer of data and/or to terminate the contract where the recipient is not, or is no longer, able to comply with the standard data protection clauses. Unless the controller does so, it will be in breach of its obligations under Clause 4(a) in the annex to the SCC Decision as interpreted in the light of the GDPR and of the Charter.

141 It follows that Clause 4(a) and Clause 5(a) and (b) in that annex oblige the controller established in the European Union and the recipient of personal data to satisfy themselves that the legislation of the third country of destination enables the recipient to comply with the standard data protection clauses in the annex to the SCC Decision, before transferring personal data to that third country. As regards that verification, the footnote to Clause 5 states that mandatory requirements of that legislation which do not go beyond what is necessary in a democratic society to safeguard, inter alia, national security, defence and public security are not in contradiction with those standard data protection clauses. Conversely, as stated by the Advocate General in point 131 of his Opinion, compliance with an obligation prescribed by the law of the third country of destination which goes beyond what is necessary for those purposes must be treated as a breach of those clauses. Operators' assessments of the necessity of such an obligation must, where relevant, take into account a finding that the level of protection ensured by the third country in a Commission adequacy decision, adopted under Article 45(3) of the GDPR, is appropriate.

142 It follows that a controller established in the European Union and the recipient of personal data are required to verify, prior to any transfer, whether the level of protection required by EU law is respected in the third country concerned. The recipient is, where appropriate, under an obligation, under Clause 5(b), to inform the controller of

any inability to comply with those clauses, the latter then being, in turn, obliged to suspend the transfer of data and/or to terminate the contract.

143 If the recipient of personal data to a third country has notified the controller, pursuant to Clause 5(b) in the annex to the SCC Decision, that the legislation of the third country concerned does not allow him or her to comply with the standard data protection clauses in that annex, it follows from Clause 12 in that annex that data that has already been transferred to that third country and the copies thereof must be returned or destroyed in their entirety. In any event, under Clause 6 in that annex, breach of those standard clauses will result in a right for the person concerned to receive compensation for the damage suffered.

144 It should be added that, under Clause 4(f) in the annex to the SCC Decision, a controller established in the European Union undertakes, where special categories of data could be transferred to a third country not providing adequate protection, to inform the data subject before, or as soon as possible after, the transfer. That notice enables the data subject to be in a position to bring legal action against the controller pursuant to Clause 3(1) in that annex so that the controller suspends the proposed transfer, terminates the contract concluded with the recipient of the personal data or, where appropriate, requires the recipient to return or destroy the data transferred.

145 Lastly, under Clause 4(g) in that annex, the controller established in the European Union is required, when the recipient of personal data notifies him or her, pursuant to Clause 5(b), in the event of a change in the relevant legislation which is likely to have a substantial adverse effect on the warranties and obligations provided by the standard data protection clauses, to forward any notification to the competent supervisory authority if the controller established in the European Union decides, notwithstanding that notification, to continue the transfer or to lift the suspension. The forwarding of such a notification to that supervisory authority and its right to conduct an audit of the recipient of personal data pursuant to Clause 8(2) in that annex enable that supervisory authority to ascertain whether the proposed transfer should be suspended or prohibited in order to ensure an adequate level of protection.

146 In that context, Article 4 of the SCC Decision, read in the light of recital 5 of Implementing Decision 2016/2297, supports the view that the SCC Decision does not prevent the competent supervisory authority from suspending or prohibiting, as appropriate, a transfer of personal data to a third country pursuant to the standard data protection clauses in the annex to that decision. In that regard, as is apparent from the answer to the eighth question, unless there is a valid Commission adequacy decision, the competent supervisory authority is required, under Article 58(2)(f) and (j) of the GDPR, to suspend or prohibit such a transfer, if, in its view and in the light of all the circumstances of that transfer, those clauses are not or cannot be complied with in that third country and the protection of the data transferred that is required by EU law cannot be ensured by other means, where the controller or a processor has not itself suspended or put an end to the transfer.

147 As regards the fact, underlined by the Commissioner, that transfers of personal data to such a third country may result in the supervisory authorities in the various Member States adopting divergent decisions, it should be added that, as is clear from Article 55(1) and Article 57(1)(a) of the GDPR, the task of enforcing that regulation is conferred, in principle, on each supervisory authority on the territory of its own Member State. Furthermore, in order to avoid divergent decisions, Article 64(2) of the GDPR provides for the possibility for a supervisory authority which considers that transfers of data to a third country must, in general, be prohibited, to refer the matter to the European Data Protection Board (EDPB) for an opinion, which may, under Article 65(1)(c) of the GDPR, adopt a binding decision, in particular where a supervisory authority does not follow the opinion issued.

148 It follows that the SCC Decision provides for effective mechanisms which, in practice, ensure that the transfer to a third country of personal data pursuant to the standard data protection clauses in the annex to that decision is suspended or prohibited where the recipient of the transfer does not comply with those clauses or is unable to comply with them.

149 In the light of all of the foregoing considerations, the answer to the 7th and 11th questions is that examination of the SCC Decision in the light of Articles 7, 8 and 47 of the Charter has disclosed nothing to affect the validity of that decision.

The 4th, 5th, 9th and 10th questions

150 By its ninth question, the referring court wishes to know, in essence, whether and to what extent findings in the Privacy Shield Decision to the effect that the United States ensures an adequate level of protection are binding on the supervisory authority of a Member State. By its 4th, 5th and 10th questions, that court asks, in essence, whether, in view of its own findings on US law, the transfer to that third country of personal data pursuant to the standard data protection clauses in the annex to the SCC Decision breaches the rights enshrined in Articles 7, 8 and 47 of the Charter and asks the Court, in particular, whether the introduction of the ombudsperson referred to in Annex III to the Privacy Shield Decision is compatible with Article 47 of the Charter.

151 As a preliminary matter, it should be noted that, although the Commissioner's action in the main proceedings only calls into question the SCC Decision, that action was brought before the referring court prior to the adoption of the Privacy Shield Decision. In so far as, by its fourth and fifth questions, that court asks the Court, at a general level, what protection must be ensured, under Articles 7, 8 and 47 of the Charter, in the context of such a transfer, the Court's analysis must take into consideration the consequences arising from the subsequent adoption of the Privacy Shield Decision. A fortiori that is the case in so far as the referring court asks expressly, by its 10th question, whether the protection required by Article 47 of the Charter is ensured by the offices of the ombudsperson to which the Privacy Shield Decision refers.

152 In addition, it is clear from the information provided in the order for reference that, in the main proceedings, Facebook Ireland claims that the Privacy Shield Decision is binding on the Commissioner in respect of the finding on the adequacy of the level of protection ensured by the United States and therefore in respect of the lawfulness of a transfer to that third country of personal data pursuant to the standard data protection clauses in the annex to the SCC Decision.

153 As appears from paragraph 59 above, in its judgment of 3 October 2017, provided in an annex to the order for reference, the referring court stated that it was obliged to take account of amendments to the law that may have occurred in the interval between the institution of the proceedings and the hearing of the action before it. Thus, that court would appear to be obliged to take into account, in order to dispose of the case in the main proceedings, the change in circumstances brought about by the adoption of the Privacy Shield Decision and any binding force it may have.

154 In particular, the question whether the finding in the Privacy Shield Decision that the United States ensures an adequate level of protection is binding is relevant for the purposes of assessing both the obligations, set out in paragraphs 141 and 142 above, of the controller and recipient of personal data transferred to a third country pursuant to the standard data protection clauses in the annex to the SCC Decision and also any obligations to which the supervisory authority may be subject to suspend or prohibit such a transfer.

155 As to whether the Privacy Shield Decision has binding effects, Article 1(1) of that decision provides that, for the purposes of Article 45(1) of the GDPR, 'the United States ensures an adequate level of protection for personal data transferred from the [European] Union to organisations in the United States under the EU-U.S. Privacy Shield'. In accordance with Article 1(3) of the decision, personal data are regarded as transferred under the EU-US Privacy Shield where they are transferred from the Union to organisations in the United States that are included in the 'Privacy Shield List', maintained and made publicly available by the US Department of Commerce, in accordance with Sections I and III of the Principles set out in Annex II to that decision.

