European Market Law

Handbook Vol. I

Hana Horak • Kosjenka Dumančić • Kristijan Poljanec • Dominik Vuletić

INTEREULAWEAST
European and International Law Master Programme Development in Eastern Europe

Tempus

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PREFACE

This Handbook makes an integral part of the TEMPUS InterEULawEast project No. 544117 funded by the European Union aiming at ensuring the sustainability and visibility of the project after its completion. It will contribute to the promotion of the European Law and increase the legal culture of wider public, not only students in all countries involved in the project. The authors' objective was to encourage and provide an excellent foundation for the future master students in promotion and affirmation of the European values.

One of the goals of the TEMPUS InterEULawEast Project is the implementation of the Master Programme "International and European Law" which is introduced within the TEMPUS InterEULawEast Project. Therefore, the experts from the European Union and teachers from co-beneficiaries institutions are preparing all necessary logistic and scientific materials for achieving these goals. This also serves to disseminate the knowledge and to gain results that will last after the project lifetime. Publishing of this book represents one of the achievements of the abovementioned goals and contribution for the Master Programme International and European Law.

The authors' intention is to collect at one place their knowledge and experience in teaching the European law issues and to present how to use different sources of European Law for research. Furthermore, their intention is to present at one place the representative European Court of Justice case-law regarding four market freedoms.

This Handbook is divided in two parts. The first part gives a clear overview of database research. This methodological approach is a result of successful teaching of generations of students who studied at graduate and postgraduate study "Legal and economic framework of doing business within the EU" at the Faculty of Economics and Business, University of Zagreb. The Internet resources are clearly and simply presented by using figures and descriptive way of presenting each Internet source. Knowledge and experience in researching within the relevant sources of EU law and other information is of utmost importance for master student as well as for others who study and research within the EU topics.

The ECJ has an important institutional role in the European integration system. As a part of the secondary source of EU law, the ECJ case-law is the most valuable for understanding the role of the EU Law, principles and rules. The second part of the Handbook gives a selection of ECJ cases. When deciding what cases should be presented in this book, it was agreed that cases covering general issues of the European Law would be presented at the beginning, followed by cases which issues fall within the scope of different areas of free movement of goods, services, persons and capital. The selected cases are intended to be used by students of law and economics faculties and master students and also as the base for long-life learning programmes and for all those interested in the European Law.

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SEARCHING DATABASES ON EU LAW

1. INTRODUCTORY REMARK

Nowadays electronic communications have become inherent to doing business and important communication tool of social life. Although using of informatic skills is inherent to business and public services, those skills have become valuable for academics and students in course of their scientific work and studies. That refers particularly to use of numerous of databases which have become a helpful tool for the introduction to available data on the subject matter of one's research. The most prominent example of that are legal databases containing valuable information on sources of law, including the case-law, articles and books. In addition to the aforementioned, databases help us to achieve the right to acess information in easier manner than it was before. That leads us to"more democracy" and higher level of transparency and disclosure of key information on various aspects of life in general.

At the Faculty of Economics and Business within the Postgraduate Studies of "Legal and Economic Framework of Doing Business within the EU", through course in the "European Law and Institutions",[1] searching databases on the EU has been developed. This practical teaching method has been developed within the EU courses as a condition for studying the European law by Professor Hana Horak as Coordinator of the above mentioned studies and her team. As introduction, all fundamental databases are searchable (www.europa.eu, www.eurlex.eu, www.curia.eu. *etc*.). Students are getting familiar with searching databases in specific areas of *acquis communautaire* and its topics according to classification headings. At the end of the course, students are prepared to search on their own all relevant and necessary information that are prerequisites for their future work in searching the European Law and all other information in regards of the EU integration. Since this original and practical teaching method has been recognised as one of the greatest benefits of learning, this will also form an integral part of teaching at the future European and International Master Programme within the InterEULawEast Tempus Project.[2] For teachers and students,

[1] More information on Postgraduate Studies „Legal and Economic Framework of Doing Business within the EU" see at http://www.efzg.unizg.hr/default.aspx?id=7657.
[2] For more information on Tempus Project InterEULawEast see http://iele.weebly.com/.

using databases as a sort of teaching material, in addition to traditional ones, is becoming a new methodological approach, added methodological value, which encourages and fosters student's intellectual capacities, independence in their studies and interdisciplinary approach.

In the context of EU, one should bear in mind that EU is a specific community of states which has developed a unique legal system which differs from that of international law and which forms an integral part of national legal systems.[3] EU implements a number of policies.[4] Each policy is regulated by numerous sources of law. According to some statements, approximately 80 % of laws relevant for contemporary life in the EU are enacted in the European Parliament.[5] By putting those and other sources of law in one ”place“ and making them available via Internet on ”one-stop-shop“ principle is of utmost relevance for each citizen of EU. An insight into work and results of work done by the EU institutions, bodies and agencies and admission to the information concerning EU policies helps to achieve the principle of democracy which is one of the proclaimed principles of the EU.[6] Availability of information has become important for wide range of categories of EU citizens (entrepreneurs, consumers, students, scientists, employees, academics etc.). In the era of IT, the admission to information via publically available databases and websites promotes achieving the general awareness of EU citizens regarding the importance of such information. Staying in touch only with information on national policies and laws is not enough any more due to the fact that important decisions are made at supranational level.

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[3] Available at http://euinfo.pravo.hr/page.aspx?pageID=42. On various theories of EU integration see Craig, P.; De Burca, G., EU Law: Text, Cases and Materials, Fifth Edition, Oxford University Press, pp. 2-4.. See also Bodiroga Vukobrat, N.; Horak, H.; Martinović, A., Temeljne gospodarske slobode u Europskoj uniji/Fundamental Market Freedoms in the European Union, Inženjerski biro, Zagreb, 2011., pp. 13-20.

[4] There are fifteen policies and many of them refer to economic and social issues. For overview see http://ec.europa.eu/policies/index_en.htm (last visited on 5 June 2014).

[5] Jacques Delors, former President of the European Commission predicted in 1988 that within 10 years 80% of economic legislation, and perhaps also fiscal and social legislation, would be of European origin. National laws are becoming “Europeanised“ in terms of quantity of EU laws and their impact on domestic law and policy. Estimation on proportion of EU law in EU Member States vary, so some say it is from 6%-84%. Taken from Miller, V.; How much legislation comes from Europe?, Research Paper 10/62, 13 October 2010, Library of House of Commons, available at: http://www.parliament.uk/briefing-papers/RP10-62.pdf (last visited on 5 June 2014).

[6] See Consolidated version of the Treaty on the European Union, OJ C 326, 26. 10. 2012., Title II., Art. 10. Further as: TFEU.

In education and science, where everything is getting faster on daily basis, using only traditional sources of information is no longer possible. Databases can provide easy access to the most recent information on some legal topic and promote international approach and comparative analysis. Even more, databases promote interdisciplinarity and cross-border mobility of information. For teachers, using databases as a sort of teaching material, in addition to traditional ones, is becoming a new methodological approach, added methodological value, which encourages and fosters student's intellectual capacities, independence in their studies and interdisciplinary approach.

Due to the aforementioned reasons, the authors have decided to present their method of teaching the EU law and put it into this publication. Relevant databases will be presented in this publication which enables quick and easy outlook on legal provisions and relevant case-law as a useful and helpful tool in the process of decision-making in situations involving the EU dimension. Due to that fact, this publication is intended to serve as a practical guide through databases and authors hope it will be useful for day-to-day activities.[7]

2. EU SOURCES OF LAW IN DATABASES AND ON DATABASES

The sources of EU law are generally divided into following main categories[8]: **primary law**[9] and **secondary law**[10]. **Fundamental principles of EU law**[11] and

[7] For more on databases on EU law including some Croatian databases and websites see in Bodiroga Vukobrat, N.; Đerđa, D.; Pošćić, A. (ur./eds.), Zbirka presuda Europskog suda (Izbor recentne prakse)/Collection of ECJ's Case-Law (Selection of Recent Cases), Inženjerski biro, Zagreb, 2011., pp. 5-37.

[8] Sources of EU law are primarily based on TFEU. For categorisation of sources of law see art. 288. TFEU. For categorisation of sources of EU law in foreign and domestic literature see more in Craig, P.; De Burca, G., EU Law: Text, Cases and Materials, Fifth Edition, Oxford University Press, 2011., Dashwood, A.; Dougan, M.; Rodger, B.; Spaventa, E.; Wyatt, D.; Wyatt & Dashwoods' European Union Law, Sixth Edition, Hart Publishing, 2011., Bodiroga Vukobrat, N.; Đerđa, D.; Pošćić, A. (ur./eds.), Zbirka presuda Europskog suda (Izbor recentne prakse)/Collection of ECJ's Case Law (Selection of Recent Cases), Inženjerski biro, Zagreb, 2011., Ćapeta, T.; Rodin, S., Osnove prava Europske unije/Basics on EU Law, II. izmijenjeno i dopunjeno izdanje/II. Amendment Edition, Narodne novine, Zagreb, 2011, Horak, H.; Dumančić, K.; Pecotić Kaufman J., Uvod u europsko pravo društava/Introduction to the

international agreements[12] are part of the primary law. **Case-law of the ECJ** is of an outmost importance in the interpretation of EU Law.[13] The EU legal system is **autonomous system of rules,**[14] a result of interaction between the EU and Member States institutions. Those sources of law can be found in relevant databases. In order to give a brief introduction on the structure of EU law, three figures of branches of EU law are given below:

European Company Law, Školska knjiga, Zagreb, 2010. See also webpage of Information Centre for EU law at http://euinfo.pravo.hr/page.aspx?pageID=42 (last visited on 5 June 2014).

[9] Primary law consists of Member States' acts that are sources of law which were, without intervention of the EU institutions, directly enacted by Member States. *Ibid.*

[10] Secondary law is based on Founding Treaties and consists of acts brought by EU institutions. Member States do not participate directly in enactment procedure. *Ibid.*

[11] Fundamental principles of law include values of certain legal order and they have been recognised by ECJ's case law. *Ibid.*

[12] International agreements concluded by the EU. *Ibid.* They include international agreements concluded with third countries and international organisations. See also Ćapeta, T.; Rodin, S., Osnove prava Europske unije/Basics on EU Law, II. izmijenjeno i dopunjeno izdanje/II. Amendment Edition, Narodne novine, Zagreb, 2011, p. 15.

[13] ECJ's case law is source of law having not only *inter partes* but also *erga omnes* effect. The operative part of the judgment, which includes the Court's decision on subject matter, is source of law. Nevertheless, the explanatory part of the judgment is important due to the fact that it contains the Court's view on dispute and its context See *ibid.*

[14] *Ibid.*, p. 3.

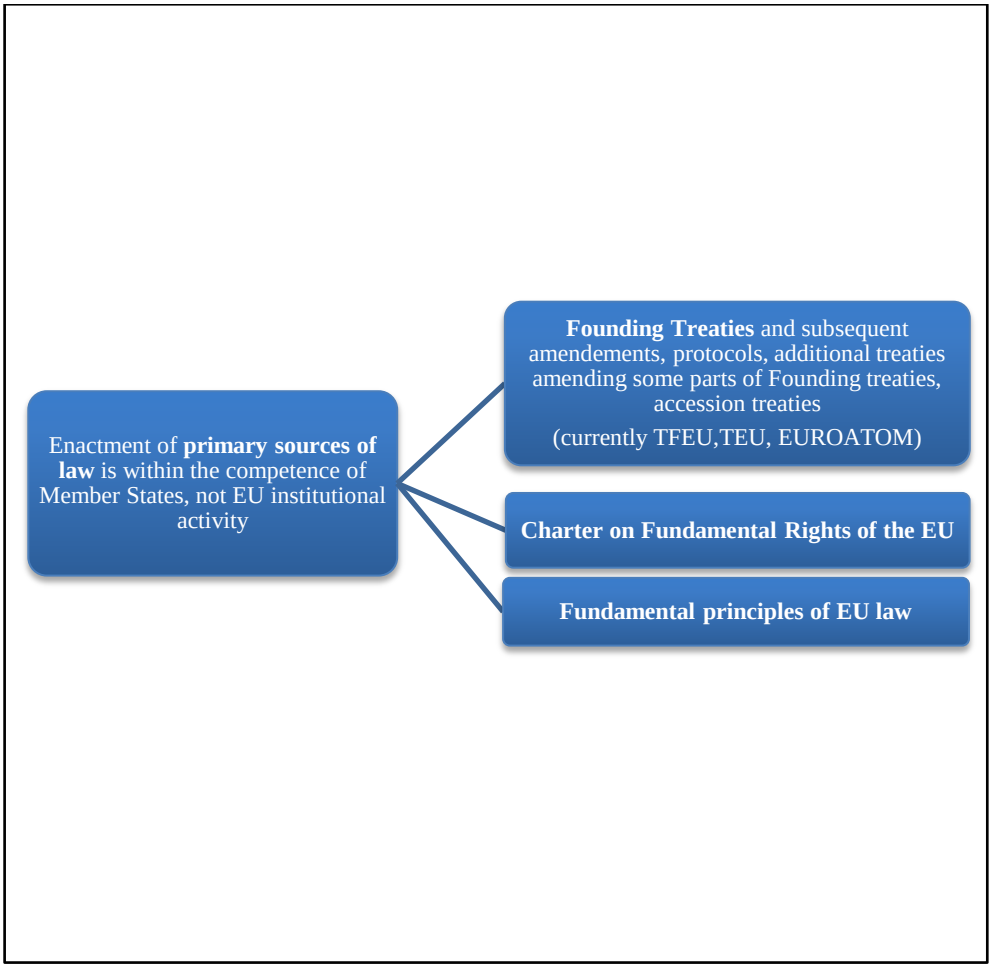


Figure 1 *Primary law of the EU*

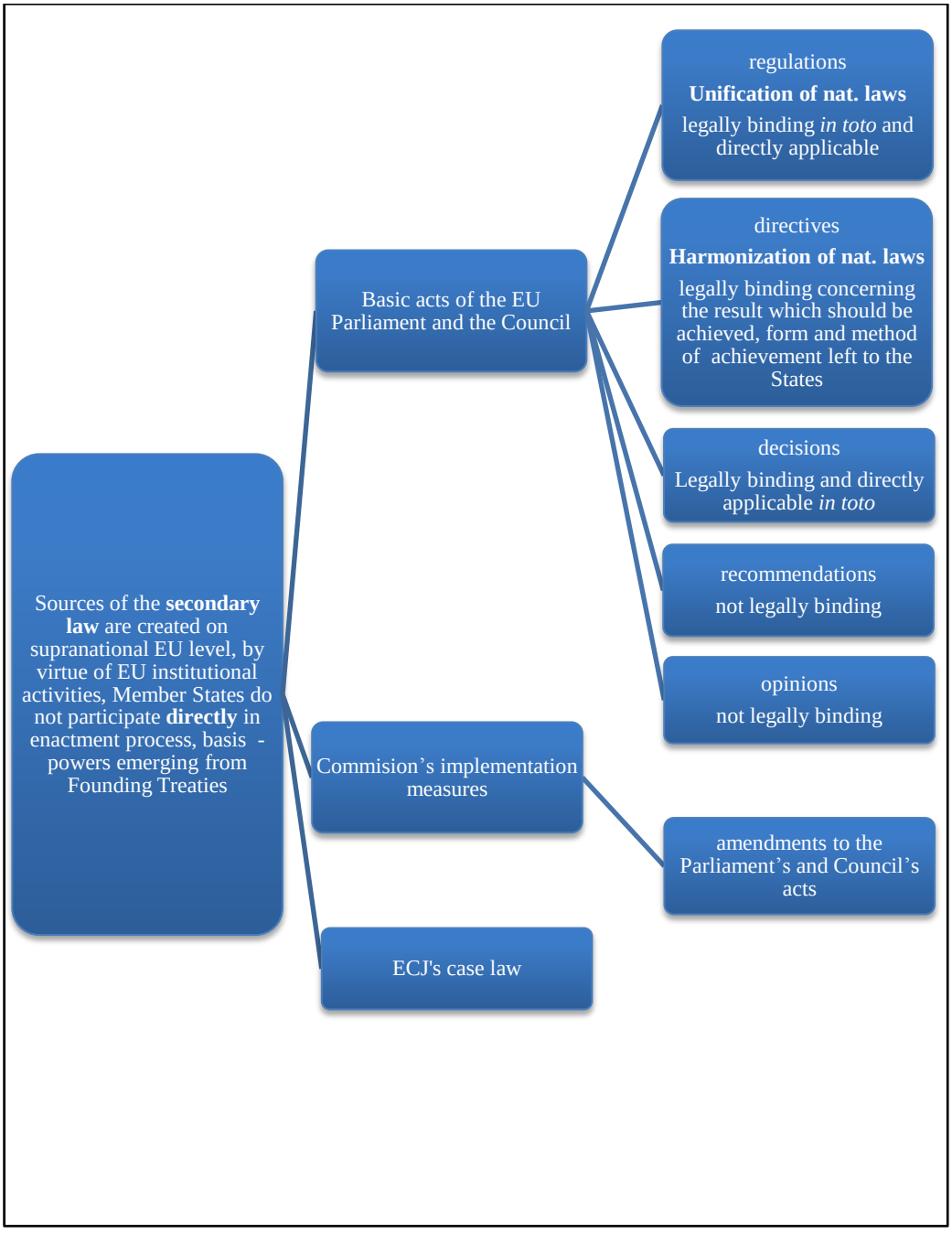


Figure 2 *Secondary law of the EU*

Databases containing sources of EU law, since they are considered to be an intellectual **property**, are regulated by several sources of EU law which provide rules for their legal protection. Thus, notwithstanding most of databases mentioned below are free-of-charge and open access is allowed, some basic rules have to be taken into account. This legal framework consists of:

1. **Primary law (on intellectual law in general)**
   - Treaty on the Functioning of the EU (consolidated version, OJ C 326, 26. 10. 2012)
2. **Respective secondary law**
   - Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of data bases, 11 March 1996, OJ L 77, 27 March 1996.
   - Council Decision 2003/239/EZ of 18 February 2003 on the conclusion of an Agreement in the form of an Exchange Letters between the United Kingdom of Great Britain and Northern Ireland on behalf of the Isle of Man and the European Community extending to the Isle of Man the legal protection of data bases as provided for in Chapter III of Directive 96/9/EZ, OJ L 89, 5 April 2003.
   - Council Regulation (EU) No 216/13 of 7 March 2013 on the electronic publication of the Official Journal of the EU, OJ L 69, 13 March 2013.

3. DATABASES ON EU LAW: AN OVERVIEW

In a wide range of relevant databases, it is not easy to select some of them and exclude the others. Since the aim of this publication is to give an overview of those bases which authors, from their teaching perspective and experience gained so far, consider to be the most useful for students and practitioners of law, an overview of several databases is given.

3.1. Europa
[http://europa.eu/index_en.htm]

The official website of EU. This site provides basic information on policies, functioning and information about EU in general and provides links to the websites of EU institutions and agencies. If one is interested in EU, this is a starting point for further searching. One can search by some of the topics offered e.g. How does EU works, Life and Business in EU, EU law, and there are also some useful publications available.

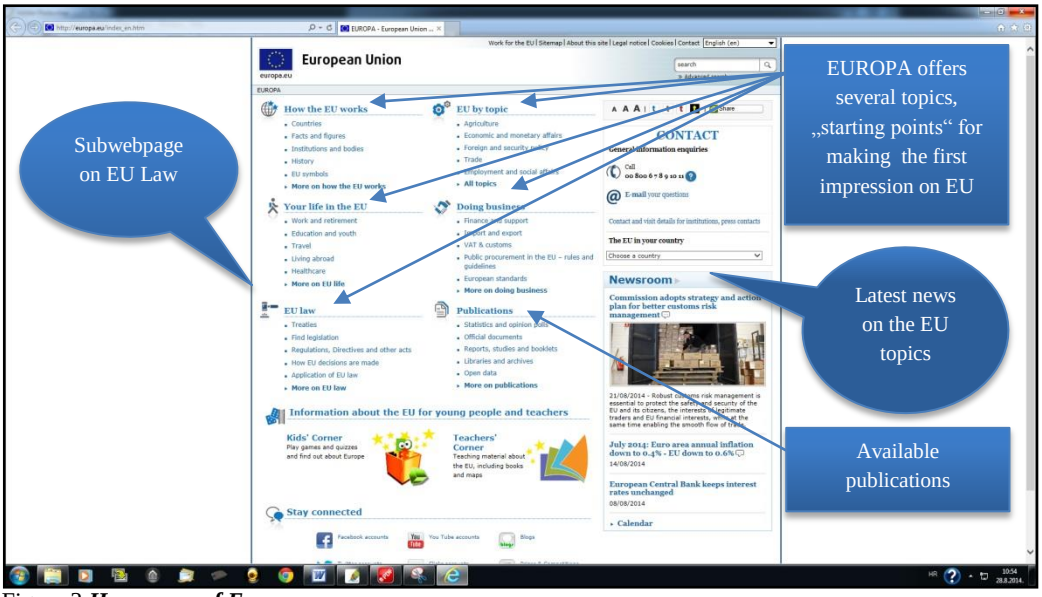


Figure 3 ***Homepage of Europa***

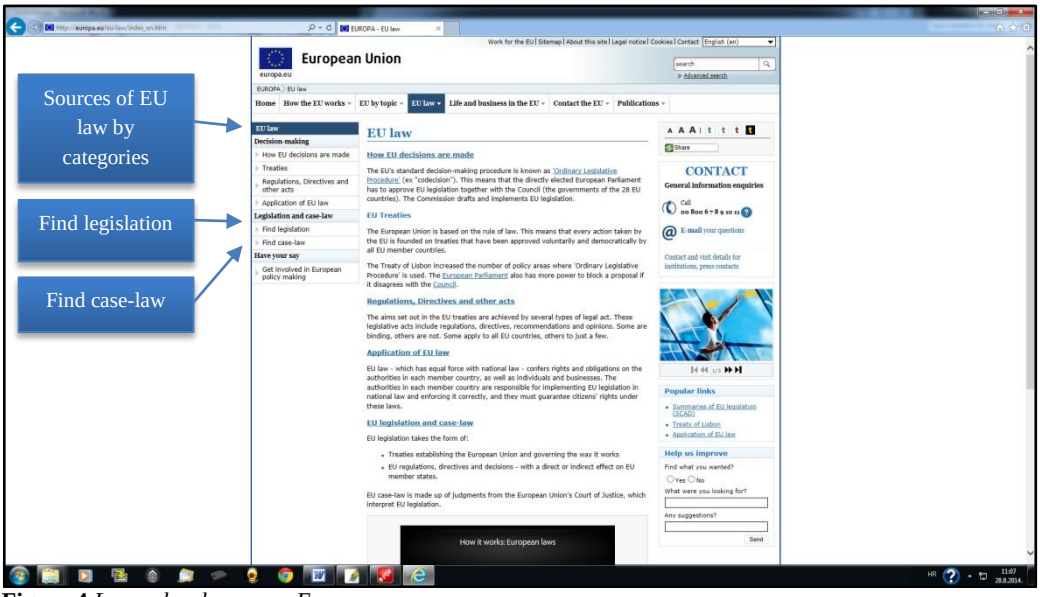


Figure 4 *Law subwebpage on Europa*

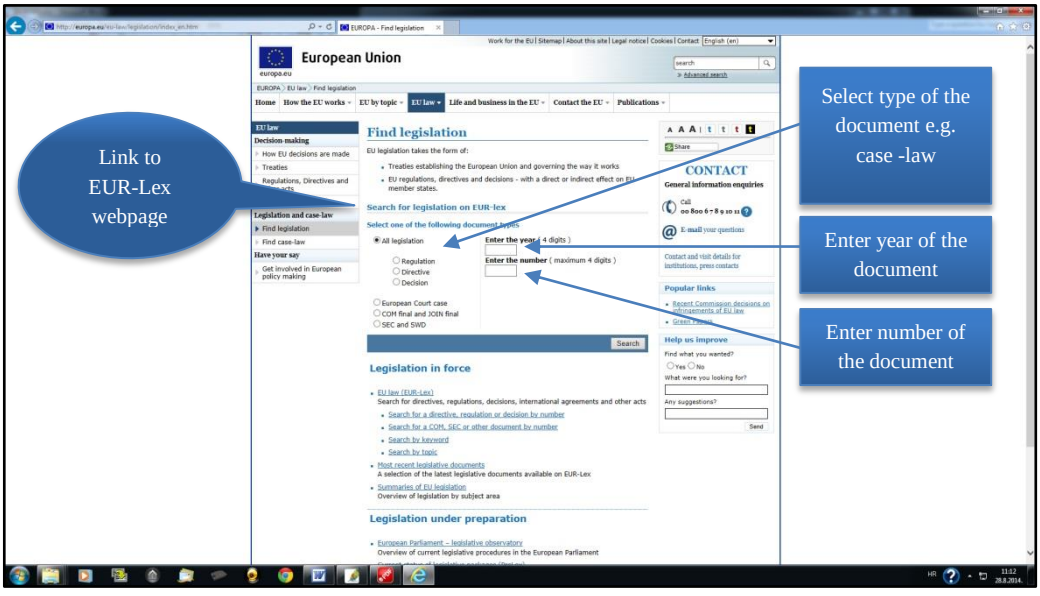


Figure 5 *Find lgislation subwebpage on Europa (1)*

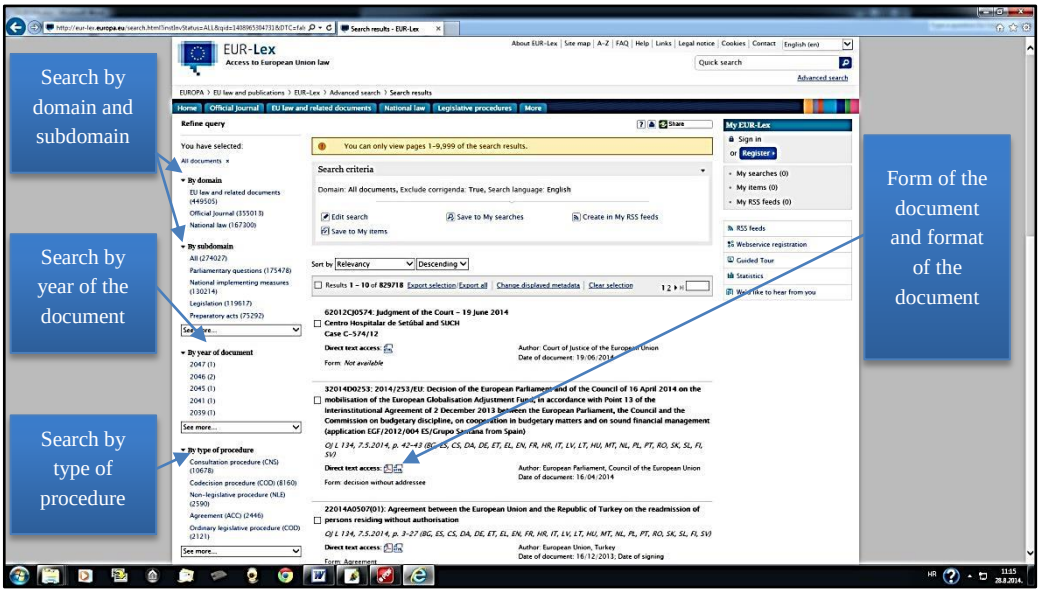


Figure 6 *Find legislation subwebpage on Europa (2)*

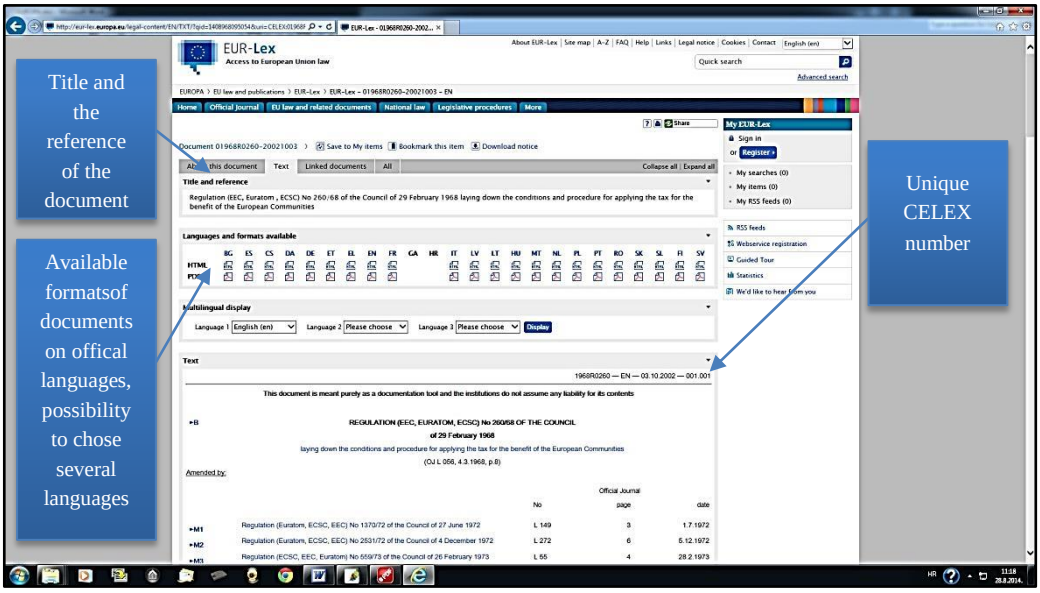


Figure 7 *Find legislation subwebpage on Europa (3)*

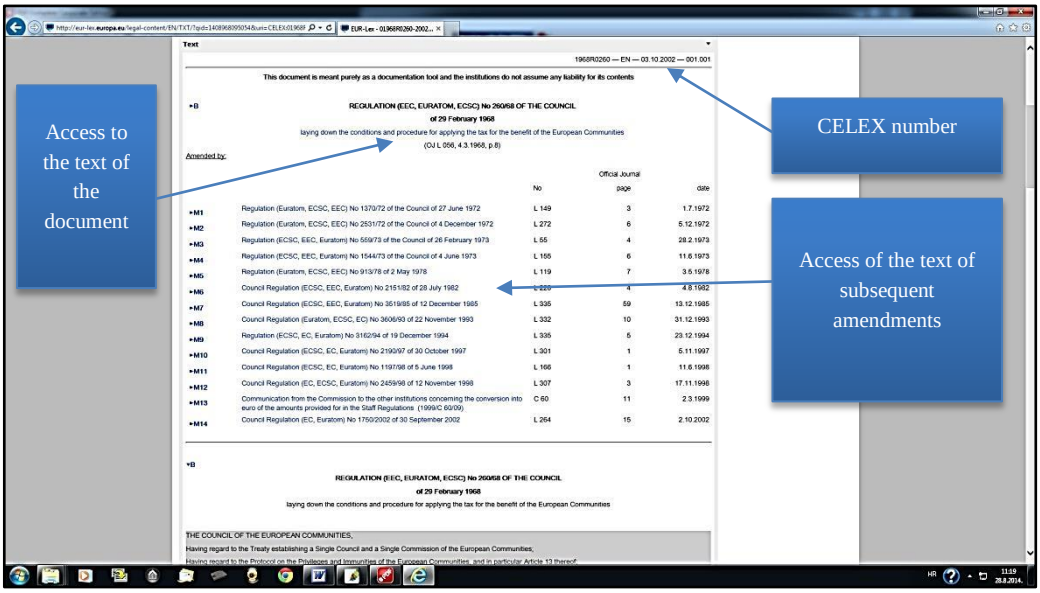


Figure 8 *Find legislation subwebpage on Europa (4)*

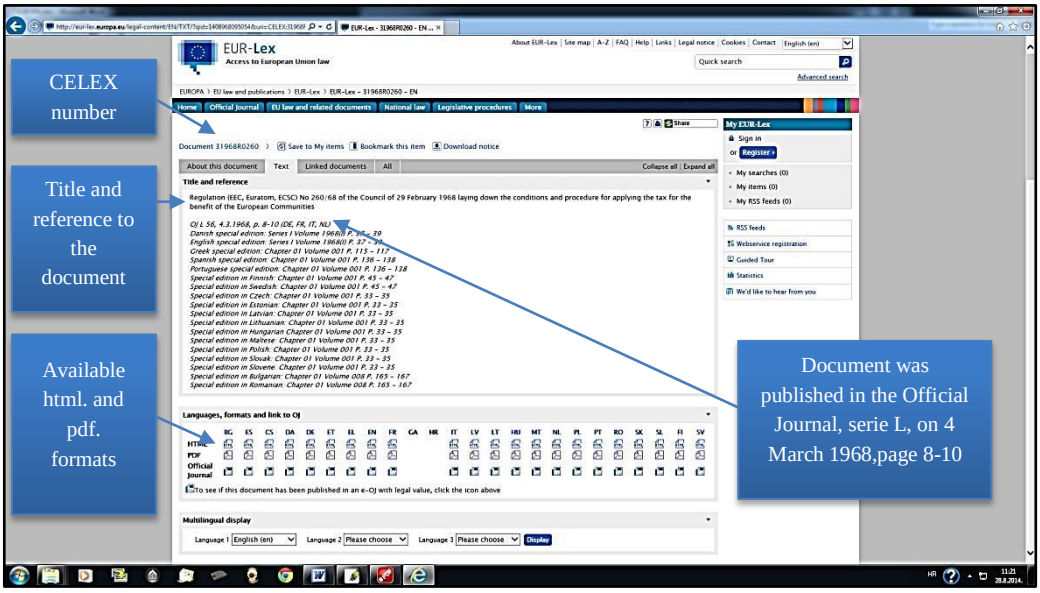


Figure 9 *Find legislation subwebpage on Europa (5)*

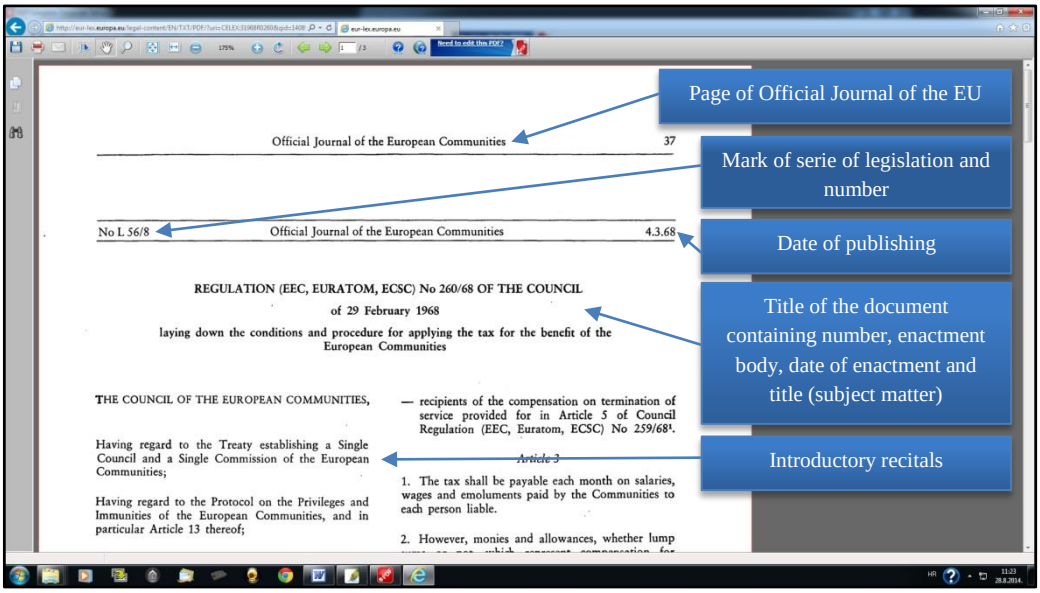


Figure 10 *Find legislation subwebpage on Europa (6)*

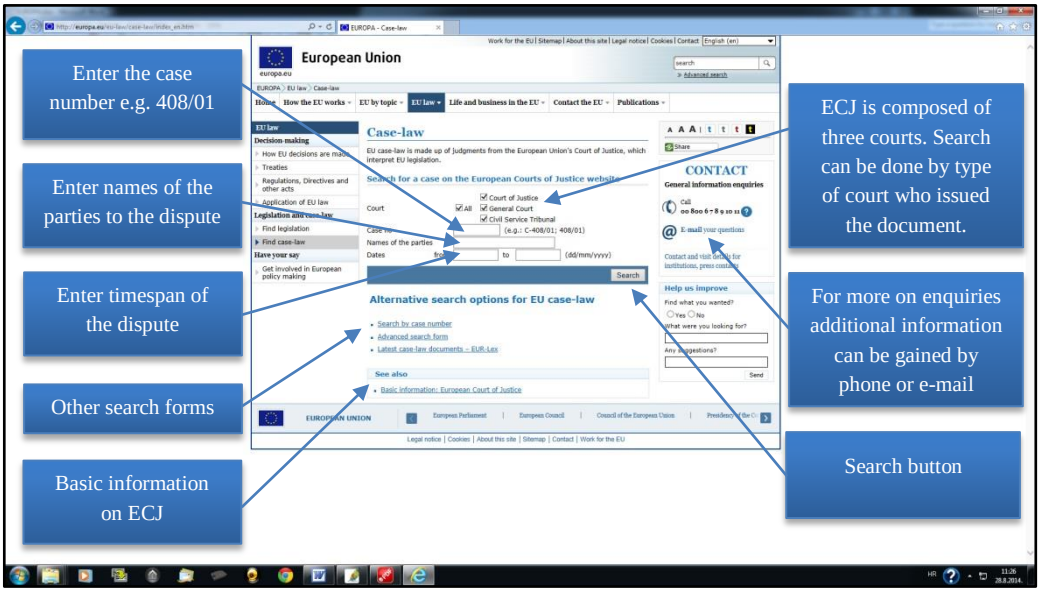


Figure 11 *Finding case law (1)*

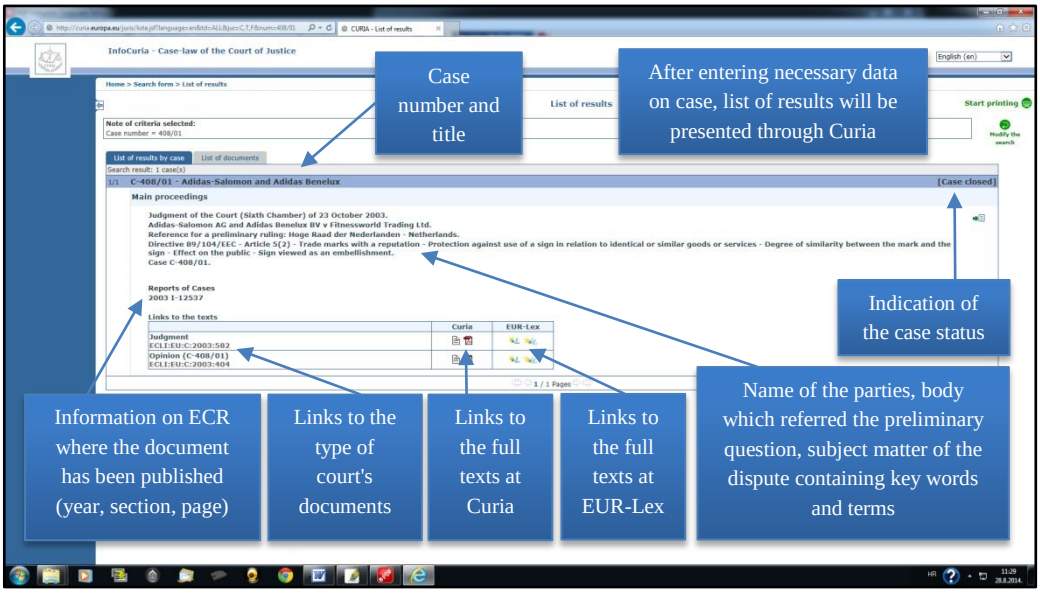


Figure 12 *Finding case law (2)*

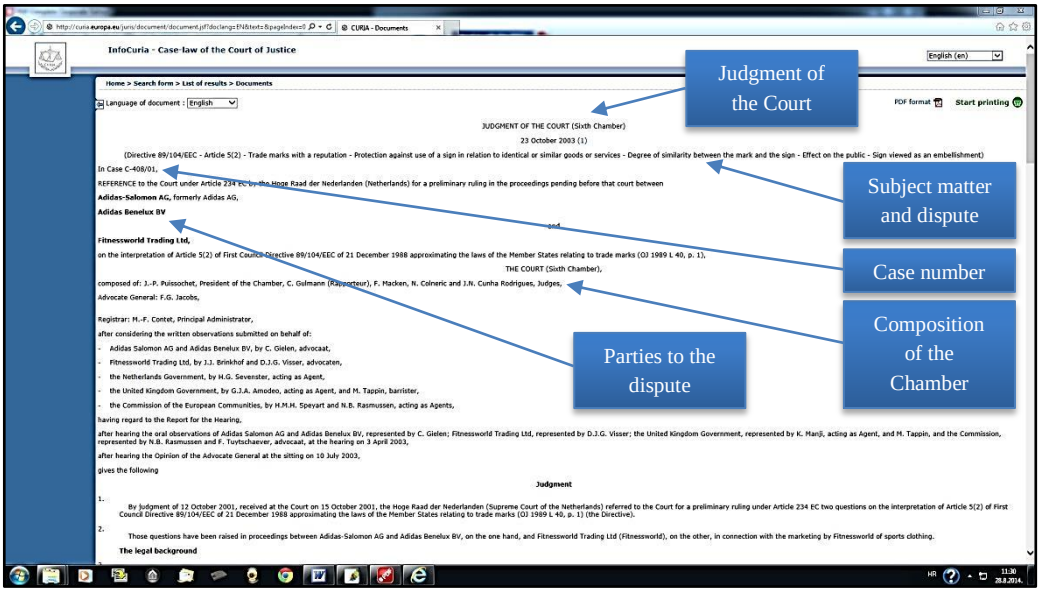


Figure 13 *Finding case law (3)*

3.2. EUR – Lex
[http://eur-lex.europa.eu/homepage.html]

A database on 24 official languages of the EU which provides free access to primary and secondary sources of EU law, preparatory acts, case-law of the ECJ, international agreements (*EUR – Lex International Agreements database*), EFTA documents and other public documents. The admission is free of charge and there are more than 3 milion documents dating back to 1951. It is being daily upgraded and about 12000 documents have been added each year. There are 467000 references on several languages. This database also provides approach to daily edition of OJEU. One can easy download its content in Word or Pdf. format. There are three types of search: Quick, Advanced or Expert Search. Given the fact that it provides an insight into various sources of law and several types of search, it is one of the most used databases for searching on EU law both for students and academics.