156 As follows from the case-law set out in paragraphs 117 and 118 above, the Privacy Shield Decision is binding on the supervisory authorities in so far as it finds that the United States ensures an adequate level of protection and, therefore, has the effect of authorising personal data transferred under the EU-US Privacy Shield. Therefore, until the Court should declare that decision invalid, the competent supervisory authority cannot suspend or prohibit a transfer of personal data to an organisation that abides by that privacy shield on the ground that it considers, contrary to the finding made by the Commission in that decision, that the US legislation governing the access to personal data transferred under that privacy shield and the use of that data by the public authorities of that third country for national security, law enforcement and other public interest purposes does not ensure an adequate level of protection.

157 The fact remains that, in accordance with the case-law set out in paragraphs 119 and 120 above, when a person lodges a complaint with the competent supervisory authority, that authority must examine, with complete independence, whether the transfer of personal data at issue complies with the requirements laid down by the GDPR and, if, in its view, the arguments put forward by that person with a view to challenging the validity of an

adequacy decision are well founded, bring an action before the national courts in order for them to make a reference to the Court for a preliminary ruling for the purpose of examining the validity of that decision.

158 A complaint lodged under Article 77(1) of the GDPR, by which a person whose personal data has been or could be transferred to a third country contends that, notwithstanding what the Commission has found in a decision adopted pursuant to Article 45(3) of the GDPR, the law and practices of that country do not ensure an adequate level of protection must be understood as concerning, in essence, the issue of whether that decision is compatible with the protection of the privacy and of the fundamental rights and freedoms of individuals (see, by analogy, as regards Article 25(6) and Article 28(4) of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 59).

159 In the present case, in essence, Mr Schrems requested the Commissioner to prohibit or suspend the transfer by Facebook Ireland of his personal data to Facebook Inc., established in the United States, on the ground that that third country did not ensure an adequate level of protection. Following an investigation into Mr Schrems's claims, the Commissioner brought the matter before the referring court and that court appears, in the light of the evidence adduced and of the competing arguments put by the parties before it, to be unsure whether Mr Schrems's doubts as to the adequacy of the level of protection ensured in that third country are well founded, despite the subsequent findings of the Commission in the Privacy Shield Decision, and that has led that court to refer the 4th, 5th and 10th questions to the Court for a preliminary ruling.

160 As the Advocate General observed in point 175 of his Opinion, those questions must therefore be regarded, in essence, as calling into question the Commission's finding, in the Privacy Shield Decision, that the United States ensures an adequate level of protection of personal data transferred from the European Union to that third country, and, therefore, as calling into question the validity of that decision.

161 In the light of the considerations set out in paragraphs 121 and 157 to 160 above and in order to give the referring court a full answer, it should therefore be examined whether the Privacy Shield Decision complies with the requirements stemming from the GDPR read in the light of the Charter (see, by analogy, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 67).

162 In order for the Commission to adopt an adequacy decision pursuant to Article 45(3) of the GDPR, 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 (see, by analogy, as regards Article 25(6) of Directive 95/46, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 96).

The Privacy Shield Decision

163 The Commission found, in Article 1(1) of the Privacy Shield Decision, that the United States ensures an adequate level of protection for personal data transferred from the Union to organisations in the United States under the EU-US Privacy Shield, the latter being comprised, inter alia, under Article 1(2) of that decision, of the Principles issued by the US Department of Commerce on 7 July 2016 as set out in Annex II to the decision and the official representations and commitments contained in the documents listed in Annexes I and III to VII to that decision.

164 However, the Privacy Shield Decision also states, in paragraph I.5. of Annex II, under the heading 'EU-U.S. Privacy Shield Framework Principles', that adherence to those principles may be limited, inter alia, 'to the extent necessary to meet national security, public interest, or law enforcement requirements'. Thus, that decision lays down, as did Decision 2000/520, that those requirements have primacy over those principles, primacy pursuant to which self-certified United States organisations receiving personal data from the European Union are bound to disregard the principles without limitation where they conflict with the requirements and therefore prove incompatible with them (see, by analogy, as regards Decision 2000/520, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 86).

165 In the light of its general nature, the derogation set out in paragraph I.5 of Annex II to the Privacy Shield Decision thus enables interference, based 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 (see, by analogy, as regards Decision 2000/520,

judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 87). More particularly, as noted in the Privacy Shield Decision, such interference can arise from access to, and use of, personal data transferred from the European Union to the United States by US public authorities through the PRISM and UPSTREAM surveillance programmes under Section 702 of the FISA and E.O. 12333.

166 In that context, in recitals 67 to 135 of the Privacy Shield Decision, the Commission assessed the limitations and safeguards available in US law, inter alia under Section 702 of the FISA, E.O. 12333 and PPD-28, as regards access to, and use of, personal data transferred under the EU-US Privacy Shield by US public authorities for national security, law enforcement and other public interest purposes.

167 Following that assessment, the Commission found, in recital 136 of that decision, that 'the United States ensures an adequate level of protection for personal data transferred from the [European] Union to self-certified organisations in the United States', and, in recital 140 of the decision, it considered that, 'on the basis of the available information about the U.S. legal order, … any interference by U.S. public authorities with the fundamental rights of the persons whose data are transferred from the [European] Union to the United States under the Privacy Shield for national security, law enforcement or other public interest purposes, and the ensuing restrictions imposed on self-certified organisations with respect to their adherence to the Principles, will be limited to what is strictly necessary to achieve the legitimate objective in question, and that there exists effective legal protection against such interference'.

The finding of an adequate level of protection

168 In the light of the factors mentioned by the Commission in the Privacy Shield Decision and the referring court's findings in the main proceedings, the referring court harbours doubts as to whether US law in fact ensures the adequate level of protection required under Article 45 of the GDPR, read in the light of the fundamental rights guaranteed in Articles 7, 8 and 47 of the Charter. In particular, that court considers that the law of that third country does not provide for the necessary limitations and safeguards with regard to the interferences authorised by its national legislation and does not ensure effective judicial protection against such interferences. As far as concerns effective judicial protection, it adds that the introduction of a Privacy Shield Ombudsperson cannot, in its view, remedy those deficiencies since an ombudsperson cannot be regarded as a tribunal within the meaning of Article 47 of the Charter.

169 As regards, in the first place, Articles 7 and 8 of the Charter, which contribute to the level of protection required within the European Union, compliance with which must be established by the Commission before it adopts an adequacy decision under Article 45(1) of the GDPR, it must be borne in mind that Article 7 of the Charter states that everyone has the right to respect for his or her private and family life, home and communications. Article 8(1) of the Charter expressly confers on everyone the right to the protection of personal data concerning him or her.

170 Thus, access to a natural person's personal data with a view to its retention or use affects the fundamental right to respect for private life guaranteed in Article 7 of the Charter, which concerns any information relating to an identified or identifiable individual. Such processing of data also falls within the scope of Article 8 of the Charter because it constitutes the processing of personal data within the meaning of that article and, accordingly, must necessarily satisfy the data protection requirements laid down in that article (see, to that effect, judgments of 9 November 2010, *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraphs 49 and 52, and of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 29; and Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraphs 122 and 123).

171 The Court has held that the communication of personal data to a third party, such as a public authority, constitutes an interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, whatever the subsequent use of the information communicated. The same is true of the retention of personal data and access to that data with a view to its use by public authorities, irrespective of whether the information in question relating to private life is sensitive or whether the persons concerned have been inconvenienced in any way on account of that interference (see, to that effect, judgments of 20 May 2003, *Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraphs 74 and 75, and of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 33 to 36; and Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraphs 124 and 126).