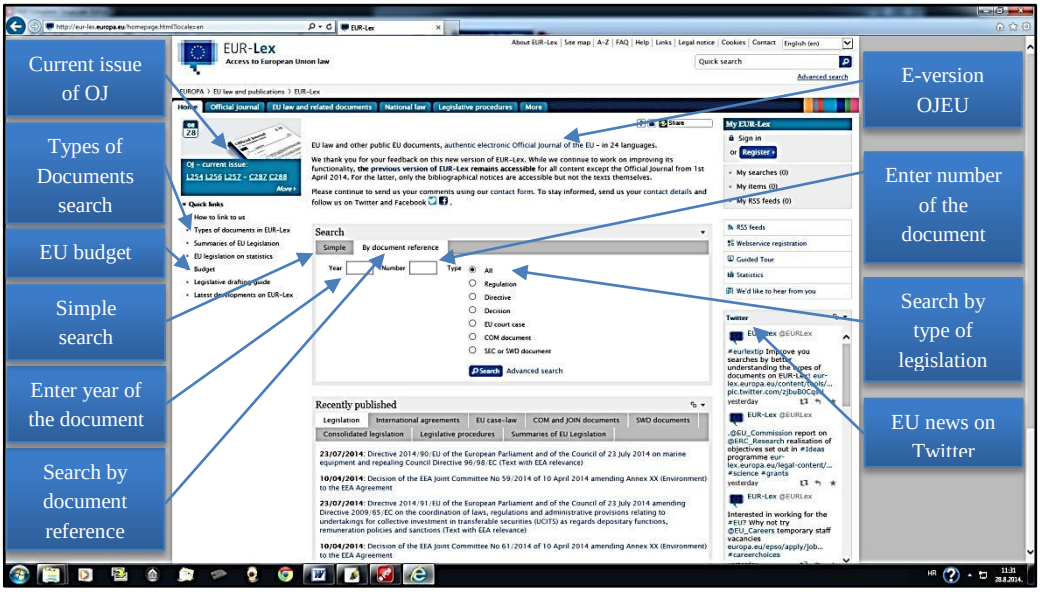


Figure 14 *EUR-lex Homepage*

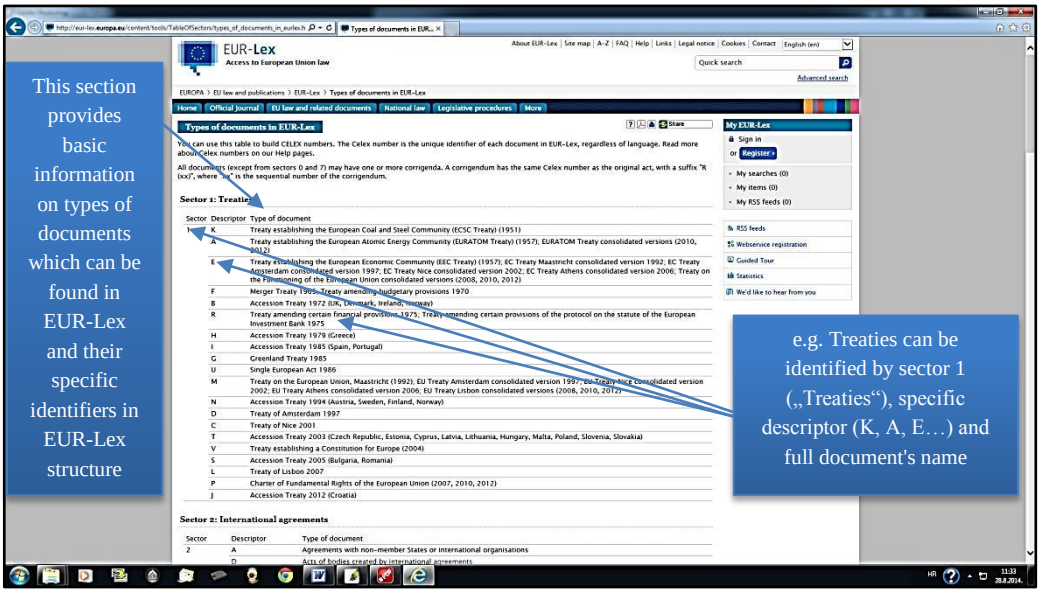


Figure 15 *Type of documents subwebpage at EUR-Lex*

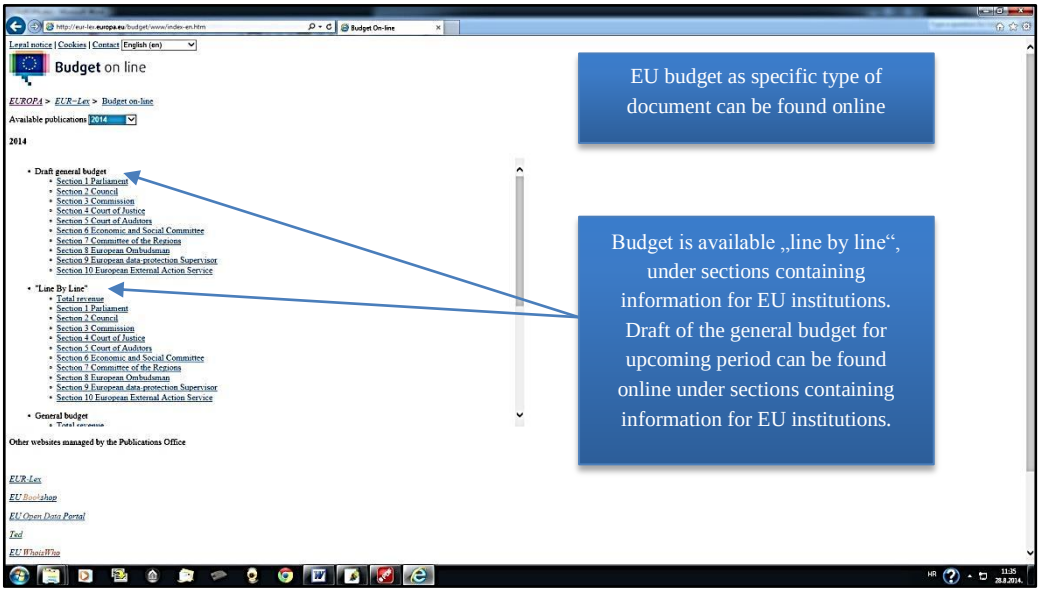


Figure 16 *Budget subwebpage at EUR-Lex (1)*

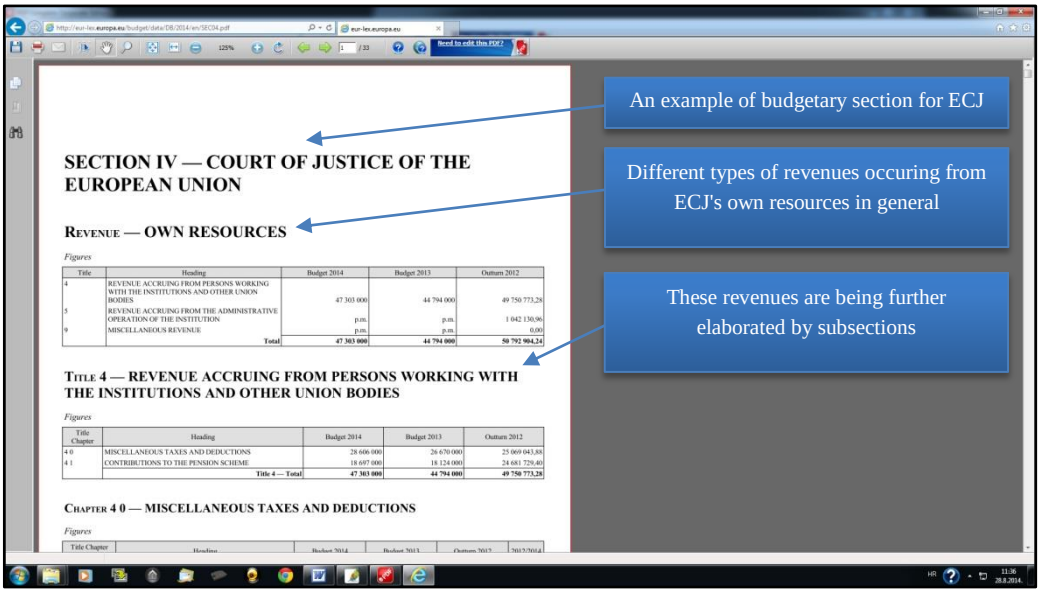


Figure 17 *Budget subwebpage at EUR-Lex (2)*

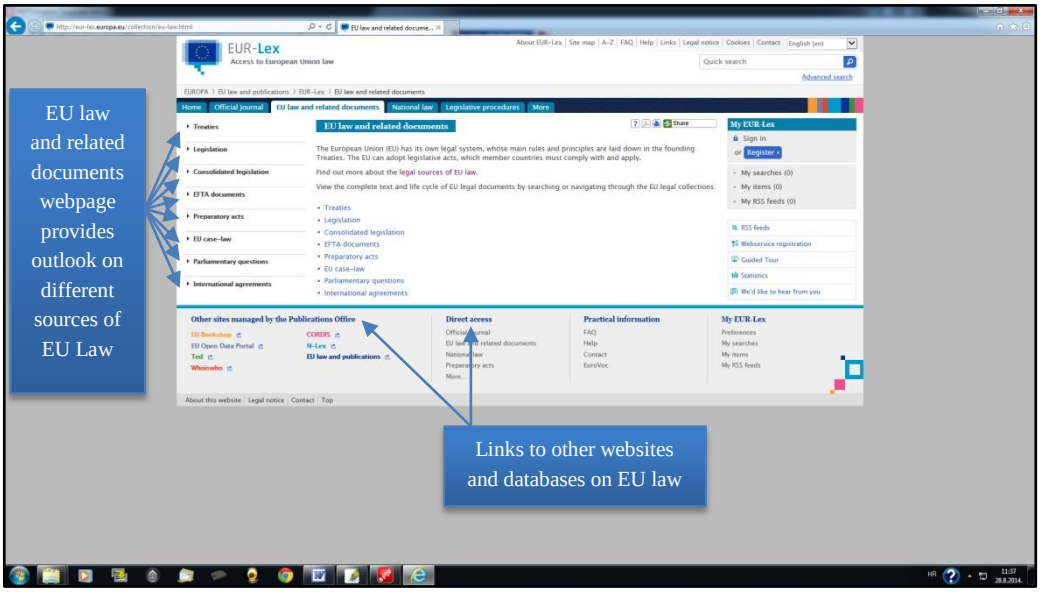


Figure 18 *EU and related documents subewbpage at EUR-Lex webpage*

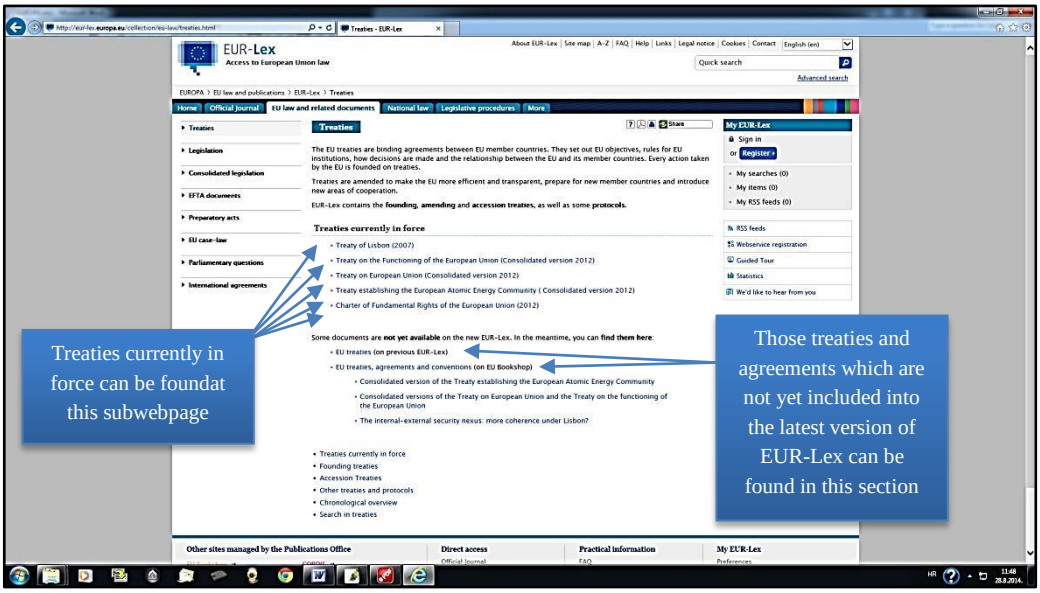


Figure 19 *Treaties subwebpage at EUR-Lex webpage (1)*

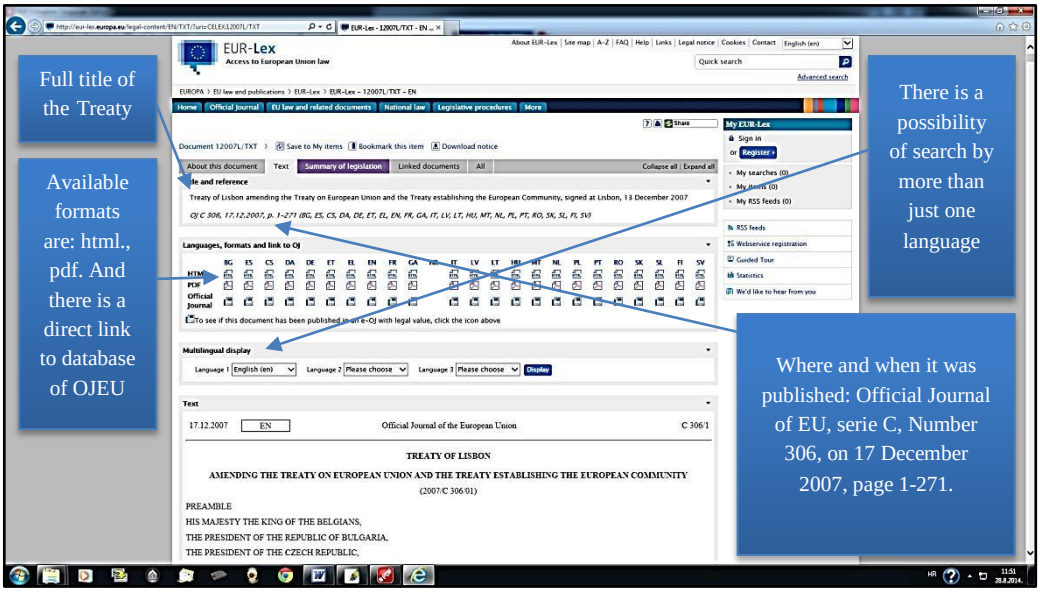


Figure 20 *Treaties subwebpage at EUR-Lex webpage (2)*

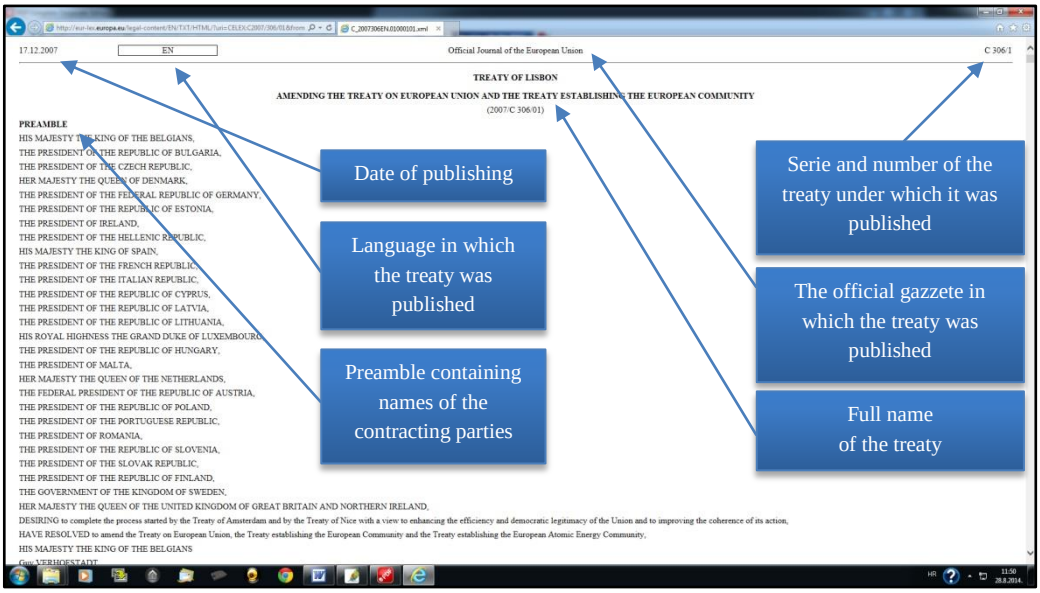


Figure 21 *First page of the Lisbon Treaty at OJEU (link from RUR-Lex webpage)*

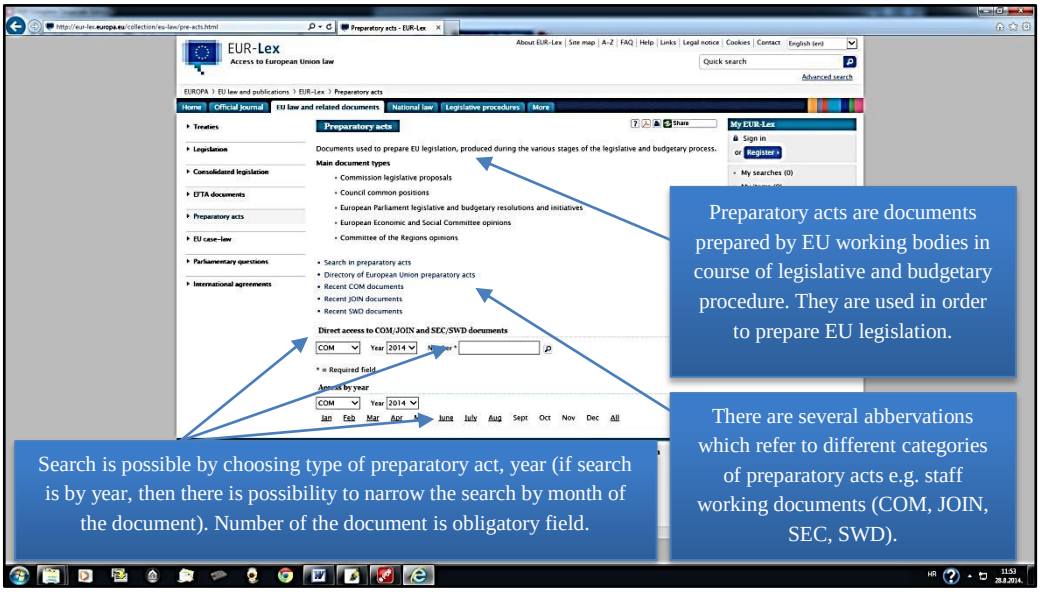


Figure 22 *Preparatory acts subwebpage at EUR-Lex webpage (1)*

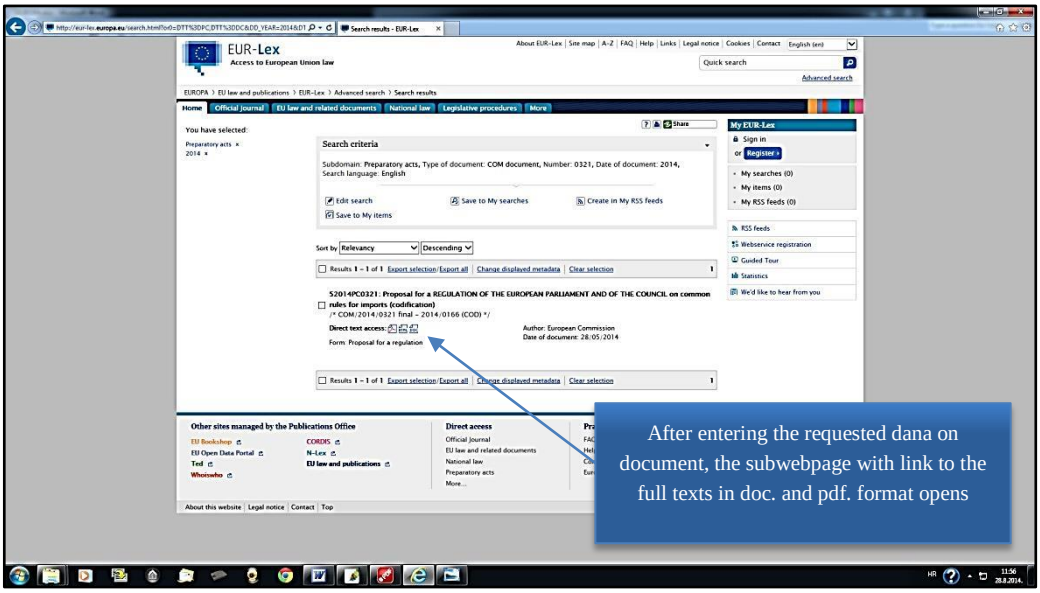


Figure 23 *Preparatory acts subwebpage at EUR-Lex webpage (2)*

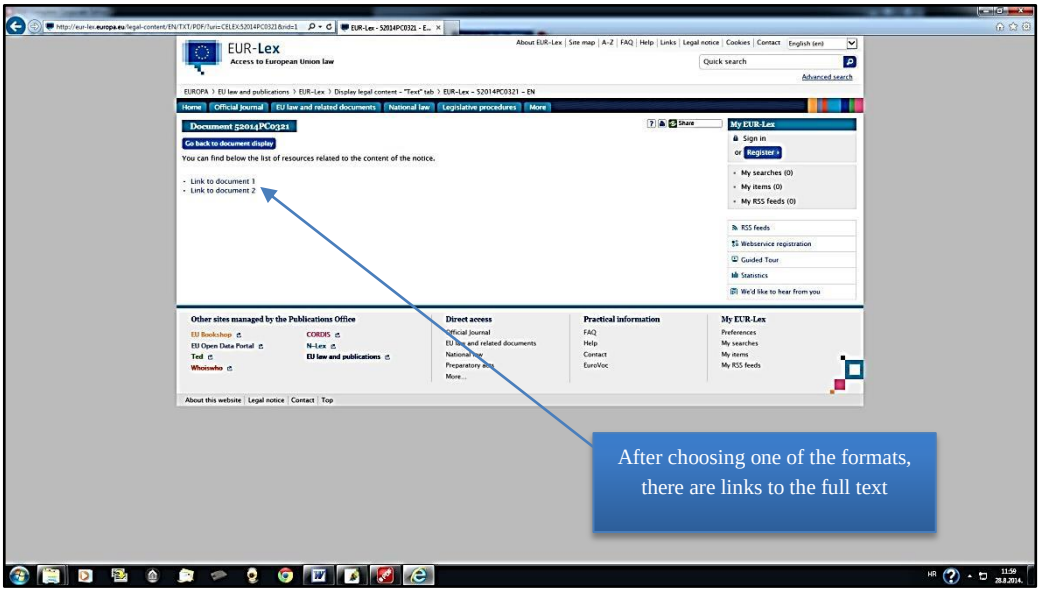


Figure 24 *Preparatory acts subwebpage at EUR-Lex webpage (3)*

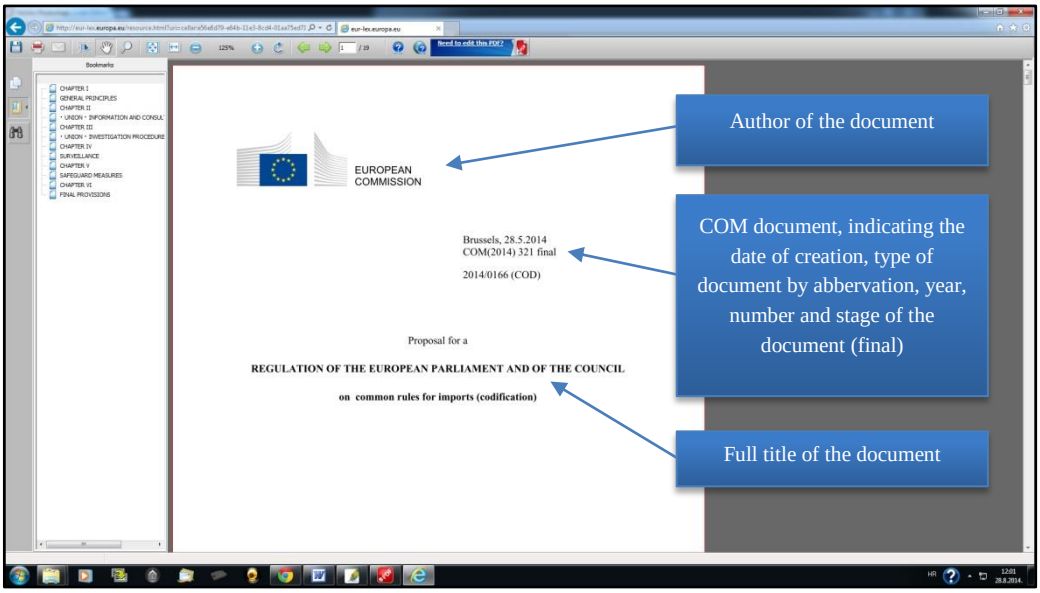


Figure 25 *Preparatory acts subwebpage at EUR-Lex webpage (4)*

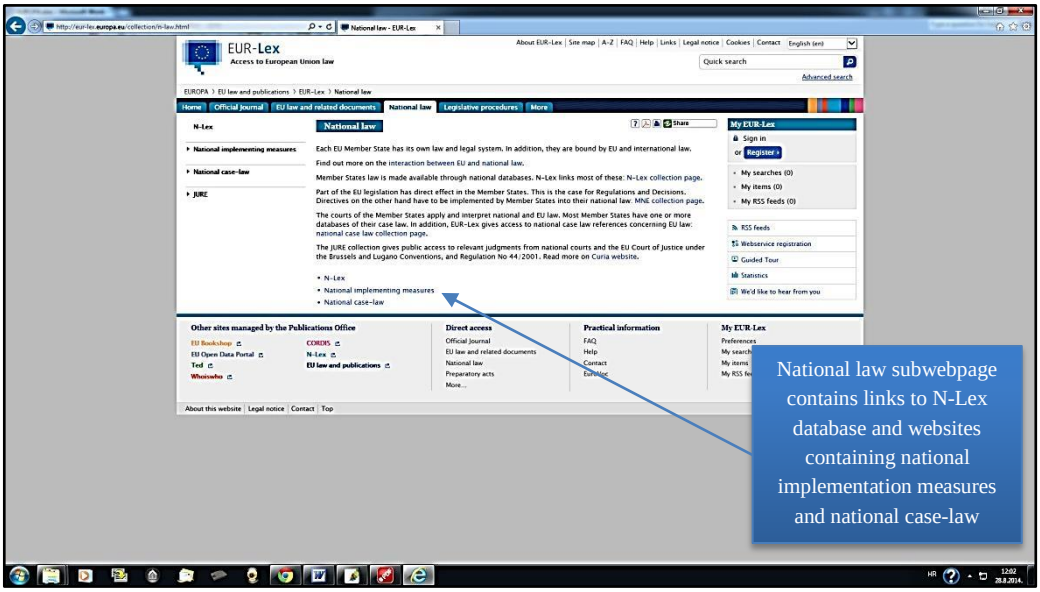


Figure 26 *National law subwebpage at EUR-Lex webpage*

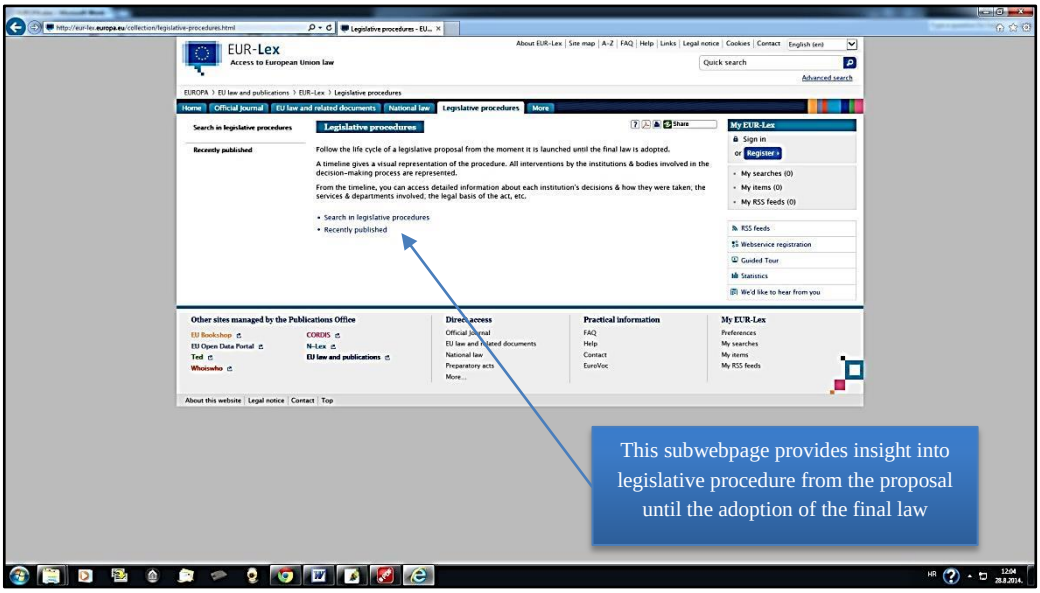


Figure 27 *Legislative procedure subwebpage at EUR-Lex webpage*

3.3. CURIA
[http://curia.europa.eu/jcms/jcms/j_6/]

A database on relevant EU case-law. Also contains sections on three courts, judicial calendar, annotation of judgments, library and documentation, as well as press and media corner.