172 However, the rights enshrined in Articles 7 and 8 of the Charter are not absolute rights, but must be considered in relation to their function in society (see, to that effect, judgments of 9 November 2010, *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraph 48 and the case-law cited, and of 17 October 2013, *Schwarz*, C-291/12, EU:C:2013:670, paragraph 33 and the case-law cited; and Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraph 136).

173 In this connection, it should also be observed that, under Article 8(2) of the Charter, personal data must, inter alia, be processed 'for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law'.

174 Furthermore, in accordance with the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Under the second sentence of Article 52(1) of the Charter, subject to the principle of proportionality, limitations may be made to those rights and freedoms 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.

175 Following from the previous point, it should be added that the requirement that any limitation on the exercise of fundamental rights must be provided for by law implies that the legal basis which permits the interference with those rights must itself define the scope of the limitation on the exercise of the right concerned (Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraph 139 and the case-law cited).

176 Lastly, in order to satisfy the requirement of proportionality according to which derogations from and limitations on the protection of personal data must apply only in so far as is strictly necessary, the legislation in question which entails the interference must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards, so that the persons whose data has been transferred have sufficient guarantees to protect effectively their personal data against the risk of abuse. It must, in particular, indicate in what circumstances and under which conditions a measure providing for the processing of such data may be adopted, thereby ensuring that the interference is limited to what is strictly necessary. The need for such safeguards is all the greater where personal data is subject to automated processing (see, to that effect, Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraphs 140 and 141 and the case-law cited).

177 To that effect, Article 45(2)(a) of the GDPR states that, in its assessment of the adequacy of the level of protection in a third country, the Commission is, in particular, to take account of 'effective and enforceable data subject rights' for data subjects whose personal data are transferred.

178 In the present case, the Commission's finding in the Privacy Shield Decision that the United States ensures an adequate level of protection for personal data essentially equivalent to that guaranteed in the European Union by the GDPR, read in the light of Articles 7 and 8 of the Charter, has been called into question, inter alia, on the ground that the interference arising from the surveillance programmes based on Section 702 of the FISA and on E.O. 12333 are not covered by requirements ensuring, subject to the principle of proportionality, a level of protection essentially equivalent to that guaranteed by the second sentence of Article 52(1) of the Charter. It is therefore necessary to examine whether the implementation of those surveillance programmes is subject to such requirements, and it is not necessary to ascertain beforehand whether that third country has complied with conditions essentially equivalent to those laid down in the first sentence of Article 52(1) of the Charter.

179 In that regard, as regards the surveillance programmes based on Section 702 of the FISA, the Commission found, in recital 109 of the Privacy Shield Decision, that, according to that article, 'the FISC does not authorise individual surveillance measures; rather, it authorises surveillance programs (like PRISM, UPSTREAM) on the basis of annual certifications prepared by the Attorney General and the Director of National Intelligence (DNI)'. As is clear from that recital, the supervisory role of the FISC is thus designed to verify whether those surveillance programmes relate to the objective of acquiring foreign intelligence information, but it does not cover the issue of whether 'individuals are properly targeted to acquire foreign intelligence information'.

180 It is thus apparent that Section 702 of the FISA does not indicate any limitations on the power it confers to implement surveillance programmes for the purposes of foreign intelligence or the existence of guarantees for

non-US persons potentially targeted by those programmes. In those circumstances and as the Advocate General stated, in essence, in points 291, 292 and 297 of his Opinion, that article cannot ensure a level of protection essentially equivalent to that guaranteed by the Charter, as interpreted by the case-law set out in paragraphs 175 and 176 above, according to which a legal basis which permits interference with fundamental rights must, in order to satisfy the requirements of the principle of proportionality, itself define the scope of the limitation on the exercise of the right concerned and lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards.

181 According to the findings in the Privacy Shield Decision, the implementation of the surveillance programmes based on Section 702 of the FISA is, indeed, subject to the requirements of PPD-28. However, although the Commission stated, in recitals 69 and 77 of the Privacy Shield Decision, that such requirements are binding on the US intelligence authorities, the US Government has accepted, in reply to a question put by the Court, that PPD-28 does not grant data subjects actionable rights before the courts against the US authorities. Therefore, the Privacy Shield Decision cannot ensure a level of protection essentially equivalent to that arising from the Charter, contrary to the requirement in Article 45(2)(a) of the GDPR that a finding of equivalence depends, inter alia, on whether data subjects whose personal data are being transferred to the third country in question have effective and enforceable rights.

182 As regards the monitoring programmes based on E.O. 12333, it is clear from the file before the Court that that order does not confer rights which are enforceable against the US authorities in the courts either.

183 It should be added that PPD-28, with which the application of the programmes referred to in the previous two paragraphs must comply, allows for '"bulk" collection … of a relatively large volume of signals intelligence information or data under circumstances where the Intelligence Community cannot use an identifier associated with a specific target … to focus the collection', as stated in a letter from the Office of the Director of National Intelligence to the United States Department of Commerce and to the International Trade Administration from 21 June 2016, set out in Annex VI to the Privacy Shield Decision. That possibility, which allows, in the context of the surveillance programmes based on E.O. 12333, access to data in transit to the United States without that access being subject to any judicial review, does not, in any event, delimit in a sufficiently clear and precise manner the scope of such bulk collection of personal data.

184 It follows therefore that neither Section 702 of the FISA, nor E.O. 12333, read in conjunction with PPD-28, correlates to the minimum safeguards resulting, under EU law, from the principle of proportionality, with the consequence that the surveillance programmes based on those provisions cannot be regarded as limited to what is strictly necessary.

185 In those circumstances, the limitations on the protection of personal data arising from the domestic law of the United States on the access and use by US public authorities of such data transferred from the European Union to the United States, which the Commission assessed in the Privacy Shield Decision, are not circumscribed in a way that satisfies requirements that are essentially equivalent to those required, under EU law, by the second sentence of Article 52(1) of the Charter.

186 In the second place, as regards Article 47 of the Charter, which also contributes to the required level of protection in the European Union, compliance with which must be determined by the Commission before it adopts an adequacy decision pursuant to Article 45(1) of the GDPR, it should be noted that the first paragraph of Article 47 requires everyone whose rights and freedoms guaranteed by the law of the Union are violated to have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. According to the second paragraph of that article, everyone is entitled to a hearing by an independent and impartial tribunal.

187 According to settled case-law, 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. Thus, 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 her, 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 (judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 95 and the case-law cited).

188 To that effect, Article 45(2)(a) of the GDPR requires the Commission, in its assessment of the adequacy of the level of protection in a third country, to take account, in particular, of 'effective administrative and judicial redress for the data subjects whose personal data are being transferred'. Recital 104 of the GDPR states, in that regard, that the third country 'should ensure effective independent data protection supervision and should provide for cooperation mechanisms with the Member States' data protection authorities', and adds that 'the data subjects should be provided with effective and enforceable rights and effective administrative and judicial redress'.

189 The existence of such effective redress in the third country concerned is of particular importance in the context of the transfer of personal data to that third country, since, as is apparent from recital 116 of the GDPR, data subjects may find that the administrative and judicial authorities of the Member States have insufficient powers and means to take effective action in relation to data subjects' complaints based on allegedly unlawful processing, in that third country, of their data thus transferred, which is capable of compelling them to resort to the national authorities and courts of that third country.

190 In the present case, the Commission's finding in the Privacy Shield Decision that the United States ensures a level of protection essentially equivalent to that guaranteed in Article 47 of the Charter has been called into question on the ground, inter alia, that the introduction of a Privacy Shield Ombudsperson cannot remedy the deficiencies which the Commission itself found in connection with the judicial protection of persons whose personal data is transferred to that third country.