Figure 28 *CURIA frontpage*

Figure 29 *Search form at curia.europa.et (1)*

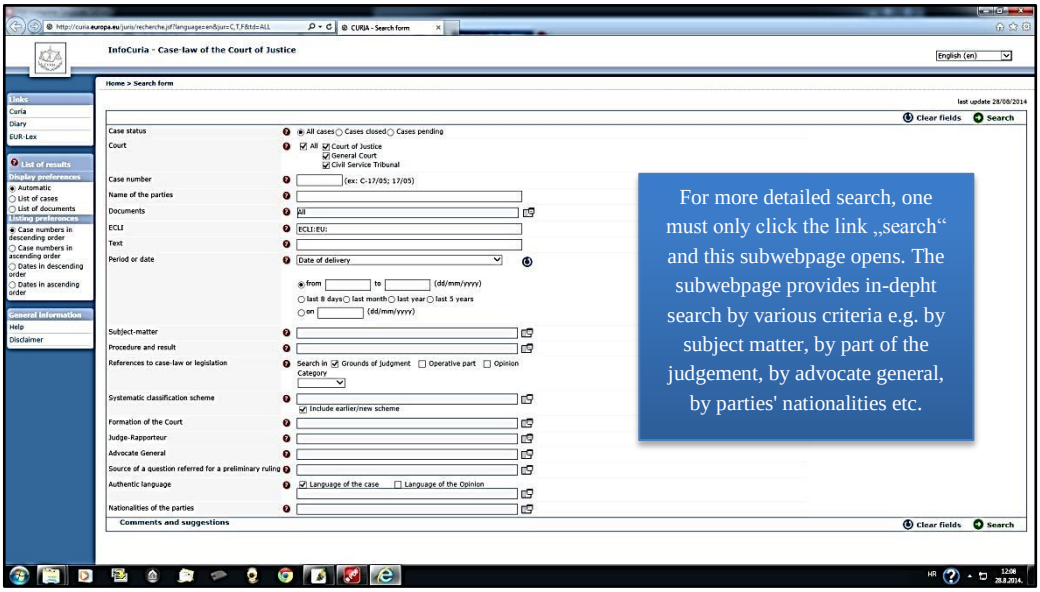


Figure 30 *Search form at curia.europa.et (2)*

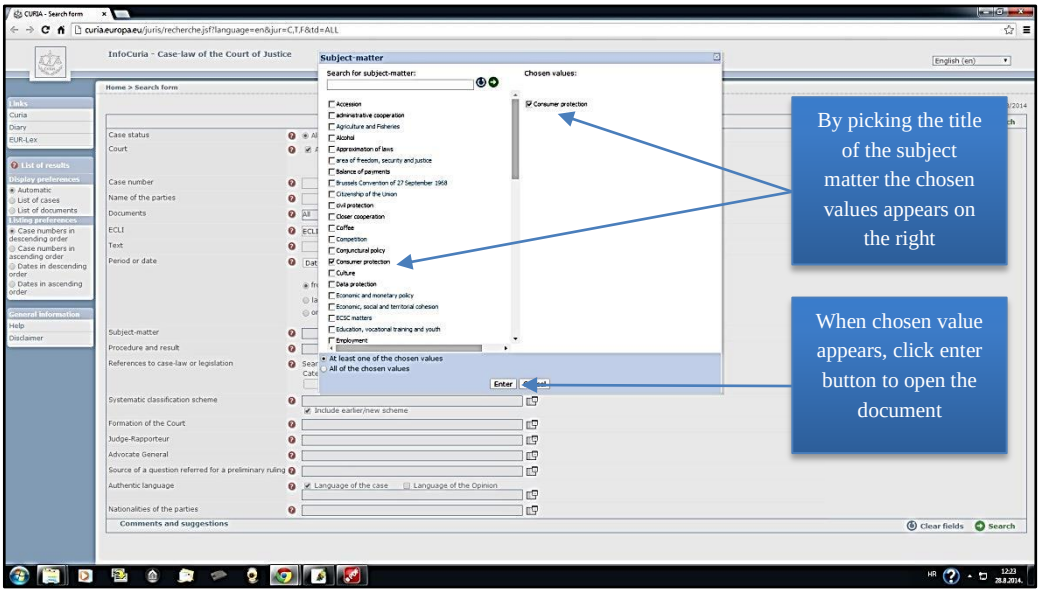


Figure 31 *Search form at curia.europa.et by subject matter (1)*

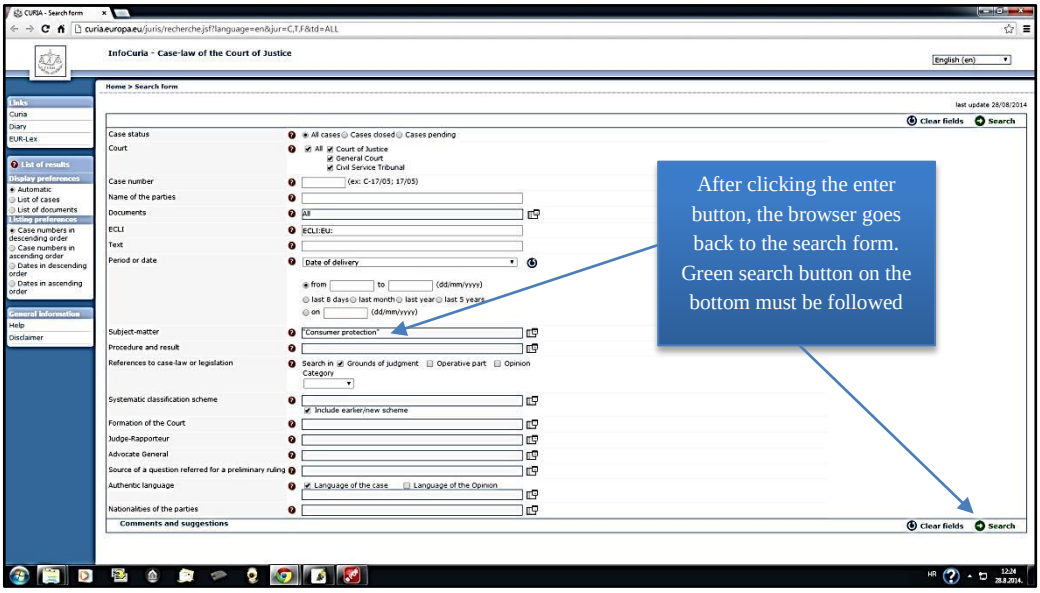


Figure 32 *Search form at curia.europa.et by subject matter (2)*

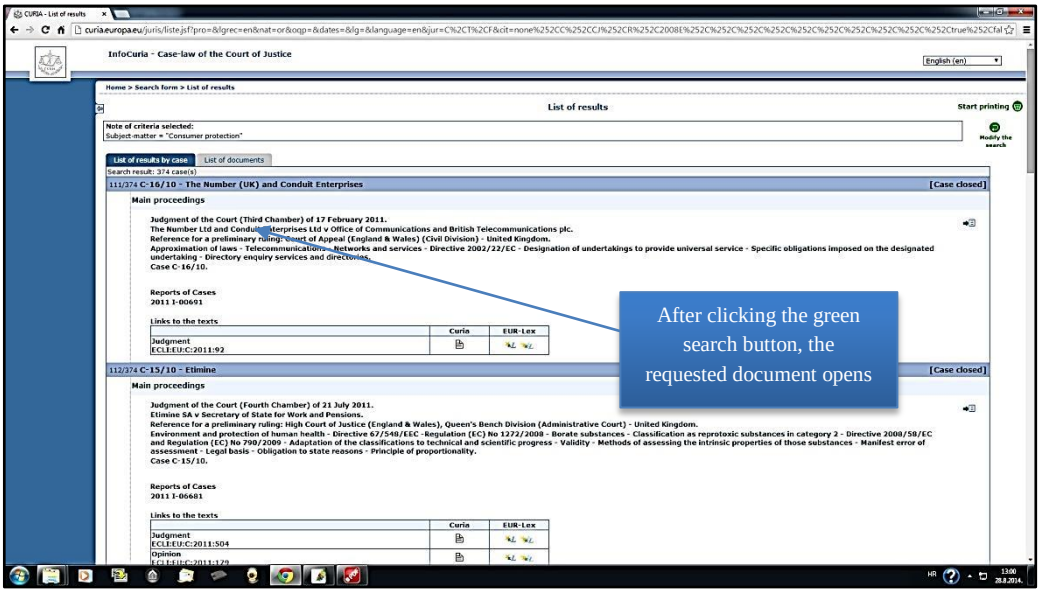


Figure 33 *Search form at curia.europa.et by subject matter (3)*

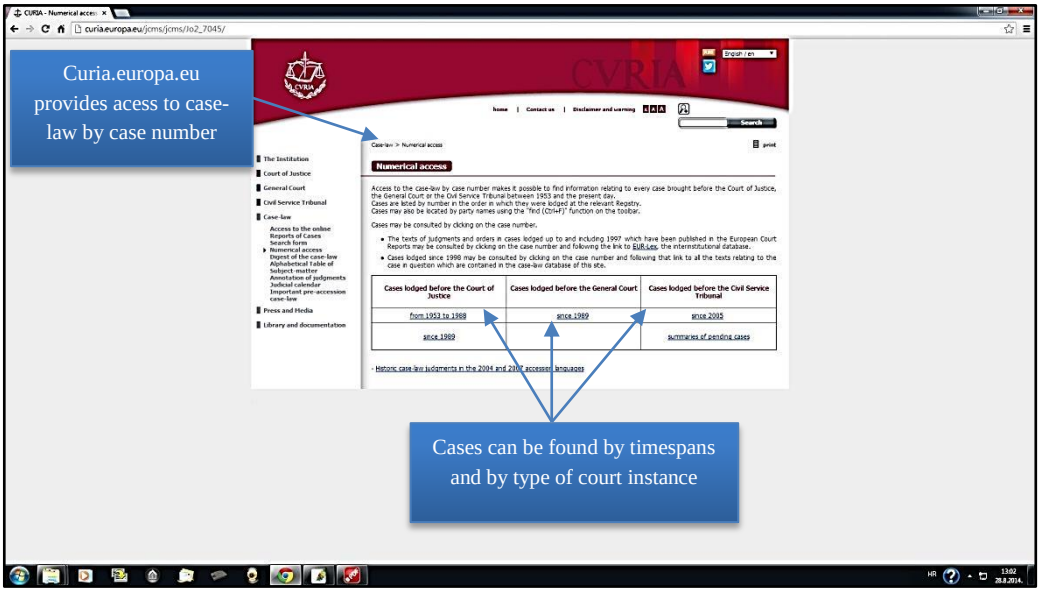


Figure 34 *Numerical access to cases at curia.europa.eu*

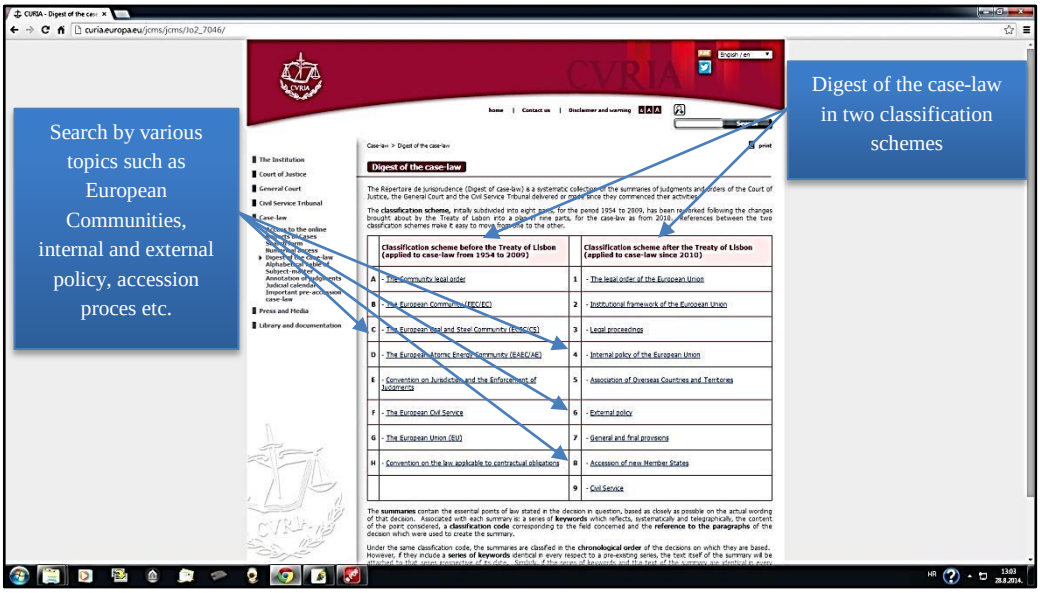


Figure 35 *Digest of case law at curia.europa.eu*

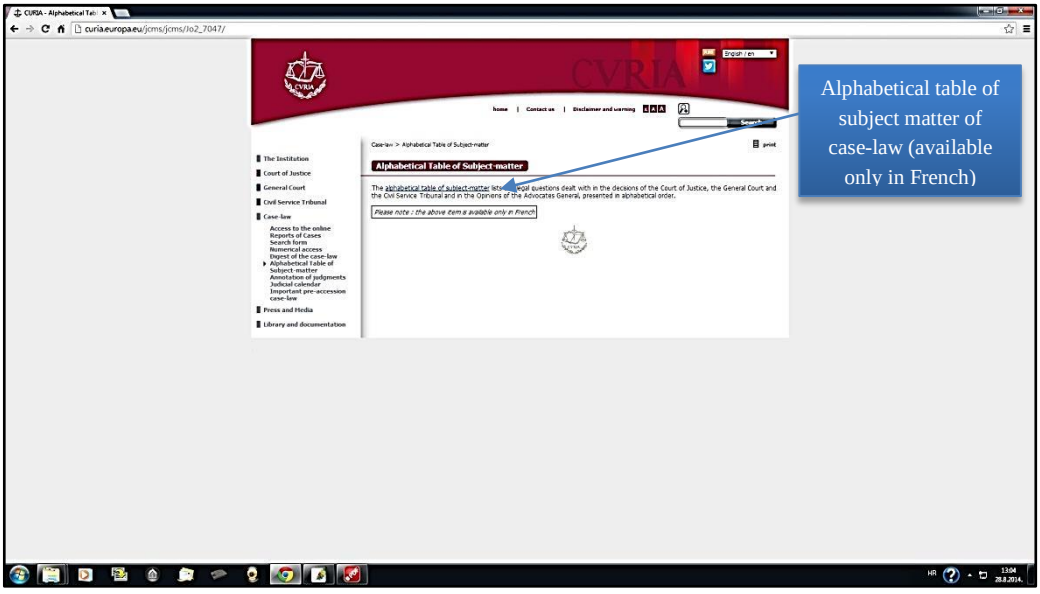


Figure 36 *Alphabetical table of the subject-matter at curia.europa.eu. frontpage*

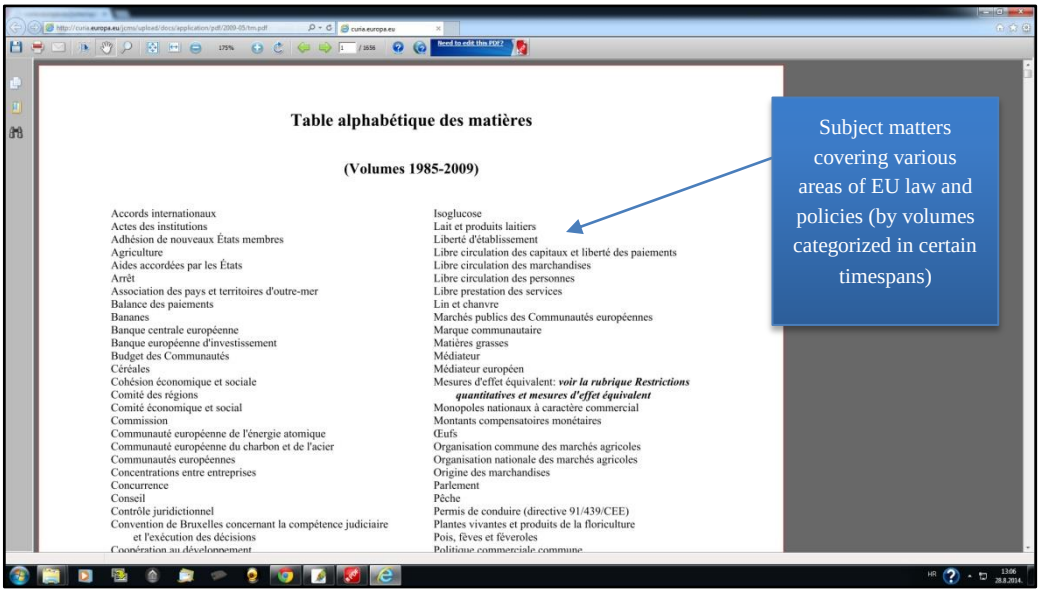


Figure 37 *The list of alphabetical table of the subject-matter at curia.europa.eu*

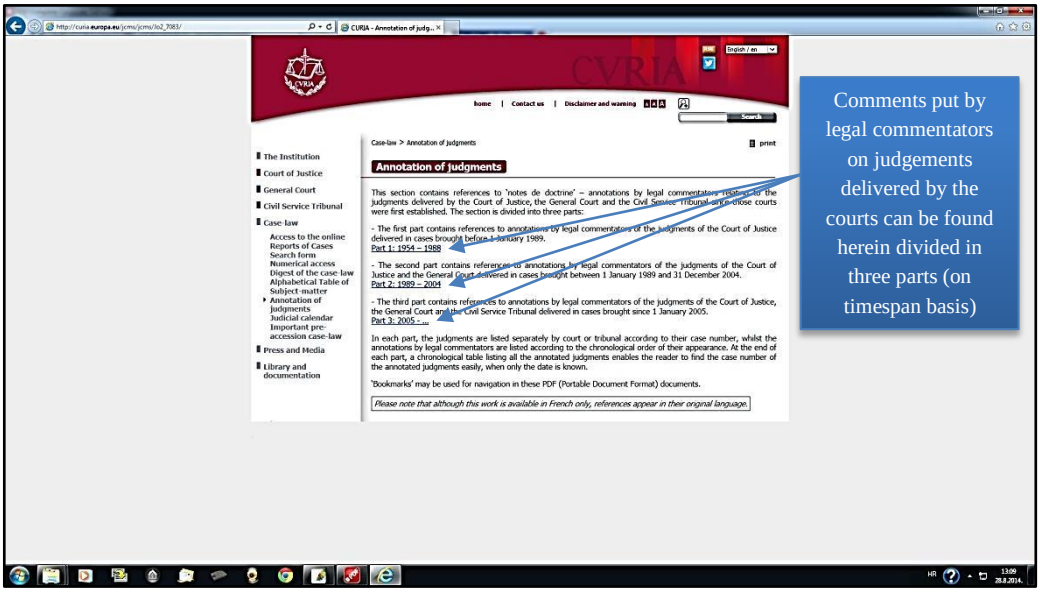


Figure 38 *Annotations of judgements available at curia.europa.eu*

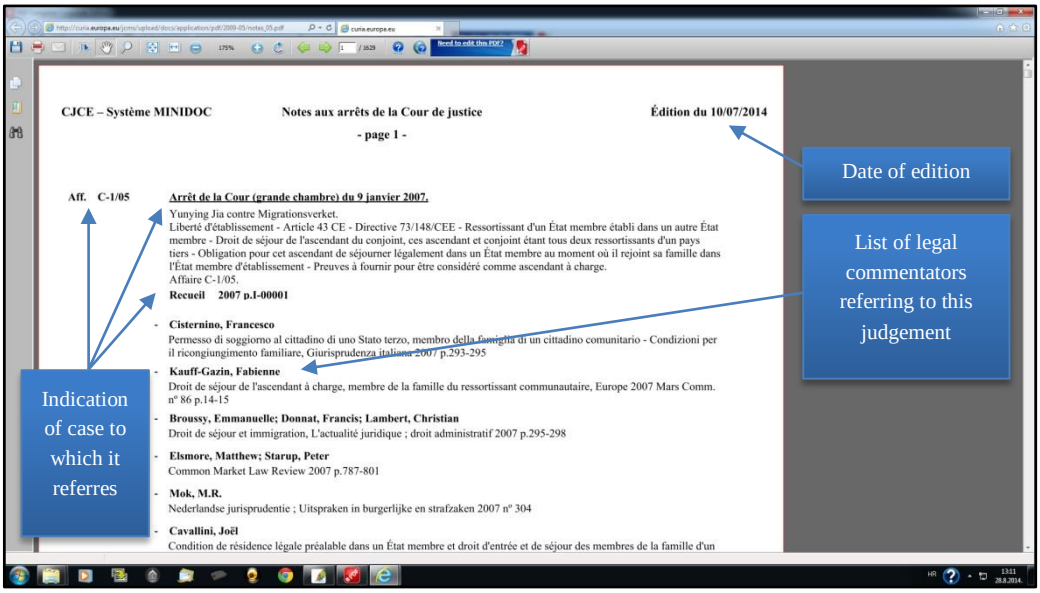


Figure 39 *An example of annotation of judgement*

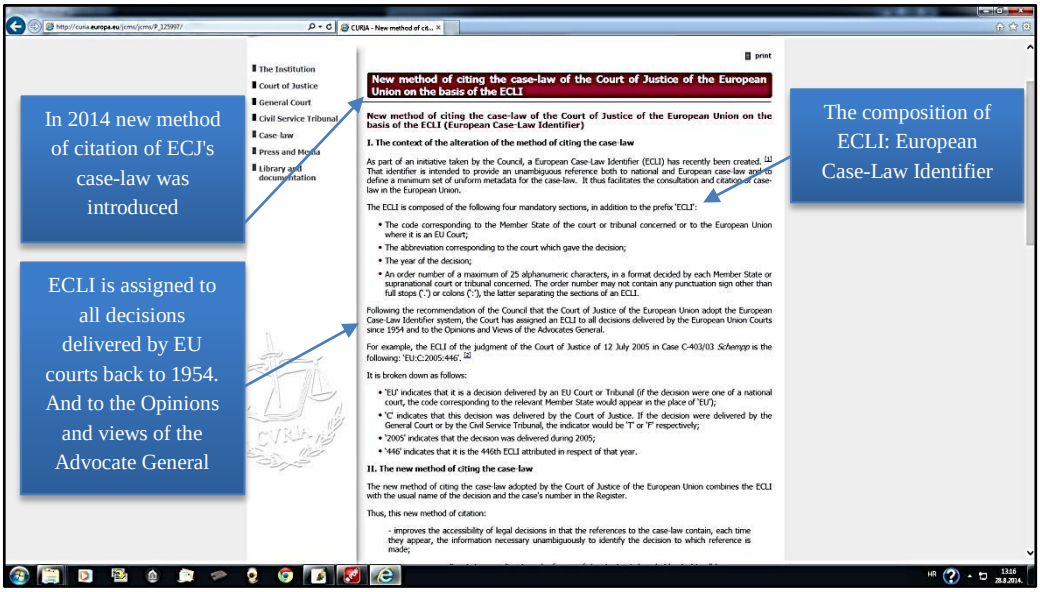


Figure 40 *New method of citation of ecj case-law at CURIA (1)*

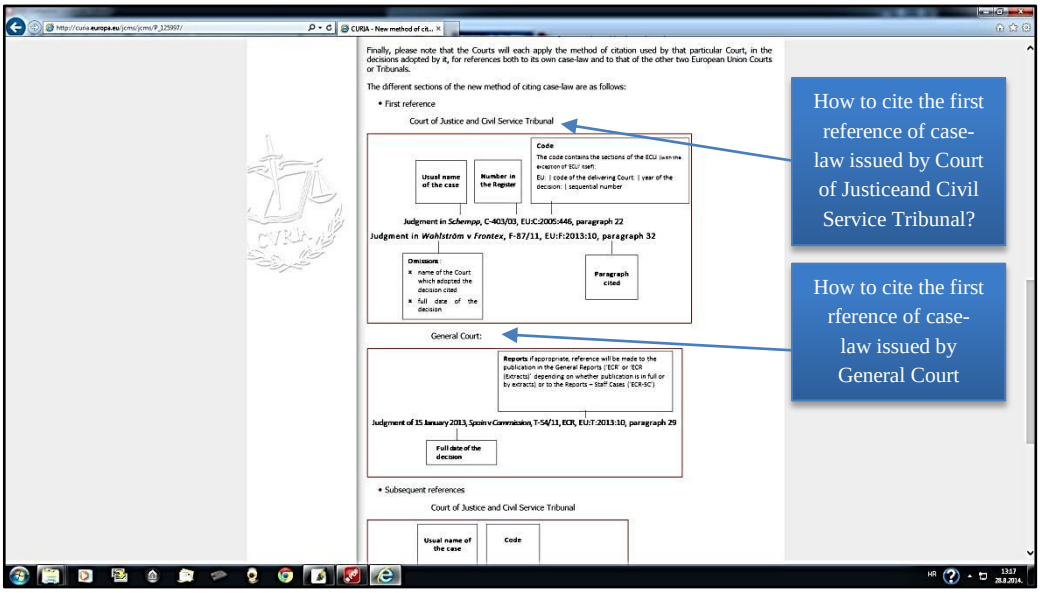


Figure 41 *New method of citation of ecj case-law at CURIA (2)*

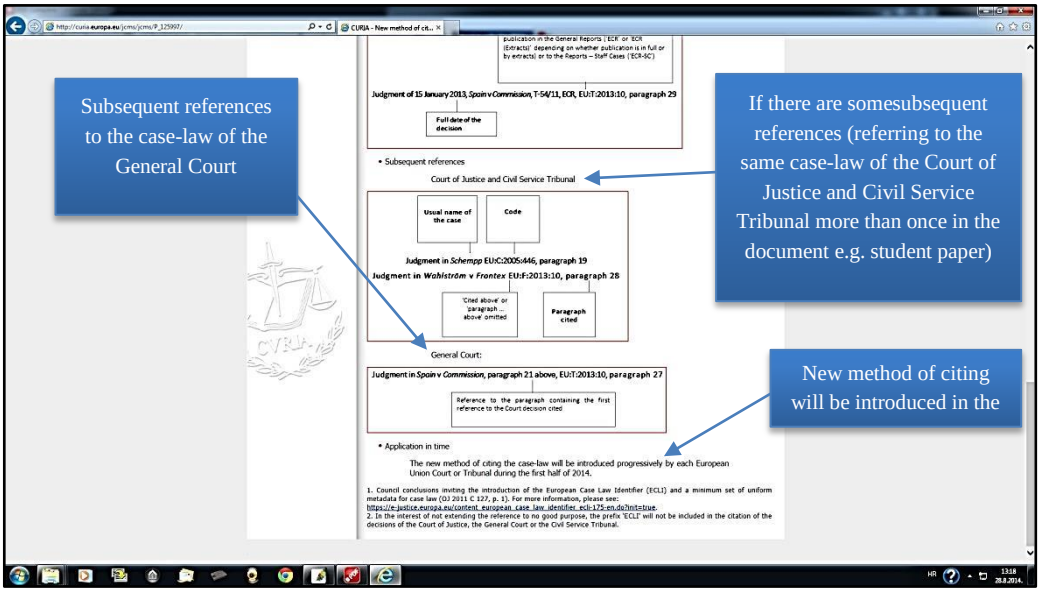


Figure 42 *New method of citation of ecj case-law at CURIA (3)*

3.4. Official Journal of the European Union [http://publications.europa.eu/official/index_en.htm]

A periodical published on 24 official languages of the EU as daily edition. The publishing started in December 1952 and since 1998 there is electronic version. Since 1 July 2013 electronic version has become authentic and legally valid. Hard copy has no legal effects, except in extraordinary cases. It consist of three series: first serie is L for legislation (legal acts of secondary law are published therein: L I for legislative acts, L II for non legislative acts, L III for other acts and L IV for acts enacted prior to 1 December 2009). Legislative acts include regulations, directives, decisions and budget, but non-legislative acts also include specific sort of regulations, directives, decisions, international agreements, recommendations, guidelines, etc. Serie C includes information and notices divided into 5 categories: C I (resolutions, recommendations and opinions), C II (notices on international agreements, joint declarations, notices issued by institutions, bodies and agencies), C III (preparatory acts), C IV (notices, including EURO exchange rates) and C V (announcements including calls for tender procedure). In special edition of serie C (C A), calls for employment at EU institutions[15] and *Common catalogue of varieties of vegetable species* are published. Serie S is the supplement which contains information on public procurement of the EU institutions. There is also electronic section to the C series (OJ C E) which are only published electronically.

[15] See e.g. OJ C 53 A, 2010.

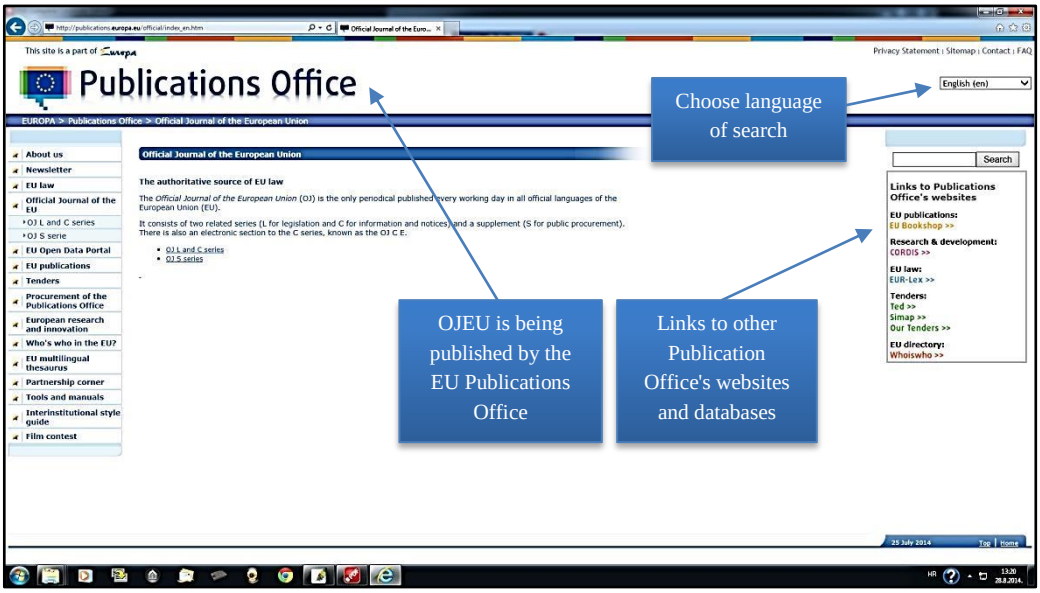


Figure 43 *Official Journal of the European Union homepage*

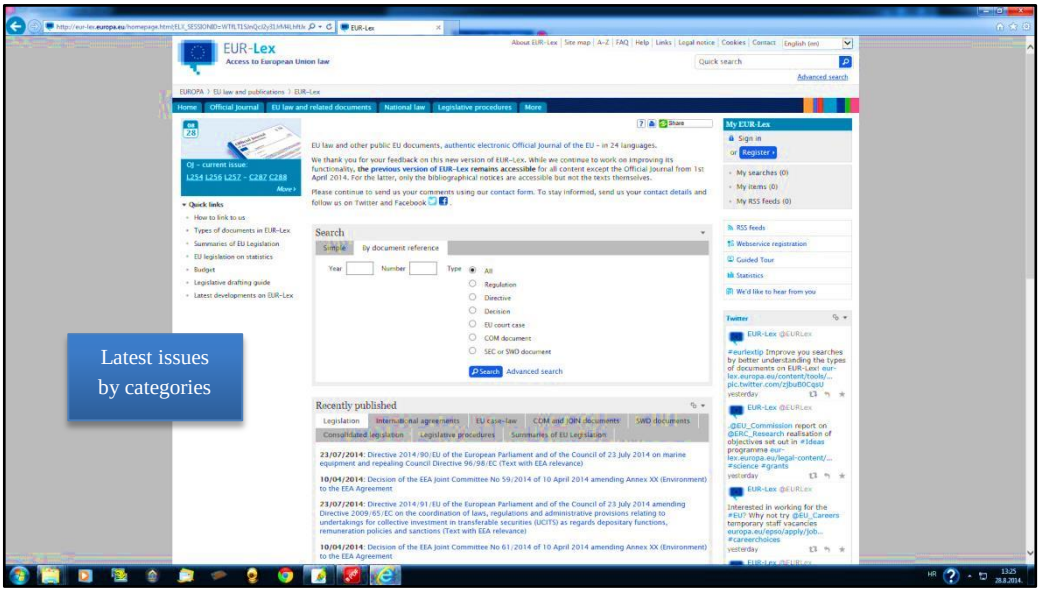


Figure 44 *Search of OJEU is done through EUR-Lex form (see Figure 15)*

3.5. PreLex
[http://ec.europa.eu/prelex/apcnet.cfm?CL=en]

A database on inter-institutional procedures. It monitors the stages of decision-making process between the EU institutions including procedural phases, decisions enacted, persons involved, services responsible, references of documents, etc. It follows the respective procedure from starting point (proposal or communication of the European Commission from the moment of its transmission to the Council or the EU Parliament).