191 In that regard, the Commission found, in recital 115 of the Privacy Shield Decision, that 'while individuals, including EU data subjects, … have a number of avenues of redress when they have been the subject of unlawful (electronic) surveillance for national security purposes, it is equally clear that at least some legal bases that U.S. intelligence authorities may use (e.g. E.O. 12333) are not covered'. Thus, as regards E.O. 12333, the Commission emphasised, in recital 115, the lack of any redress mechanism. In accordance with the case-law set out in paragraph 187 above, the existence of such a lacuna in judicial protection in respect of interferences with intelligence programmes based on that presidential decree makes it impossible to conclude, as the Commission did in the Privacy Shield Decision, that United States law ensures a level of protection essentially equivalent to that guaranteed by Article 47 of the Charter.

192 Furthermore, as regards both the surveillance programmes based on Section 702 of the FISA and those based on E.O. 12333, it has been noted in paragraphs 181 and 182 above that neither PPD-28 nor E.O. 12333 grants data subjects rights actionable in the courts against the US authorities, from which it follows that data subjects have no right to an effective remedy.

193 The Commission found, however, in recitals 115 and 116 of the Privacy Shield Decision, that, as a result of the Ombudsperson Mechanism introduced by the US authorities, as described in a letter from the US Secretary of State to the European Commissioner for Justice, Consumers and Gender Equality from 7 July 2016, set out in Annex III to that decision, and of the nature of that Ombudsperson's role, in the present instance, a 'Senior Coordinator for International Information Technology Diplomacy', the United States can be deemed to ensure a level of protection essentially equivalent to that guaranteed by Article 47 of the Charter.

194 An examination of whether the ombudsperson mechanism which is the subject of the Privacy Shield Decision is in fact capable of addressing the Commission's finding of limitations on the right to judicial protection must, in accordance with the requirements arising from Article 47 of the Charter and the case-law recalled in paragraph 187 above, start from the premiss that data subjects must have the possibility of bringing legal action before an independent and impartial court in order to have access to their personal data, or to obtain the rectification or erasure of such data.

195 In the letter referred to in paragraph 193 above, the Privacy Shield Ombudsperson, although described as 'independent from the Intelligence Community', was presented as '[reporting] directly to the Secretary of State who will ensure that the Ombudsperson carries out its function objectively and free from improper influence that is liable to have an effect on the response to be provided'. Furthermore, in addition to the fact that, as found by the Commission in recital 116 of that decision, the Ombudsperson is appointed by the Secretary of State and is an integral part of the US State Department, there is, as the Advocate General stated in point 337 of his Opinion, nothing in that decision to indicate that the dismissal or revocation of the appointment of the Ombudsperson is accompanied by any particular guarantees, which is such as to undermine the Ombudsman's independence from the executive (see, to that effect, judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraphs 60 and 63 and the case-law cited).

196 Similarly, as the Advocate General stated, in point 338 of his Opinion, although recital 120 of the Privacy Shield Decision refers to a commitment from the US Government that the relevant component of the intelligence services is required to correct any violation of the applicable rules detected by the Privacy Shield Ombudsperson, there is nothing in that decision to indicate that that ombudsperson has the power to adopt decisions that are binding on those intelligence services and does not mention any legal safeguards that would accompany that political commitment on which data subjects could rely.

197 Therefore, the ombudsperson mechanism to which the Privacy Shield Decision refers does not provide any cause of action before a body which offers the persons whose data is transferred to the United States guarantees essentially equivalent to those required by Article 47 of the Charter.

198 Therefore, in finding, in Article 1(1) of the Privacy Shield Decision, that the United States ensures an adequate level of protection for personal data transferred from the Union to organisations in that third country under the EU-US Privacy Shield, the Commission disregarded the requirements of Article 45(1) of the GDPR, read in the light of Articles 7, 8 and 47 of the Charter.

199 It follows that Article 1 of the Privacy Shield Decision is incompatible with Article 45(1) of the GDPR, read in the light of Articles 7, 8 and 47 of the Charter, and is therefore invalid.

200 Since Article 1 of the Privacy Shield Decision is inseparable from Articles 2 and 6 of, and the annexes to, that decision, its invalidity affects the validity of the decision in its entirety.

201 In the light of all of the foregoing considerations, it is to be concluded that the Privacy Shield Decision is invalid.

202 As to whether it is appropriate to maintain the effects of that decision for the purposes of avoiding the creation of a legal vacuum (see, to that effect, judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 106), the Court notes that, in any event, in view of Article 49 of the GDPR, the annulment of an adequacy decision such as the Privacy Shield Decision is not liable to create such a legal vacuum. That article details the conditions under which transfers of personal data to third countries may take place in the absence of an adequacy decision under Article 45(3) of the GDPR or appropriate safeguards under Article 46 of the GDPR.

Costs

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

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

1. **Article 2(1) and (2) of Regulation (EU) 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), must be interpreted as meaning that that regulation applies to the transfer of personal data for commercial purposes by an economic operator established in a Member State to another economic operator established in a third country, irrespective of whether, at the time of that transfer or thereafter, that data is liable to be processed by the authorities of the third country in question for the purposes of public security, defence and State security.**

2. **Article 46(1) and Article 46(2)(c) of Regulation 2016/679 must be interpreted as meaning that the appropriate safeguards, enforceable rights and effective legal remedies required by those provisions must ensure that data subjects whose personal data are transferred to a third country pursuant to standard data protection clauses are afforded a level of protection essentially equivalent to that guaranteed within the European Union by that regulation, read in the light of the Charter of Fundamental Rights of the European Union. To that end, the assessment of the level of protection afforded in the context of such a transfer must, in particular, take into consideration both the contractual clauses agreed between the controller or processor established in the European Union and the recipient of the transfer established in the third**

country concerned and, as regards any access by the public authorities of that third country to the personal data transferred, the relevant aspects of the legal system of that third country, in particular those set out, in a non-exhaustive manner, in Article 45(2) of that regulation.

3. **Article 58(2)(f) and (j) of Regulation 2016/679 must be interpreted as meaning that, unless there is a valid European Commission adequacy decision, the competent supervisory authority is required to suspend or prohibit a transfer of data to a third country pursuant to standard data protection clauses adopted by the Commission, if, in the view of that supervisory authority and in the light of all the circumstances of that transfer, those clauses are not or cannot be complied with in that third country and the protection of the data transferred that is required by EU law, in particular by Articles 45 and 46 of that regulation and by the Charter of Fundamental Rights, cannot be ensured by other means, where the controller or a processor has not itself suspended or put an end to the transfer.**

4. **Examination of Commission Decision 2010/87/EU of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EU of the European Parliament and of the Council, as amended by Commission Implementing Decision (EU) 2016/2297 of 16 December 2016 in the light of Articles 7, 8 and 47 of the Charter of Fundamental Rights has disclosed nothing to affect the validity of that decision.**

5. **Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-US Privacy Shield is invalid.**

Case C-579/21, *Pankki S*

In Case C-579/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Itä-Suomen hallinto-oikeus (Administrative Court of Eastern Finland, Finland), made by decision of 21 September 2021, received at the Court on 22 September 2021, in the proceedings brought by

J.M.

intervening parties:

Apulaistietosuojavaltuutettu,

Pankki S,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, P.G. Xuereb, T. von Danwitz, A. Kumin and I. Ziemele (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 12 October 2022,

after considering the observations submitted on behalf of:

– J.M., by himself,

– the Apulaistietosuojavaltuutettu, par A. Talus, tietosuojavaltuutettu,

– Pankki S, by T. Kalliokoski and J. Lång, asianajajat, and by E.-L. Hokkonen, oikeustieteen maisteri,

– the Finnish Government, by A. Laine and H. Leppo, acting as Agents,

– the Czech Government, by A. Edelmannová, M. Smolek and J. Vláčil, acting as Agents,

– the Austrian Government, by A. Posch, acting as Agent,

– the European Commission, by A. Bouchagiar, H. Kranenborg and I. Söderlund, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 December 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 15(1) of Regulation (EU) 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) (OJ 2016 L 119, p. 1) (‘the GDPR’).