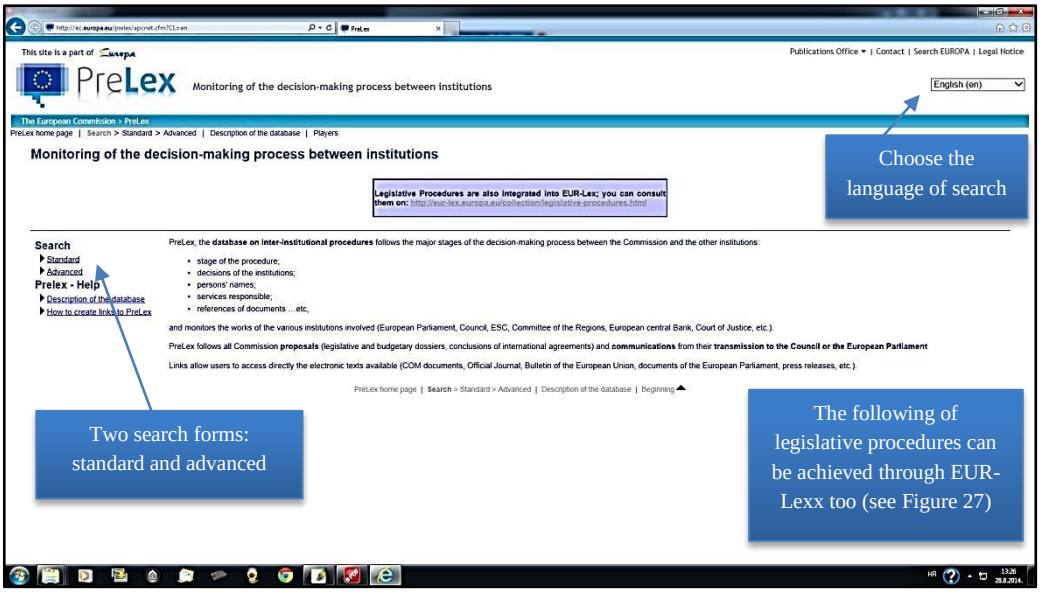


Figure 45 *PreLex homepage*

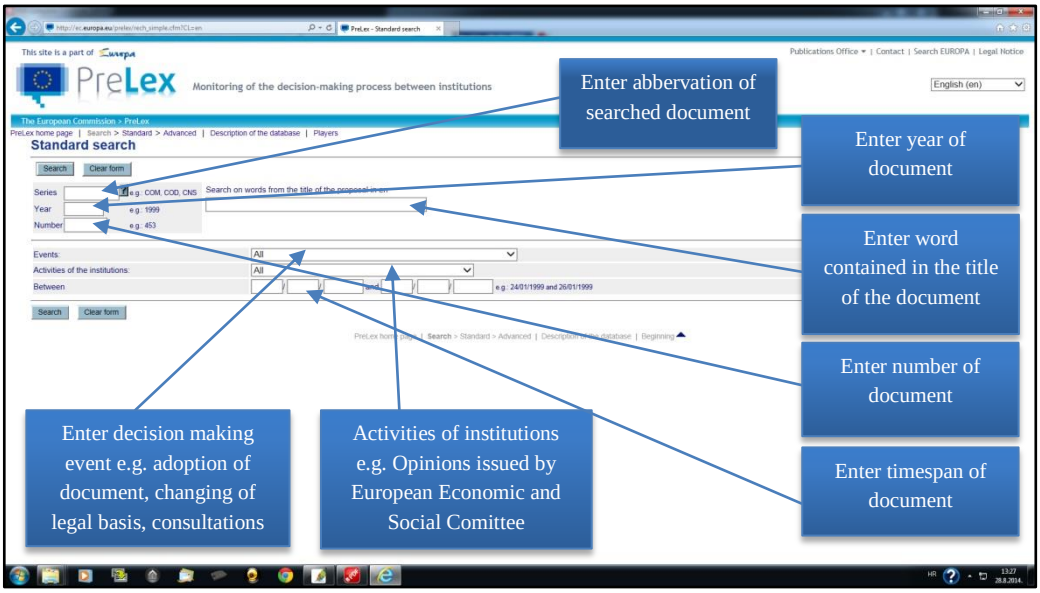


Figure 46 *Standard search form at Prelex*

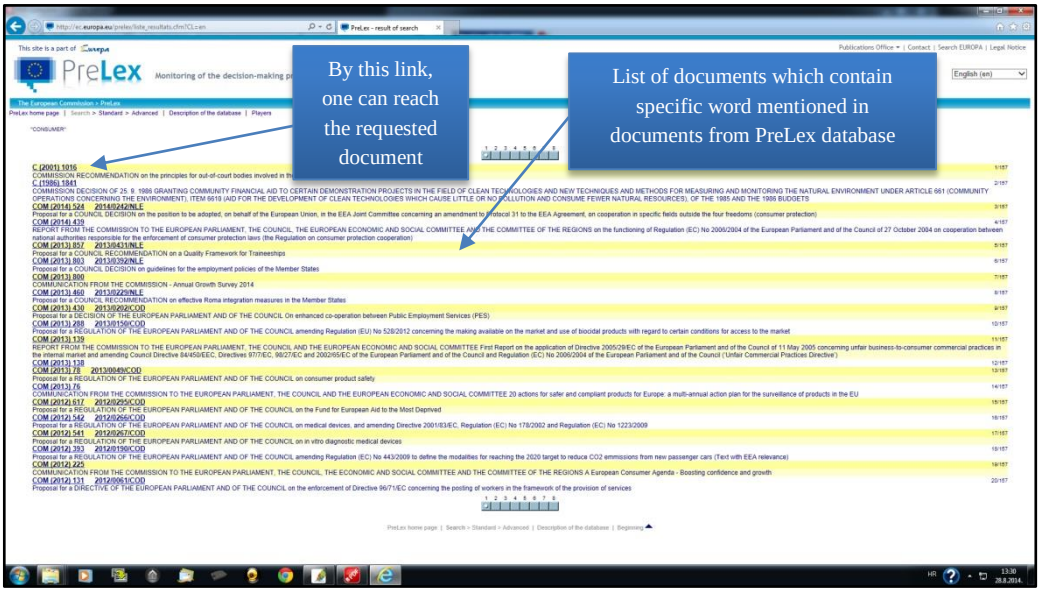


Figure 47 *Subwebpage of the search form with documents containing the specific word*

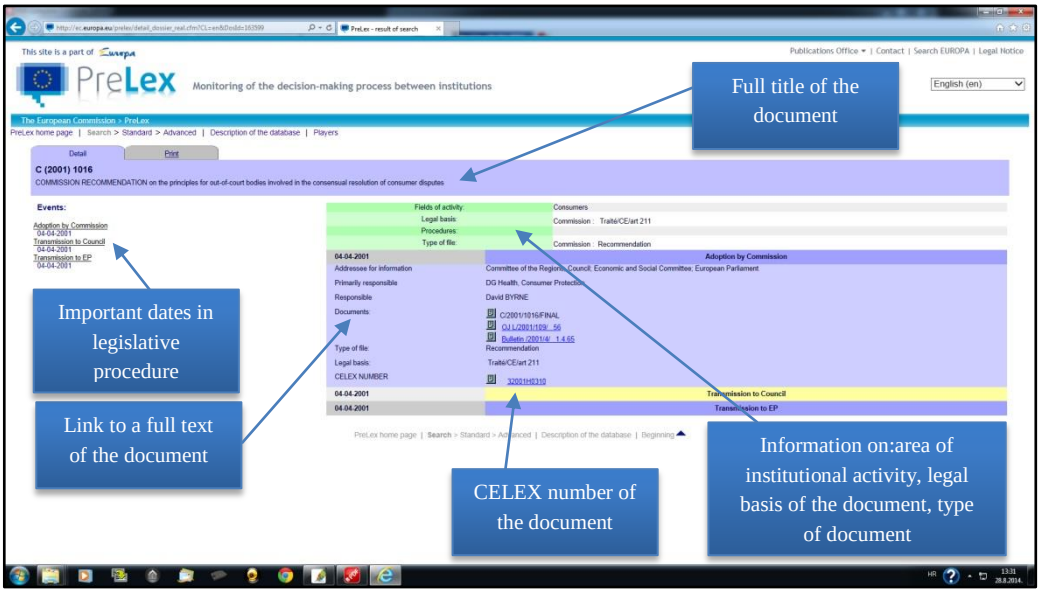


Figure 48 *Subwebpage of the search form with chosen document containing the specific word*

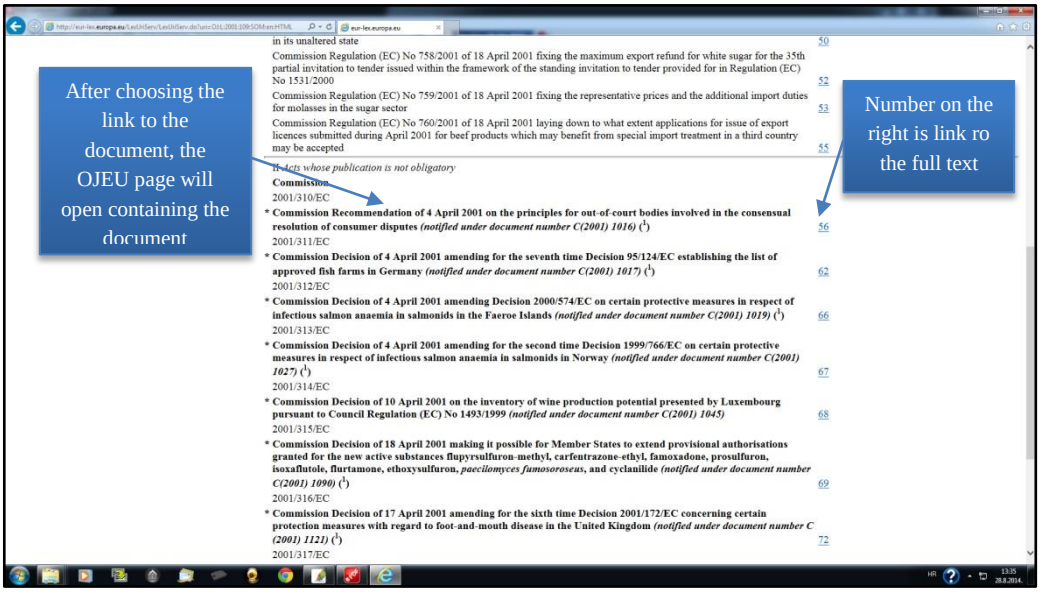


Figure 49 *Page of OJEU containing requested document and link to the text*

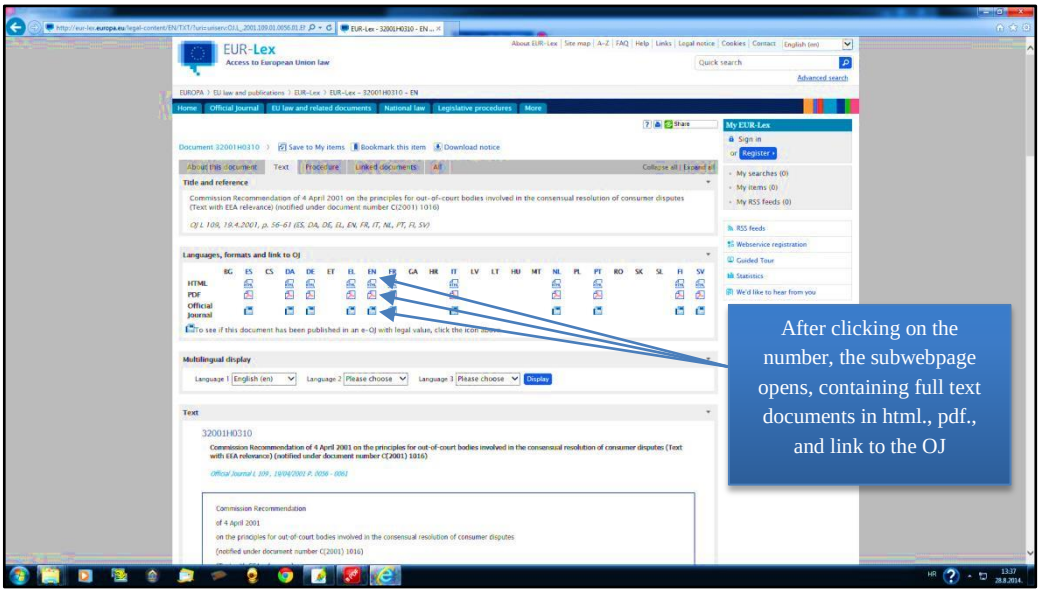


Figure 50 *EUR-Lex subwebpage containing different formats of requested document*

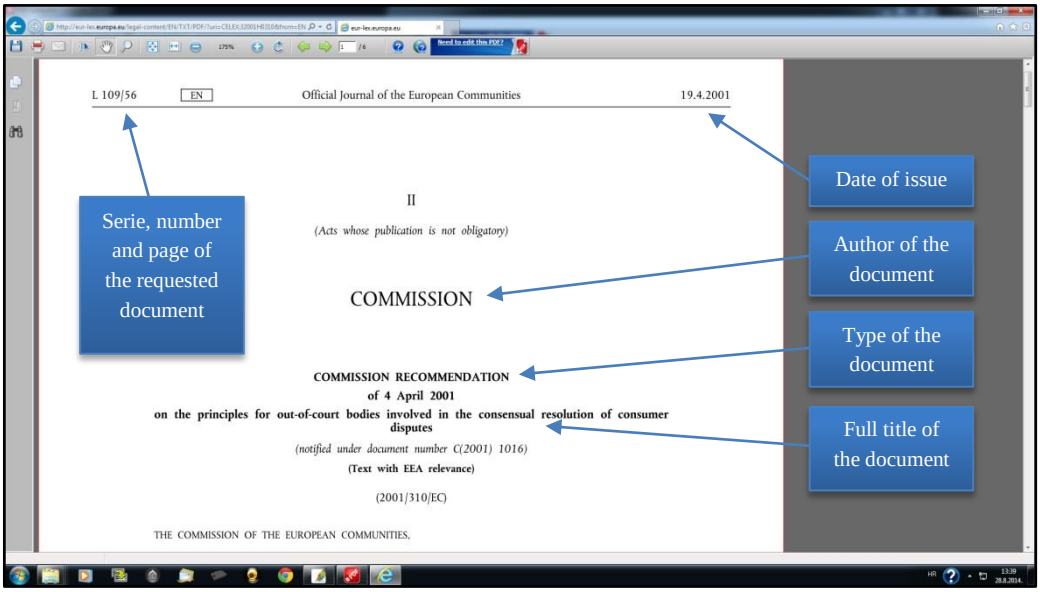


Figure 51 *First page of requested document*

3.6. DEC.NAT
[http://www.juradmin.eu/en/jurisprudence/jurisprudence_en.lasso]

A database containing national case-law concerning the EU law since 1959 and refernces to notes and comments in literature related to national case-law following the preliminary reference.

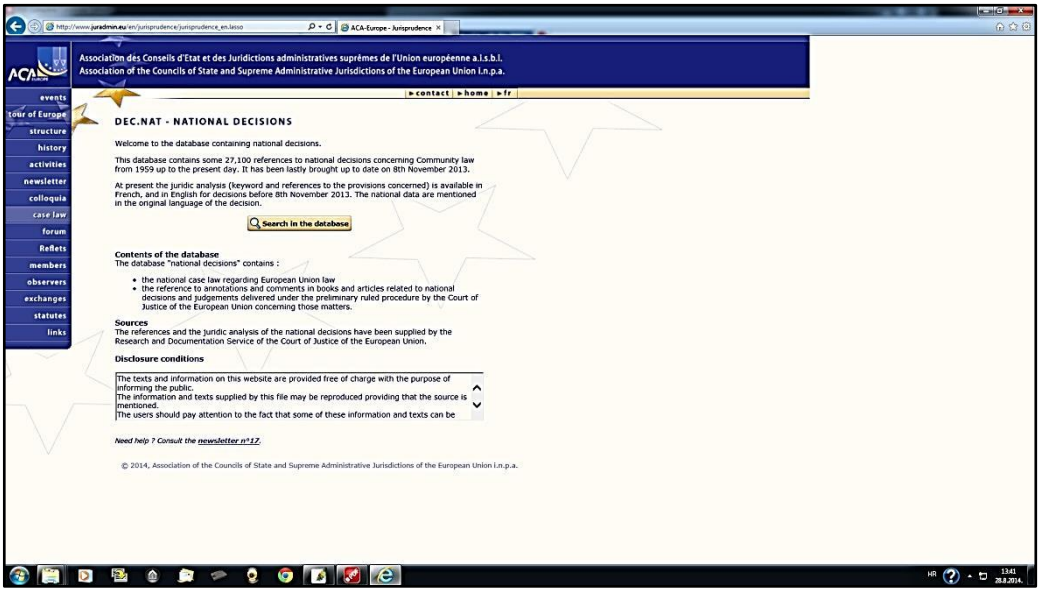


Figure 52 *DEC.NAT homepage*

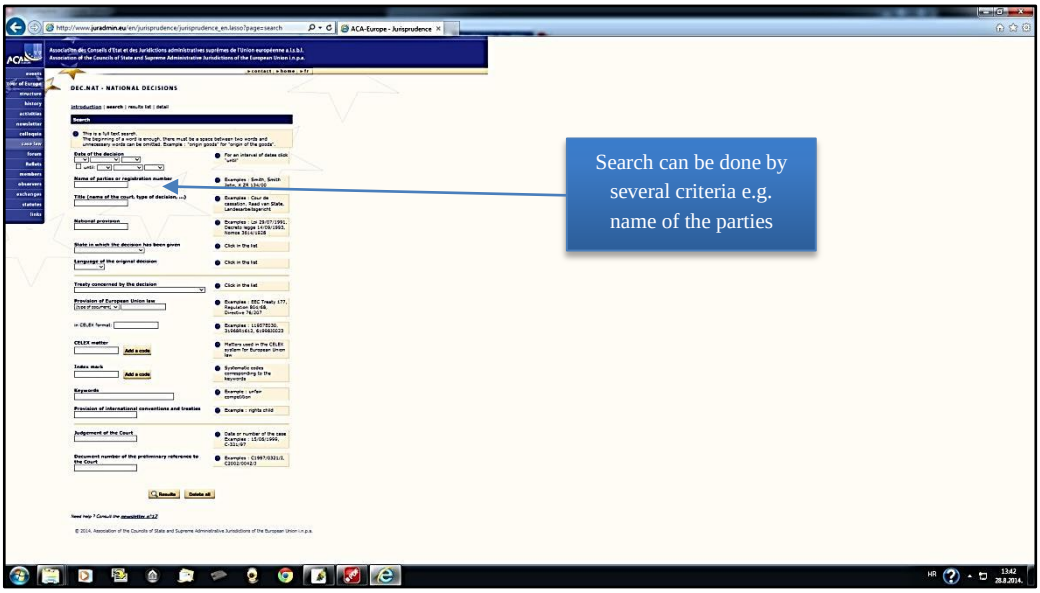


Figure 53 *DEC.NAT search form*

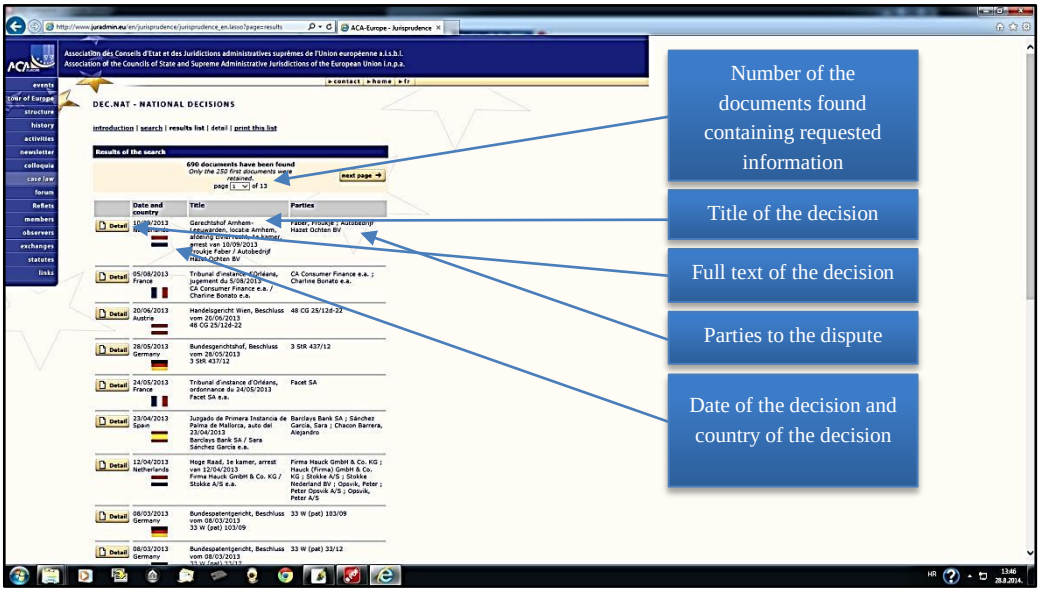


Figure 54 *Result of the search by name of the parties*

3.7. N-Lex
[http://eur-lex.europa.eu/n-lex/index_hr.htm]

A database providing access to national legal databases via unique browser. Available on national languages. Usefool tool for officials, students, legal professionals and all others who are interested in the national case-law of Member States.

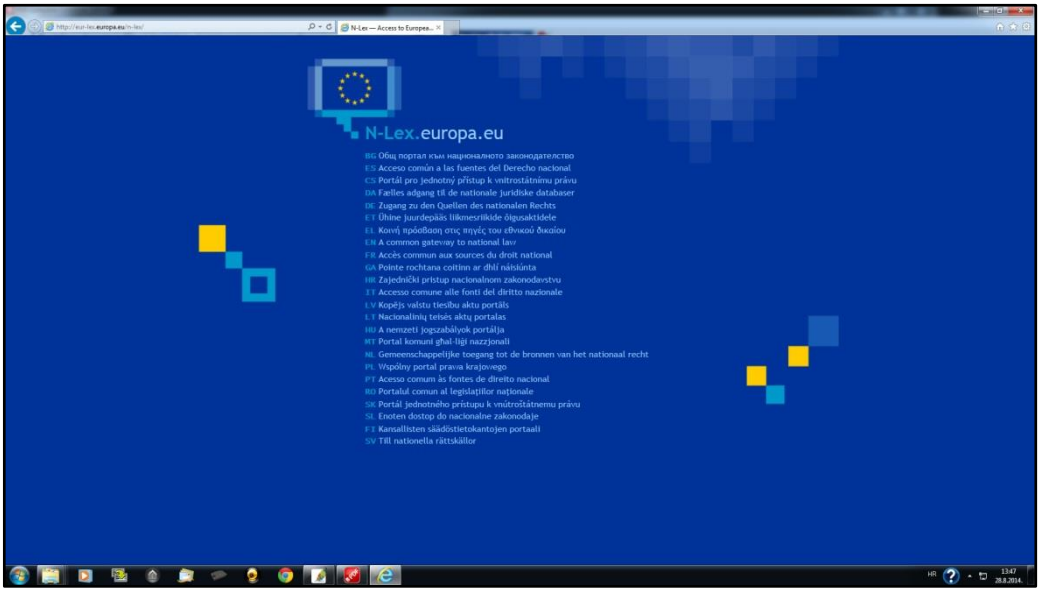


Figure 55 *N-Lex frontpage*

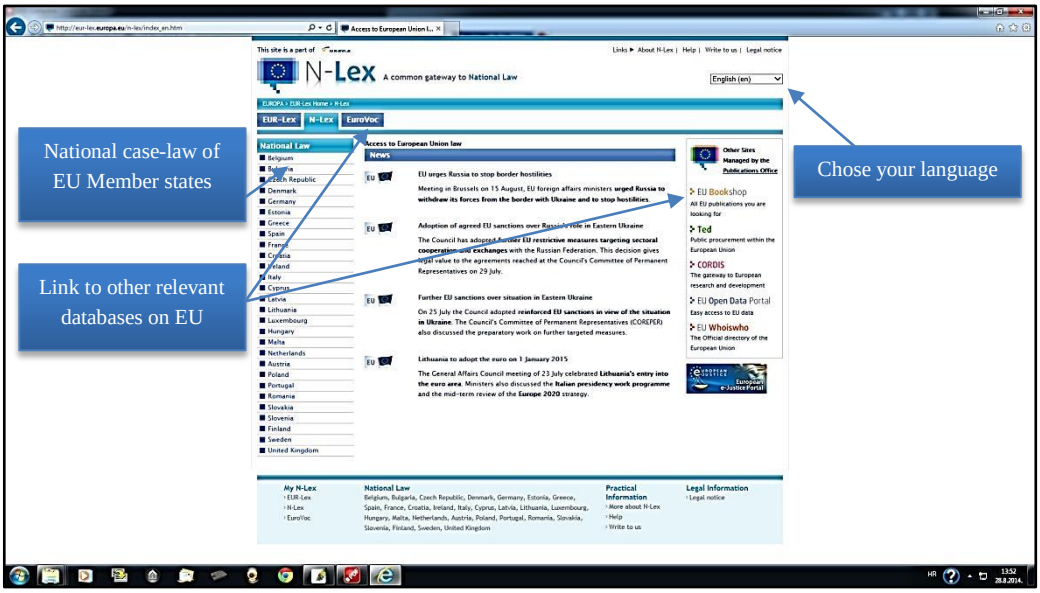


Figure 56 *N-Lex Homepage*

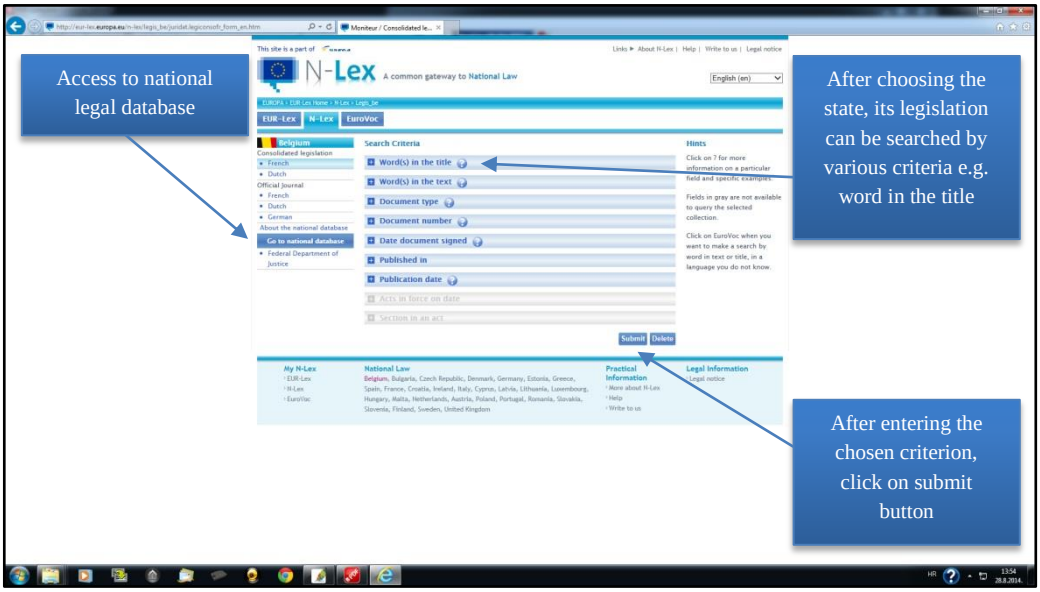


Figure 57 *N-Lex search form*

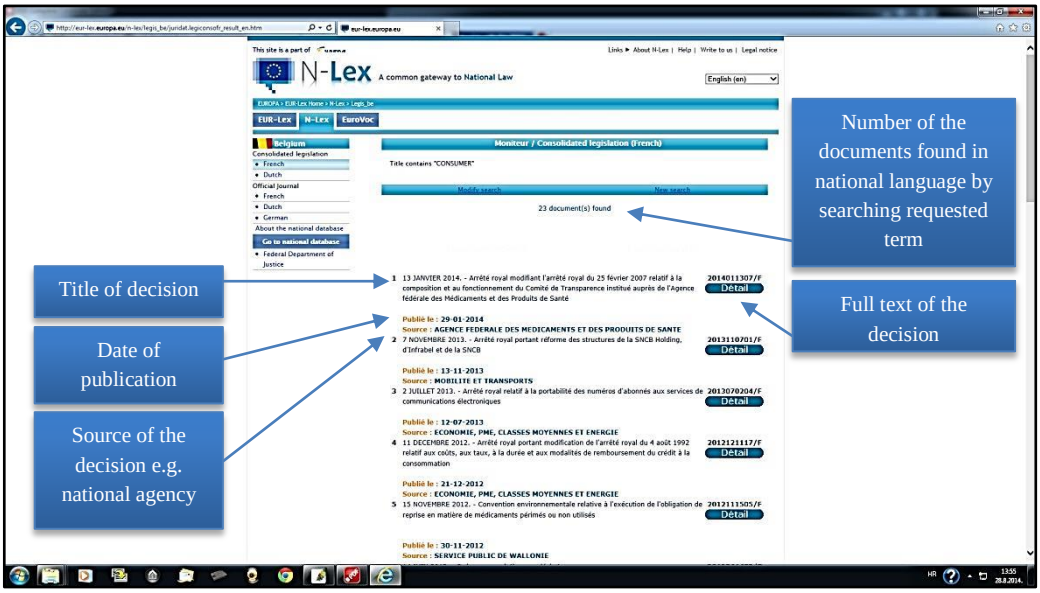


Figure 58 *Results of the N-Lex search by word in the title*

3.8. e-Justice [https://e-justice.europa.eu/home.do?action=home&plang=en]

A database on sources of law and case-law of the Member States. Provides information on justice systems throughout the EU in 23 languages. Relevant for citizens, entrepreneurs, lawyers-in-practice and judiciary. It contains information on e.g. mediation, legal aids, successions, victims of crime, judicial training, etc.

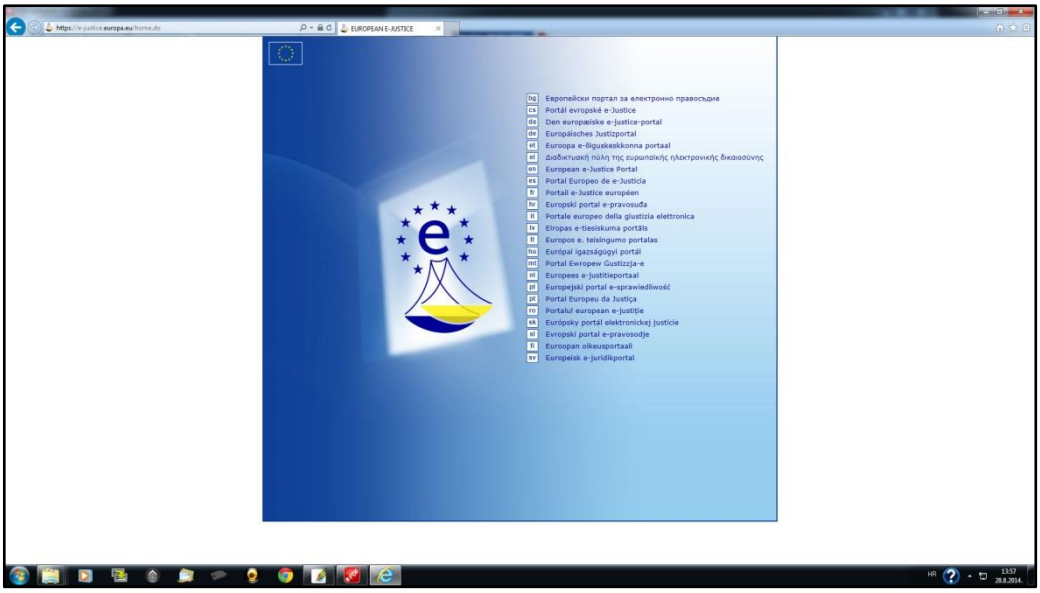


Figure 59 *e-Justice frontpage*

Figure 60 *e-Justice homepage*

Figure 61 *Law subwebpage at e-Justice*

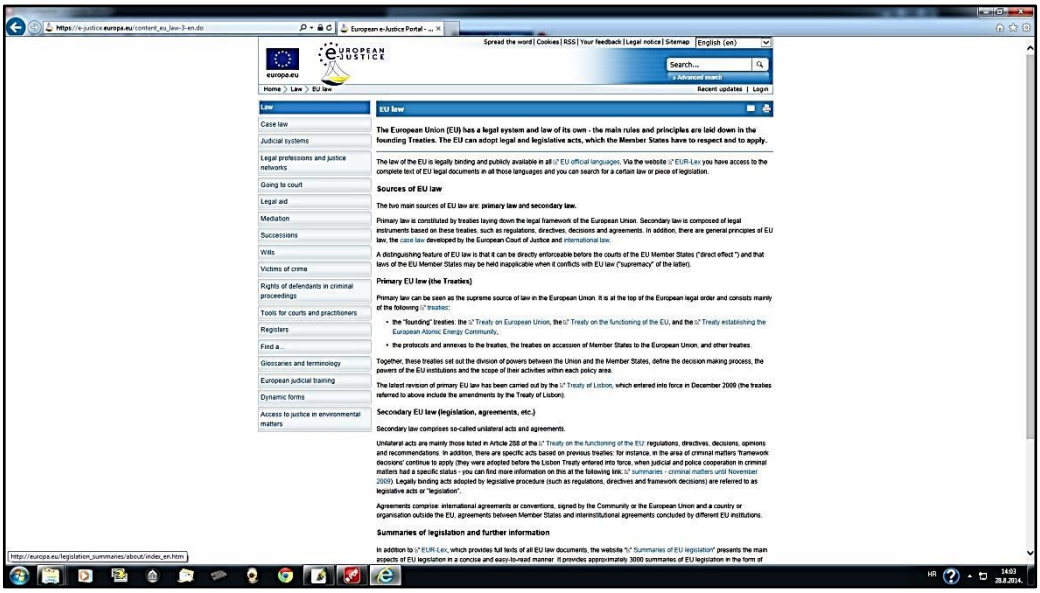


Figure 62 *e-Justice subwebpage containing general overview of sources of EU law*

3.9. Council Agreements Database [http://www.consilium.europa.eu/policies/agreements/search-the-agreements-database]

A database containing agreements between the EU and third countries or international organisations. One can search by name of the parties, title and/or date of the agreement. The database covers wide range of agreements on e.g. agriculture and fisheries, environment, foreign affairs, economic and financial affairs, employment, social policy, health and consumer affairs.

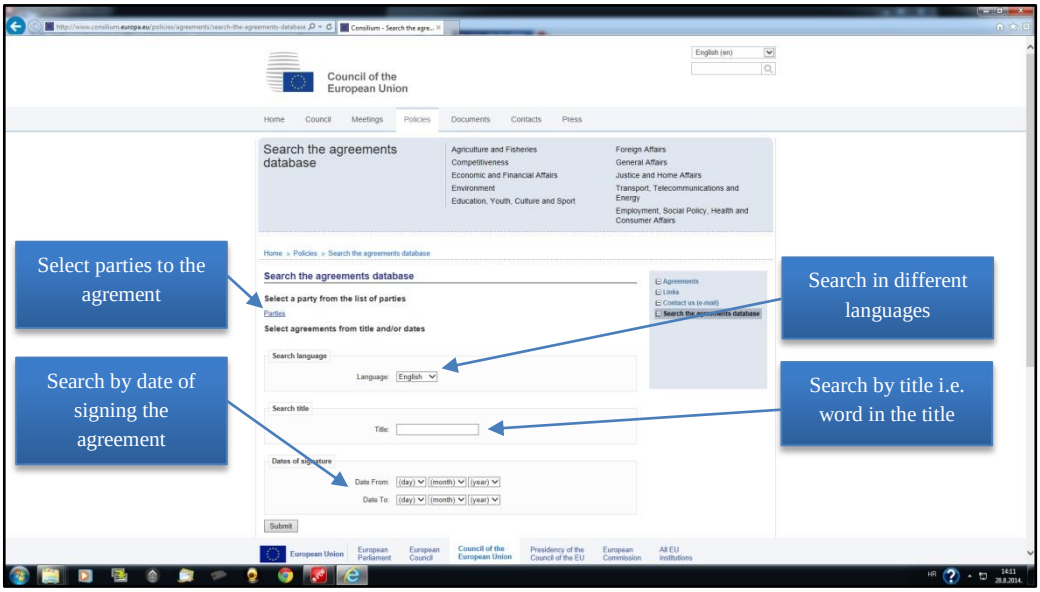


Figure 63 *Council Agreements Database search form*

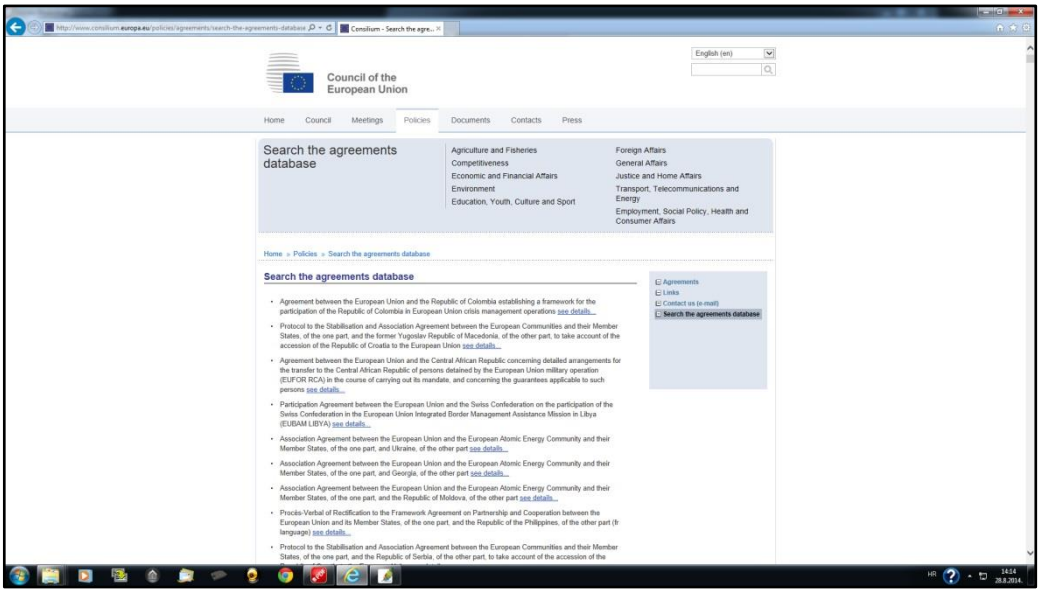


Figure 64 *Council Agreements Database subwebpage with the list of agreements containing entered words*

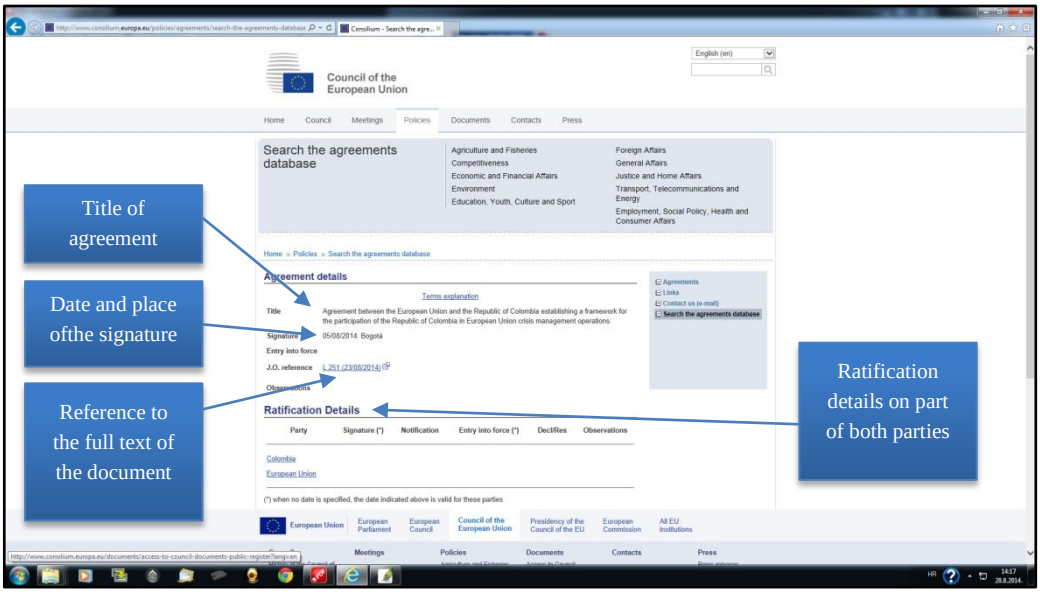


Figure 65 *Council Agreements Database subwebpage containing agreement's details*