2 The request has been made in proceedings brought by J.M. seeking annulment of the decision of the Apulaistietosuojavaltuutettu (Assistant Data Protection Supervisor, Finland) rejecting his request that Pankki S, a banking institution established in Finland, be ordered to communicate to him certain information in relation to consultation operations carried out on his personal data.

Legal context

3 Recitals 4, 10, 11, 26, 39, 58, 60, 63 and 74 of the GDPR state:

‘(4) The processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; …

…

(10) In order to ensure a consistent and high level of protection of natural persons and to remove the obstacles to flows of personal data within the [European] Union, the level of protection of the rights and freedoms of natural persons with regard to the processing of such data should be equivalent in all Member States. …

(11) Effective protection of personal data throughout the Union requires the strengthening and setting out in detail of the rights of data subjects and the obligations of those who process and determine the processing of personal data, …

…

(26) … To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. …

…

(39) Any processing of personal data should be lawful and fair. It should be transparent to natural persons that personal data concerning them are collected, used, consulted or otherwise processed and to what extent the personal data are or will be processed. The principle of transparency requires that any information and communication relating to the processing of those personal data be easily accessible and easy to understand, and that clear and plain language be used. That principle concerns, in particular, information to the data subjects on the identity of the controller and the purposes of the processing and further information to ensure fair and transparent processing in respect of the natural persons concerned and their right to obtain confirmation and communication of personal data concerning them which are being processed. Natural persons should be made aware of risks, rules, safeguards and rights in relation to the processing of personal data and how to exercise their rights in relation to such processing. In particular, the specific purposes for which personal data are processed should be explicit and legitimate and determined at the time of the collection of the personal data. …

…

(58) The principle of transparency requires that any information addressed to the public or to the data subject be concise, easily accessible and easy to understand, and that clear and plain language and, additionally, where appropriate, visualisation be used. Such information could be provided in electronic form, for example, when addressed to the public, through a website. This is of particular relevance in situations where the proliferation of actors and the technological complexity of practice make it difficult for the data subject to know and understand whether, by whom and for what purpose personal data relating to him or her are being collected, such as in the case of online advertising. Given that children merit specific protection, any information and communication, where processing is addressed to a child, should be in such a clear and plain language that the child can easily understand.

…

(60) The principles of fair and transparent processing require that the data subject be informed of the existence of the processing operation and its purposes. The controller should provide the data subject with any further information necessary to ensure fair and transparent processing taking into account the specific circumstances and context in which the personal data are processed. …

…

(63) A data subject should have the right of access to personal data which have been collected concerning him or her, and to exercise that right easily and at reasonable intervals, in order to be aware of, and verify, the lawfulness of the processing. … Every data subject should therefore have the right to know and obtain communication in particular with regard to the purposes for which the personal data are processed, where possible the period for which the personal data are processed, the recipients of the personal data, the logic involved in any automatic personal data processing and, at least when based on profiling, the consequences of such processing. … That right should not adversely affect the rights or freedoms of others, including trade secrets or intellectual property and in particular the copyright protecting the software. …

…

(74) The responsibility and liability of the controller for any processing of personal data carried out by the controller or on the controller's behalf should be established. In particular, the controller should be obliged to implement appropriate and effective measures and be able to demonstrate the compliance of processing activities with this Regulation, including the effectiveness of the measures. Those measures should take into account the nature, scope, context and purposes of the processing and the risk to the rights and freedoms of natural persons.'

4 Article 1 of the GDPR, headed 'Subject matter and objectives', provides in paragraph 2 thereof:

'This Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data.'

5 Article 4 of that regulation provides:

'For the purposes of this Regulation:

(1) "personal data" means any information relating to an identified or identifiable natural person …; 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;

…

(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; …

…

(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. …

…

(21) "supervisory authority" means an independent public authority which is established by a Member State pursuant to Article 51;

…’

6 Article 5 of that regulation, entitled ‘Principles relating to processing of personal data’, is worded as follows:

‘1. Personal data shall be:

(a) processed lawfully, fairly and in a transparent manner in relation to the data subject (“lawfulness, fairness and transparency”);

…

(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”).’

7 Article 12 of the GDPR, entitled ‘Transparent information, communication and modalities for the exercise of the rights of the data subject’, states:

‘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, … The information shall be provided in writing, or by other means, including, where appropriate, by electronic means. …

…

5. … Where requests from a data subject are manifestly unfounded or excessive, in particular because of their repetitive character, the controller may either:

…

(b) refuse to act on the request.

The controller shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

…’

8 Article 15 of that regulation, entitled ‘Right of access by the data subject’, provides:

‘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.

…

3. The controller shall provide a copy of the personal data undergoing processing. …

4. The right to obtain a copy referred to in paragraph 3 shall not adversely affect the rights and freedoms of others.'

9 Articles 16 and 17 of that regulation lay down, respectively, the data subject's right to have inaccurate personal data rectified (right of rectification), as well as the right, in certain circumstances, to erasure of those data (right to erasure or 'right to be forgotten').

10 Article 18 of that regulation, entitled 'Right to restriction of processing', provides in paragraph 1 thereof:

'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.'

11 Article 21 of the GDPR, entitled 'Right to object', provides in paragraph 1 thereof:

'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.'

12 Under Article 24(1) of that regulation:

'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. …'

13 Article 29 of that regulation, entitled 'Processing under the authority of the controller or processor', is worded as follows:

‘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.’

14 Article 30 of the GDPR, entitled ‘Records of processing activities’, provides:

‘1. Each controller and, where applicable, the controller’s representative, shall maintain a record of processing activities under its responsibility. …

…

4. The controller … and, where applicable, the controller’s … representative, shall make the record available to the supervisory authority on request.

…’

15 Article 58 of that regulation, entitled ‘Powers’, provides, in paragraph 1 thereof:

‘Each supervisory authority shall have all of the following investigative powers:

(a) to order the controller and the processor, and, where applicable, the controller’s or the processor’s representative to provide any information it requires for the performance of its tasks;

…’

16 Article 77 of that regulation, entitled ‘Right to lodge a complaint with a supervisory authority’, states as follows:

‘1. Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with a supervisory authority, in particular in the Member State of his or her habitual residence, place of work or place of the alleged infringement if the data subject considers that the processing of personal data relating to him or her infringes this Regulation.

2. The supervisory authority with which the complaint has been lodged shall inform the complainant on the progress and the outcome of the complaint including the possibility of a judicial remedy pursuant to Article 78.’

17 Article 79 of the GDPR, entitled ‘Right to an effective judicial remedy against a controller or processor’, states in paragraph 1 thereof:

‘Without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority pursuant to Article 77, each data subject shall have the right to an effective judicial remedy where he or she considers that his or her rights under this Regulation have been infringed as a result of the processing of his or her personal data in non-compliance with this Regulation.’

18 Article 82 of that regulation, entitled ‘Right to compensation and liability’, provides in paragraph 1 thereof:

‘Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.’

19 In accordance with Article 99(2) thereof, the GDPR has been applicable from 25 May 2018.

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

20 In 2014, J.M., who was then an employee and customer of Pankki S, learned that his own customer data had been accessed by members of the bank’s staff on several occasions during the period from 1 November to 31 December 2013.

21 Since he had doubts as to the lawfulness of those consultations, J.M., who had in the meantime been dismissed from his post with Pankki S, on 29 May 2018 asked Pankki S to inform him of the identity of the persons who had consulted his customer data, the exact dates of the consultations and the purposes for which those data were processed.

22 In its reply of 30 August 2018, Pankki S, in its capacity as controller within the meaning of Article 4(7) of the GDPR, refused to disclose the identity of the employees who had carried out the consultation operations on the ground that that information constituted the personal data of those employees.

23 However, in that reply, Pankki S provided further details of the consultation operations carried out, on its instructions, by its internal audit department. It thus explained that a customer of the bank in respect of whom J.M. was the customer advisor was a creditor of a person also bearing J.M.'s surname, so that the bank had wished to clarify whether the applicant in the main proceedings and the debtor in question were one and the same person and whether there might have been a possible impermissible conflict of interest. Pankki S added that the clarification of that issue required the processing of J.M.'s data, and every member of the bank's staff who had processed his data had given a statement to the internal audit department on the reasons for the processing of the data. In addition, the bank stated that those consultations had made it possible to rule out any suspicion of conflict of interest in relation to J.M..

24 J.M. applied to the Tietosuojavaltuutetun toimisto (Data Protection Supervisor's Office, Finland), the supervisory authority within the meaning of Article 4(21) of the GDPR, for an order that Pankki S provide him with the information requested.

25 By decision of 4 August 2020, the Assistant Data Protection Supervisor rejected J.M.'s application. He explained that such an application sought to enable J.M. to gain access to the log data of the employees who had processed his data, whereas, under the Assistant Data Protection Supervisor's decision-making practice, such log data constituted personal data relating not to the person concerned but to the employees who processed the data of that person.

26 J.M. brought an action against that decision before the referring court.

27 That court notes that Article 15 of the GDPR provides for the right of the data subject to obtain from the controller access to the data processed concerning him or her and information relating, inter alia, to the purposes of the processing and recipients of the data. It asks whether the communication of the log data generated during processing operations, which contain such information, in particular the identity of the controller's employees, is covered by Article 15 of the GDPR, since those log data might prove necessary to the data subject for the purposes of assessing the lawfulness of the processing of his or her data.

28 In those circumstances, the Itä-Suomen hallinto-oikeus (Administrative Court of Eastern Finland) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the data subject's right of access under Article 15(1) of the [GDPR], considered in conjunction with the [concept of] "personal data" within the meaning of Article 4(1) thereof, to be interpreted as meaning that information collected by the controller, which indicates who processed the data subject's personal data and when and for what purpose they were processed, does not constitute information in respect of which the data subject has a right of access, in particular because it consists of data concerning the controller's employees?

(2) If Question 1 is answered in the affirmative and the data subject does not have a right of access to the information referred to in that question on the basis of Article 15(1) of the [GDPR], because it does not constitute "personal data" of the data subject within the meaning of Article 4(1) of [that regulation], it remains necessary in the present case to consider the information in respect of which the data subject does have a right of access in accordance with Article 15(1)[(a) to (h)]:

(a) How is the purpose of processing within the meaning of Article 15(1)(a) [of the GDPR] to be interpreted in relation to the scope of the data subject's right of access, that is to say, can the purpose of the processing give rise to a right of access to the user log data collected by the controller, such as information concerning personal data of the processors and the time and the purpose of the processing of the personal data?

(b) In that context, can the persons who processed J.M.'s customer data be regarded, under certain criteria, as recipients of the personal data within the meaning of Article 15(1)(c) of the [GDPR], in respect of whom the data subject would be entitled to obtain information?

(3) Is the fact that the bank at issue performs a regulated activity or that J.M. was both an employee and a customer of the bank at the same time relevant to the present case?

(4) Is the fact that J.M.'s data were processed before the entry into force of the [GDPR] relevant to the examination of the questions set out above?'

Consideration of the questions referred

The fourth question

29 By its fourth question, which it is appropriate to examine first, the referring court asks, in essence, whether Article 15 of the GDPR, read in the light of Article 99(2) of that regulation, is applicable to a request for access to the information referred to in the first of those provisions where the processing operations covered by that request were carried out before the date on which that regulation became applicable, but the request was made after that date.

30 In order to answer that question, it should be noted that, under Article 99(2) of the GDPR, that regulation has been applicable since 25 May 2018.

31 In the present case, it is apparent from the order for reference that the personal data processing operations at issue in the main proceedings were carried out between 1 November 2013 and 31 December 2013, that is to say, before the date on which the GDPR became applicable. However, it is also apparent from that decision that J.M. submitted his request for information to Pankki S after that date, namely on 29 May 2018.

32 In that regard, it must be borne in mind that procedural rules are generally taken to apply from the date on which they enter into force, as opposed to substantive rules, which are usually interpreted as applying to situations that have arisen and become definitive before their entry into force only in so far as it follows clearly from their terms, their objectives or their general scheme that such an effect must be given to them (judgment of 15 June 2021, *Facebook Ireland and Others*, C-645/19, EU:C:2021:483, paragraph 100 and the case-law cited).

33 In the present case, it is apparent from the order for reference that J.M.'s request to be provided with the information at issue in the main proceedings is connected with Article 15(1) of the GDPR, which provides for the right of the data subject to obtain access to personal data concerning him or her which are being processed, and to the information referred to in that provision.

34 It must be stated that that provision does not concern the conditions under which the processing of the personal data of the data subject is lawful. Article 15(1) of the GDPR merely specifies the scope of that data subject's right of access to the data and to the information to which it covers.

35 It follows, as the Advocate General observed in point 33 of his Opinion, that Article 15(1) of the GDPR confers on data subjects a procedural right consisting of obtaining information about the processing of their personal data. As a procedural rule, that provision applies to requests for access made from the entry into application of that regulation, such as J.M.'s request.

36 In those circumstances, the answer to the fourth question is that Article 15 of the GDPR, read in the light of Article 99(2) of that regulation, must be interpreted as meaning that it is applicable to a request for access to the information referred to in that provision where the processing operations which that request concerns were carried out before the date on which that regulation became applicable, but the request was submitted after that date.

The first and second questions

37 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 15(1) of the GDPR must be interpreted as meaning that information relating to consultation operations carried out on a data subject's personal data and concerning the dates and purposes of those operations, and the identity of the natural persons who carried out those operations, constitutes information which that data subject is entitled to obtain from the controller under that provision.

38 As a preliminary point, it should be borne in mind that, in accordance with settled case-law, the interpretation of a provision of EU law requires that account be taken not only of its wording, but also of its context and the objectives and purpose pursued by the act of which it forms part (judgment of 12 January 2023, *Österreichische Post (Information regarding the recipients of personal data)*, C-154/21, EU:C:2023:3, point 29).

39 As regards, first of all, the wording of Article 15(1) of the GDPR, that provision states that the data subject has 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 information about the purposes of the processing and the recipients or categories of recipient to whom those personal data have been or will be disclosed.

40 In that regard, it must be pointed out that the concepts in Article 15(1) of the GDPR are defined in Article 4 of that regulation.

41 Thus, in the first place, Article 4(1) of the GDPR states that personal data is 'any information relating to an identified or identifiable natural person' and specifies that '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'.

42 The use of the expression 'any information' in the definition of the concept of 'personal data' in that provision reflects the aim of the EU legislature to assign a wide scope to that concept, which potentially encompasses all kinds of information, not only objective but also subjective, in the form of opinions and assessments, provided that it 'relates' to the data subject (judgment of 4 May 2023, *Österreichische Datenschutzbehörde and CRIF*, C-487/21, EU:C:2023:369, paragraph 23).

43 In that regard, it has been held that information relates to an identified or identifiable natural person where, by reason of its content, purpose or effect, it is linked to an identifiable person (judgment of 4 May 2023, *Österreichische Datenschutzbehörde and CRIF*, C-487/21, EU:C:2023:369, paragraph 24).

44 As regards the 'identifiable' nature of a person, recital 26 of the GDPR states that account should be taken of 'all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly'.

45 Therefore, the broad definition of the concept of 'personal data' covers not only data collected and stored by the controller, but also includes all information resulting from the processing of personal data relating to an identified or identifiable person (see, to that effect, judgment of 4 May 2023, *Österreichische Datenschutzbehörde and CRIF*, C-487/21, EU:C:2023:369, paragraph 26).

46 In the second place, as regards the concept of 'processing', as defined in Article 4(2) of the GDPR, it should be noted that, by using the expression 'any operation', the EU legislature intended to give that concept a broad scope by using a non-exhaustive list of operations applied to personal data or sets of personal data, which cover, among others, collection, recording, storage or also consultation (see, to that effect, judgment of 4 May 2023, *Österreichische Datenschutzbehörde and CRIF*, C-487/21, EU:C:2023:369, paragraph 27).

47 In the third place, Article 4(9) of the GDPR states that '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'.

48 In that regard, the Court has held that the data subject has the right to obtain from the controller information about the specific recipients to whom the personal data concerning him or her have been or will be disclosed (judgment of 12 January 2023, *Österreichische Post (Information regarding the recipients of personal data)*, C-154/21, EU:C:2023:3, paragraph 46).

49 Therefore, it follows from the textual analysis of Article 15(1) of the GDPR and the concepts contained therein that the right of access granted to the data subject by that provision is characterised by the broad scope of the information that the controller must provide to the data subject.

50 As regards, next, the context of Article 15(1) of the GDPR, in the first place, recital 63 of that regulation provides that every data subject should have the right to know and obtain communication in particular with regard to the purposes for which the personal data are processed, where possible the period for which the personal data are processed and the recipients of the personal data.

51 In the second place, recital 60 of the GDPR states that the principles of fair and transparent processing require that the data subject be informed of the existence of the processing operation and its purposes, it being stressed that the controller should provide any further information necessary to ensure fair and transparent processing, taking into account the specific circumstances and context in which the personal data are processed. Furthermore, in accordance with the principle of transparency, alluded to by the referring court, to which recital 58 of the GDPR refers and which is expressly enshrined in Article 12(1) of that regulation, any information sent to the data subject must be concise, easily accessible and easy to understand, and formulated in clear and plain language.

52 In that regard, Article 12(1) of the GDPR states that the information must be provided by the controller in writing or by other means, including, where appropriate, by electronic means, unless the data subject requests that it be provided orally. The purpose of that provision, an expression of the principle of transparency, is to ensure that the data subject is able fully to understand the information sent to him or her (judgment of 4 May 2023, *Österreichische Datenschutzbehörde and CRIF*, C-487/21, EU:C:2023:369, paragraph 38 and the case-law cited).

53 It follows from the foregoing contextual analysis that Article 15(1) of the GDPR is one of the provisions intended to ensure the transparency of the manner in which personal data are processed in relation to the data subject.

54 Lastly, that interpretation of the scope of the right of access provided for in Article 15(1) of the GDPR is supported by the objectives pursued by that regulation.

55 First, as stated in recitals 10 and 11 thereof, the purpose of that regulation is to ensure a consistent and high level of protection of natural persons within the European Union and to strengthen and set out in detail the rights of data subjects.

56 In addition, as is apparent from recital 63 of the GDPR, the right of a data subject to have access to his or her own personal data and to the other information referred to in Article 15(1) of that regulation is intended, first of all, to enable that person to become aware of the processing and to verify its lawfulness. It follows, according to that same recital and as stated in paragraph 50 above, that every data subject should have the right to know and obtain communication in particular with regard to the purposes for which the personal data are processed, where possible the period for which the personal data are processed, the recipients of the personal data and the logic involved in their processing.

57 In that regard, it must be recalled, secondly, that the Court has already held that the right of access provided for in Article 15 of the GDPR must enable the data subject to ensure that the personal data relating to him or her are correct and that they are processed in a lawful manner (judgment of 4 May 2023, *Österreichische Datenschutzbehörde and CRIF,* C-487/21, EU:C:2023:369, paragraph 34).

58 In particular, that right of access is necessary to enable the data subject to exercise, depending on the circumstances, his or her right to rectification, right to erasure (‘right to be forgotten’) or right to restriction of processing, conferred, respectively, by Articles 16 to 18 of the GDPR, as well as the data subject’s right to object to his or her personal data being processed, laid down in Article 21 of the GDPR, and right of action where he or she suffers damage, laid down in Articles 79 and 82 of the GDPR (judgment of 4 May 2023, *Österreichische Datenschutzbehörde and CRIF*, C-487/21, EU:C:2023:369, paragraph 35 and the case-law cited).

59 Accordingly, Article 15(1) of the GDPR is one of the provisions intended to ensure transparency vis-à-vis the data subject of the manner in which personal data are processed (judgment of 12 January 2023, *Österreichische Post (Information regarding the recipients of personal data)*, C-154/21, EU:C:2023:3, paragraph 42), without

which that data subject would not be in a position to assess the lawfulness of the processing of his or her data or to exercise the rights provided for, inter alia, in Articles 16 to 18, 21, 79 and 82 of that regulation.

60 In the present case, it is apparent from the order for reference that J.M. requested Pankki S to provide him with information relating to the consultation operations carried out on his personal data between 1 November 2013 and 31 December 2013, including the dates of those consultations, their purposes and the identity of the persons who carried them out. The referring court states that the transmission of the log data generated during those operations would make it possible to respond to J.M's request.

61 Here, it is not disputed that the consultation operations carried out on the personal data of the applicant in the main proceedings constitute 'processing' within the meaning of Article 4(2) of the GDPR, with the result that they confer on him, pursuant to Article 15(1) of that regulation, not only a right of access to those personal data, but also a right to be provided with the information linked to those operations, as referred to in the latter provision.

62 In respect of information such as that requested by J.M., the communication, first of all, of the dates of the consultation operations is such as to enable the data subject to obtain confirmation that his personal data have actually been processed at a given time. In addition, since the conditions of lawfulness laid down in Articles 5 and 6 of the GDPR must be satisfied at the point of the processing itself, the date of that processing is a factor which makes it possible to verify its lawfulness. Next, it should be noted that information relating to the purposes of the processing is expressly referred to in Article 15(1)(a) of that regulation. Lastly, Article 15(1)(c) of that regulation provides that the controller is to inform the data subject of the recipients to whom his or her data have been disclosed.

63 As regards, specifically, the communication of all that information by means of the provision of the log data relating to the processing operations at issue in the main proceedings, it should be noted that the first sentence of Article 15(3) of the GDPR states that the controller 'shall provide a copy of the personal data undergoing processing'.

64 In that regard, the Court has already held that the concept of 'copy' thus used refers to the faithful reproduction or transcription of an original, with the result that a purely general description of the data undergoing processing or a reference to categories of personal data does not correspond to that definition. Furthermore, it is apparent from the wording of the first sentence of Article 15(3) of that regulation that the disclosure obligation relates to the personal data undergoing the processing in question (see, to that effect, judgment of 4 May 2023, *Österreichische Datenschutzbehörde and CRIF*, C-487/21, EU:C:2023:369, paragraph 21).

65 The copy that the controller is required to provide must contain all the personal data undergoing processing, must have all the characteristics necessary for the data subject effectively to exercise his or her rights under that regulation and must, consequently, reproduce those data fully and faithfully (see, to that effect, judgment of 4 May 2023, *Österreichische Datenschutzbehörde and CRIF*, C-487/21, EU:C:2023:369, paragraphs 32 and 39).

66 In order to ensure that the information thus provided is easy to understand, as required by Article 12(1) of the GDPR, read in conjunction with recital 58 of that regulation, the reproduction of extracts from documents or even entire documents or extracts from databases which contain, inter alia, the personal data undergoing processing may prove to be essential where the contextualisation of the data processed is necessary in order to ensure the data are intelligible. In particular, where personal data are generated from other data or where such data result from empty fields, that is to say, where there is an absence of information which provides information about the data subject, the context in which the data are processed is an essential element in enabling the data subject to have transparent access and an intelligible presentation of those data (judgment of 4 May 2023, *Österreichische Datenschutzbehörde and CRIF*, C-487/21, EU:C:2023:369, paragraphs 41 and 42).

67 In the present case, as the Advocate General observed in points 88 to 90 of his Opinion, the log data, which contain the information requested by J.M., correspond to records of activities, within the meaning of Article 30 of the GDPR. It must be held that they fall within the scope of the measures, referred to in recital 74 of that regulation, implemented by the controller to demonstrate the compliance of the processing activities with that regulation. Article 30(4) of that regulation specifies in particular that they must be made available to the supervisory authority on its request.

68 In so far as those records of activities do not contain information relating to an identified or identifiable natural person within the meaning of the case-law referred to in paragraphs 42 and 43 above, they merely enable the controller to fulfil his or her obligations towards the supervisory authority which requests the provision of those records.

69 As regards, more specifically, the controller's log data, the disclosure of a copy of the information contained in those files may be necessary in order to satisfy the obligation to provide the data subject with access to all the information referred to in Article 15(1) of the GDPR and to ensure fair and transparent processing, thus enabling him or her fully to assert his or her rights under that regulation.

70 First, such log data reveal the existence of data processing, information to which the data subject must have access under Article 15(1) of the GDPR. In addition, they provide information on the frequency and intensity of the consultation operations, thus enabling the data subject to ensure that the processing carried out is actually motivated by the purposes put forward by the controller.

71 Secondly, those files contain information relating to the identity of the persons who carried out the consultation operations.

72 In the present case, it is apparent from the order for reference that the persons who carried out the consultation operations at issue in the main proceedings are employees of Pankki S, who acted under its authority and in accordance with its instructions.

73 Although it follows from Article 15(1)(c) of the GDPR that the data subject has the right to obtain from the controller information relating to the recipients or categories of recipients to whom the personal data have been or will be disclosed, the employees of the controller cannot be regarded as being 'recipients', within the meaning of Article 15(1)(c) of the GDPR, as recalled in paragraphs 47 and 48 above, when they process personal data under the authority of that controller and in accordance with its instructions, as the Advocate General observed in point 63 of his Opinion.

74 In that regard, it must be pointed out that, in accordance with Article 29 of the GDPR, any person acting under the authority of the controller who has access to personal data may process those data only on instructions from that controller.

75 That being the case, the information contained in the log data relating to the persons who have consulted the data subject's personal data could constitute information falling within the scope of Article 4(1) of the GDPR, as recalled in paragraph 41 above, capable of enabling him or her to verify the lawfulness of the processing of his or her data and, in particular, to satisfy him or herself that the processing operations were actually carried out under the authority of the controller and in accordance with its instructions.

76 Nevertheless, first, it is apparent from the order for reference that the information in log data such as those at issue in the main proceedings makes it possible to identify the employees who carried out the processing operations and contains personal data of those employees, within the meaning of Article 4(1) of the GDPR.

77 In that regard, it should be recalled that, as regards the right of access provided for in Article 15 of the GDPR, recital 63 of that regulation states that 'that right should not adversely affect the rights or freedoms of others'.

78 Under recital 4 of the GDPR, the right to the protection of personal data is not an absolute right, since it must be considered in relation to its function in society and be balanced against other fundamental rights (see, to that effect, judgment of 16 July 2020, *Facebook Ireland and Schrems*, C-311/18, EU:C:2020:559, paragraph 172).

79 Even if the disclosure of the information relating to the identity of the controller's employees to the data subject may be necessary for that data subject in order to ensure the lawfulness of the processing of his or her personal data, it is nevertheless liable to infringe the rights and freedoms of those employees.

80 In those circumstances, in the event of a conflict between, on the one hand, the exercise of a right of access which ensures the effectiveness of the rights conferred on the data subject by the GDPR and, on the other hand, the rights or freedoms of others, a balance will have to be struck between the rights and freedoms in question.

Wherever possible, means of communicating personal data that do not infringe the rights or freedoms of others should be chosen, bearing in mind that, as follows from recital 63 of the GDPR, 'the result of those considerations should not be a refusal to provide all information to the data subject' (see, to that effect, judgment of 4 May 2023, *Österreichische Datenschutzbehörde and CRIF*, C-487/21, EU:C:2023:369, paragraph 44).

81 However, secondly, it is apparent from the order for reference that J.M. does not seek disclosure of the information relating to the identity of Pankki S's employees who carried out the consultation operations on his personal data on the ground that they did not actually act under the authority and in accordance with the instructions of the controller, but appears to doubt the veracity of the information relating to the purpose of those consultations communicated to him by Pankki S.

82 In such circumstances, if the data subject were to consider the information provided by the controller to be insufficient to enable him or her to dispel his or her doubts as to the lawfulness of the processing of his or her personal data, he or she has the right to lodge a complaint with the supervisory authority on the basis of Article 77(1) of the GDPR, that authority having the power, under Article 58(1)(a) of that regulation, to request the controller to provide it with any information it needs in order to examine the data subject's complaint.

83 It follows from the foregoing considerations that Article 15(1) of the GDPR must be interpreted as meaning that information relating to consultation operations carried out on a data subject's personal data and concerning the dates and purposes of those operations constitutes information which that person has the right to obtain from the controller under that provision. On the other hand, that provision does not lay down such a right in respect of information relating to the identity of the employees of that controller who carried out those operations under its authority and in accordance with its instructions, unless that information is essential in order to enable the data subject effectively to exercise the rights conferred on him or her by that regulation and provided that the rights and freedoms of those employees are taken into account.

The third question

84 By its third question, the referring court asks, in essence, whether the fact, first, that the controller is engaged in the business of banking and acts within the framework of a regulated activity and, second, that the data subject whose personal data has been processed in his or her capacity as a customer of the controller was also an employee of that controller is relevant for the purposes of defining the scope of the right of access conferred on him or her by Article 15(1) of the GDPR.

85 At the outset, it should be noted that, as regards the scope of the right of access provided for in Article 15(1) of the GDPR, no provision of that regulation draws a distinction according to the nature of the activities of the controller or the status of the person whose personal data are being processed.

86 As regards, first, the regulated nature of Pankki S's activity, it is true that Article 23 of the GDPR allows Member States to restrict by way of a legislative measure the scope of the obligations and rights provided for, inter alia, in Article 15 of that regulation.

87 However, it is not apparent from the order for reference that Pankki S's activity is subject to such legislation.

88 As regards, secondly, the fact that J.M. was both a customer and an employee of Pankki S, it should be noted that, having regard not only to the objectives of the GDPR but also to the scope of the data subject's right of access, as recalled in paragraphs 49 and 55 to 59 above, the context in which that data subject requests access to the information referred to in Article 15(1) of the GDPR cannot have any influence on the scope of that right.

89 Consequently, Article 15(1) of the GDPR must be interpreted as meaning that the fact that the controller is engaged in the business of banking and acts within the framework of a regulated activity and that the data subject whose personal data has been processed in his or her capacity as a customer of the controller was also an employee of that controller, in principle, has no effect on the scope of the right of access conferred on that data subject by that provision.

Costs

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

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

1. **Article 15 of Regulation (EU) 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), read in the light of Article 99(2) of that regulation,**

must be interpreted as meaning that it is applicable to a request for access to the information referred to in that provision where the processing operations which that request concerns were carried out before the date on which that regulation became applicable, but the request was submitted after that date.

2. **Article 15(1) of Regulation 2016/679**

must be interpreted as meaning that information relating to consultation operations carried out on a data subject's personal data and concerning the dates and purposes of those operations constitutes information which that person has the right to obtain from the controller under that provision. On the other hand, that provision does not lay down such a right in respect of information relating to the identity of the employees of that controller who carried out those operations under its authority and in accordance with its instructions, unless that information is essential in order to enable the person concerned effectively to exercise the rights conferred on him or her by that regulation and provided that the rights and freedoms of those employees are taken into account.

3. **Article 15(1) of Regulation 2016/679**

must be interpreted as meaning that the fact that the controller is engaged in the business of banking and acts within the framework of a regulated activity and that the data subject whose personal data has been processed in his or her capacity as a customer of the controller was also an employee of that controller has, in principle, no effect on the scope of the right of access conferred on that data subject by that provision.