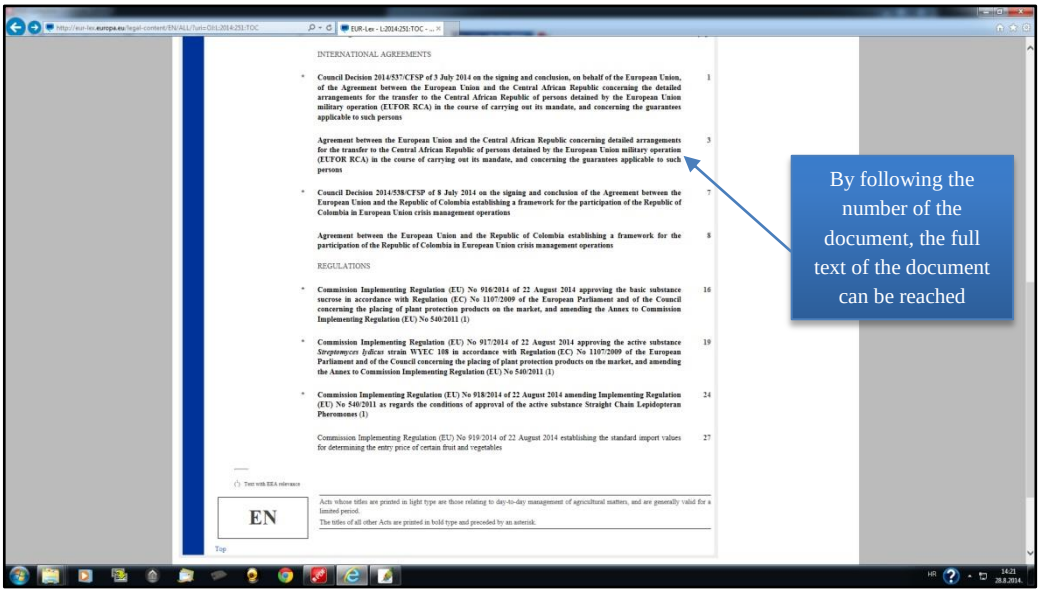


Figure 66 *Subwebpage of the OJEU containing link to the full text of agreement*

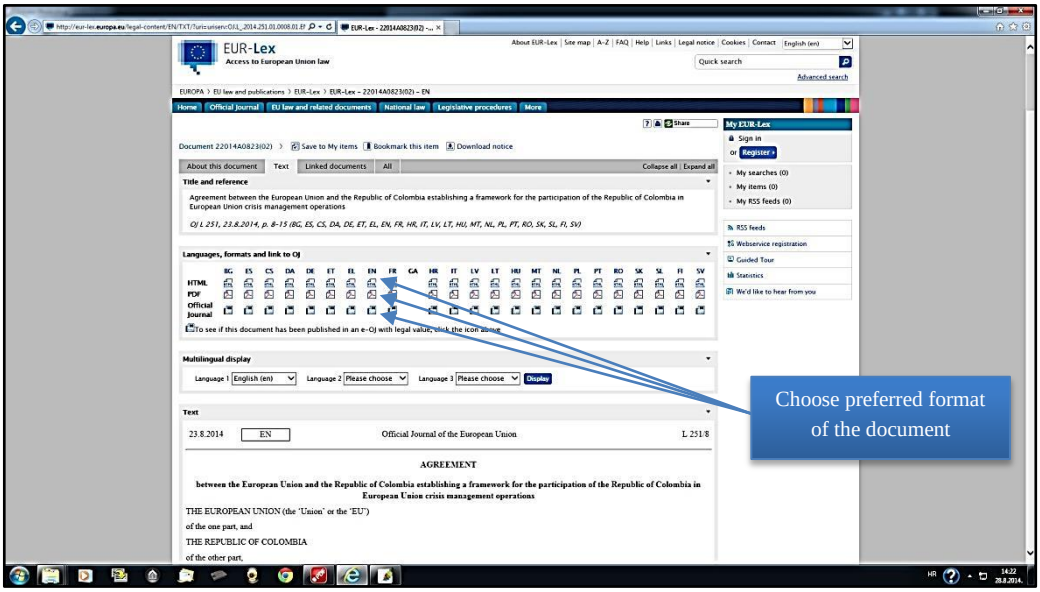
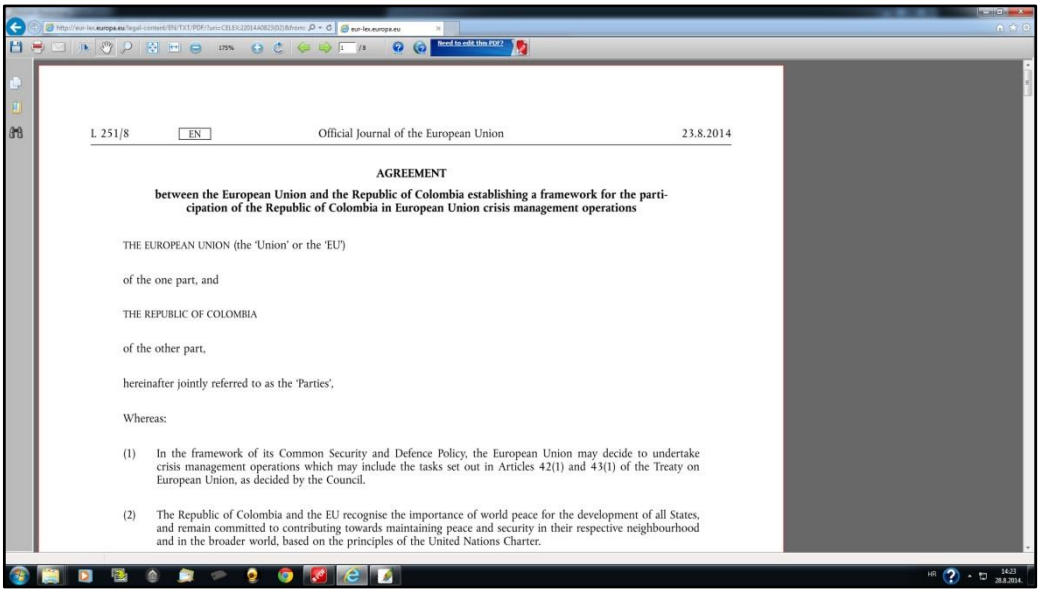


Figure 67 *Subwebpage of the EUR-Lex containing formats of the requested document*



L 251/8 EN Official Journal of the European Union 23.8.2014

AGREEMENT

between the European Union and the Republic of Colombia establishing a framework for the participation of the Republic of Colombia in European Union crisis management operations

THE EUROPEAN UNION (the 'Union' or the 'EU')

of the one part, and

THE REPUBLIC OF COLOMBIA

of the other part,

hereinafter jointly referred to as the 'Parties',

Whereas:

(1) In the framework of its Common Security and Defence Policy, the European Union may decide to undertake crisis management operations which may include the tasks set out in Articles 42(1) and 43(1) of the Treaty on European Union, as decided by the Council.

(2) The Republic of Colombia and the EU recognise the importance of world peace for the development of all States, and remain committed to contributing towards maintaining peace and security in their respective neighbourhood and in the broader world, based on the principles of the United Nations Charter.

Figure 68 *First page of the agreement*

3.10. Treaties Office Database [http://ec.europa.eu/world/agreements/default.home.do]

A database of the European External Actions Service. Contains summary and full text of all bilateral and multilateral international treaties and agreements concluded by the EU, EAEC and former European Communities (EC, EEC, ECSC). Founding Treaties are excluded.

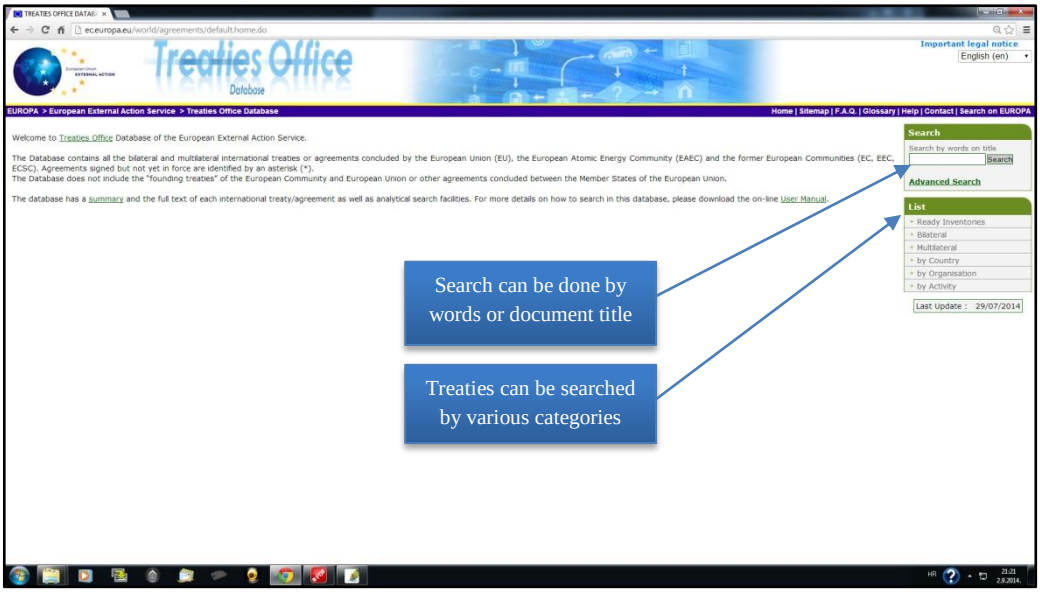


Figure 69 *Treaties Office Database homepage*

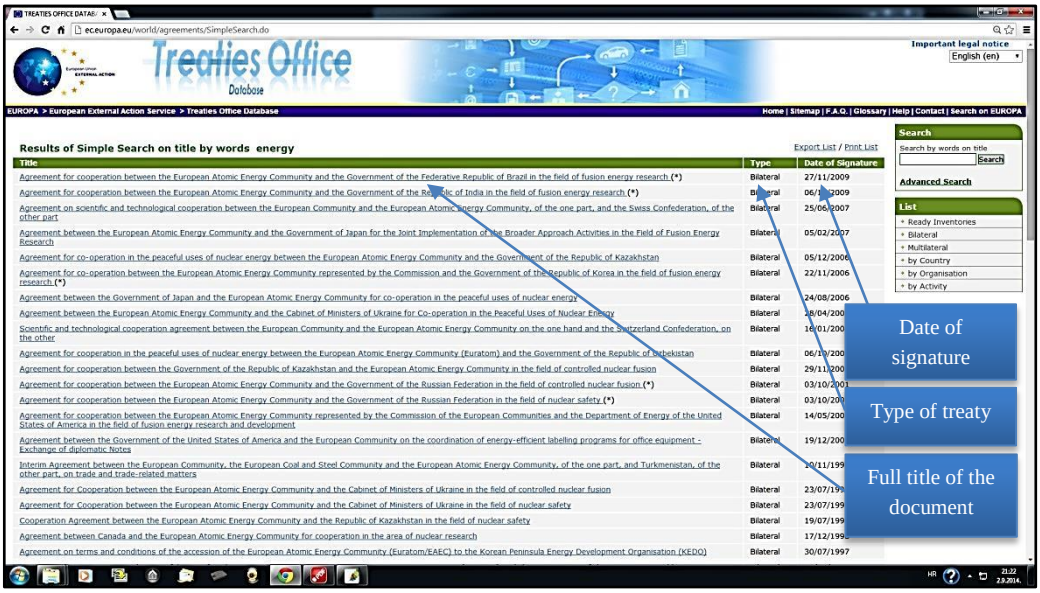


Figure 70 *Results of search by word*

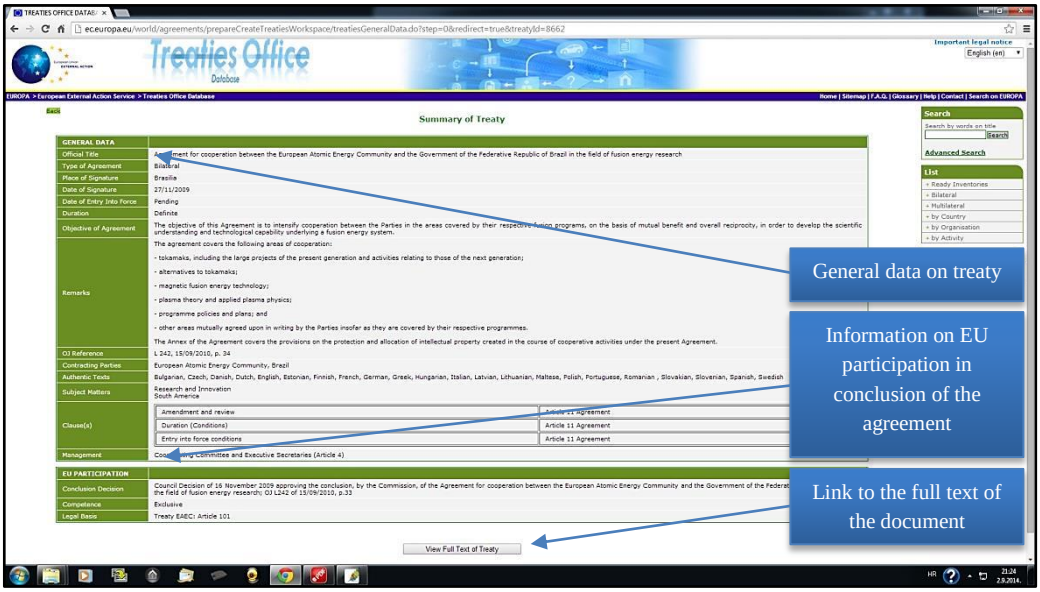


Figure 71 *Summary of the treaty found and link to the full text*

3.11. JuriFast [http://www.juradmin.eu/en/jurisprudence/jurifast/jurifast_en.php]

A database containing case-law. Database includes references and full text with preliminary questions submitted to the ECJ, ECJ's answers and national decisions following that answer and national decisions on interpretation of EU law. National decisions can be searched by states, dates, timespan, key words, headings and EU law by relevant provisions. Useful tool for search on national case law dealing with EU law issues.

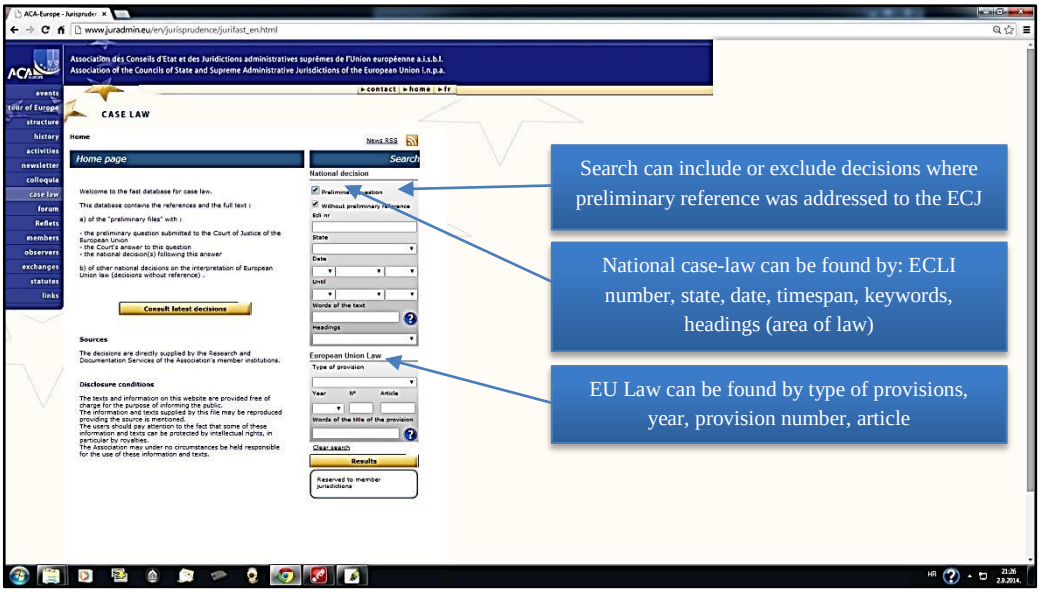


Figure 72 *JuriFast Homepage*

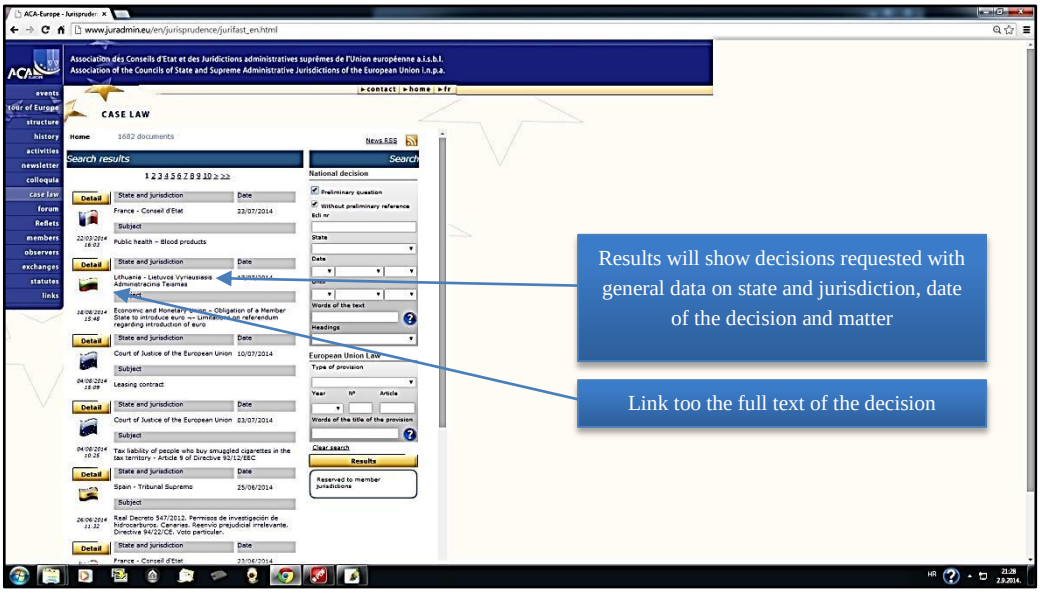


Figure 73 *Results of the search*

3.12. JURE
[http://ec.europa.eu/civiljustice/jure]

A database containing case-law of the ECJ and Member States concerning jurisdiction, recognition and enforcement in civil and commercial matters. It is free of charge and intended to make it easier for lawyers-in-practice and judges to reach information on case-law on the International Private Law (Conflict-of-Laws). The summaries of judgements are available in German, English and French and in original language of the judgement.

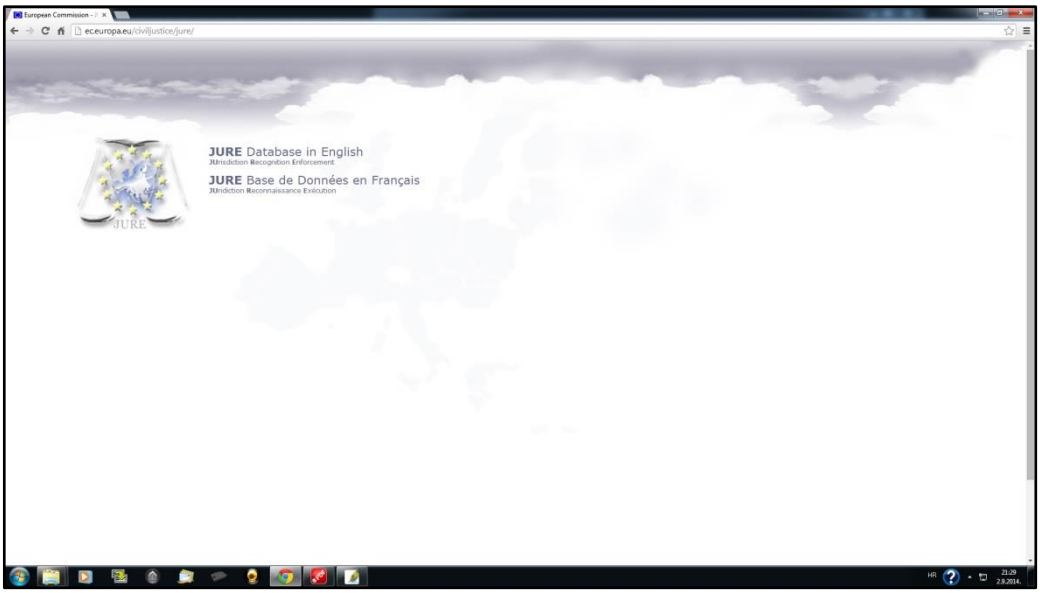


Figure 74 *JURE frontpage*

3.13. OEIL
[http://www.europarl.europa.eu/oeil/home/home.do]

A database of the EU Parliament for legislative procedure monitoring. A legislative observatory. Provides an insight into parliamentary activities and serves as a tool for enhancing democracy and people's participation in decision making process.

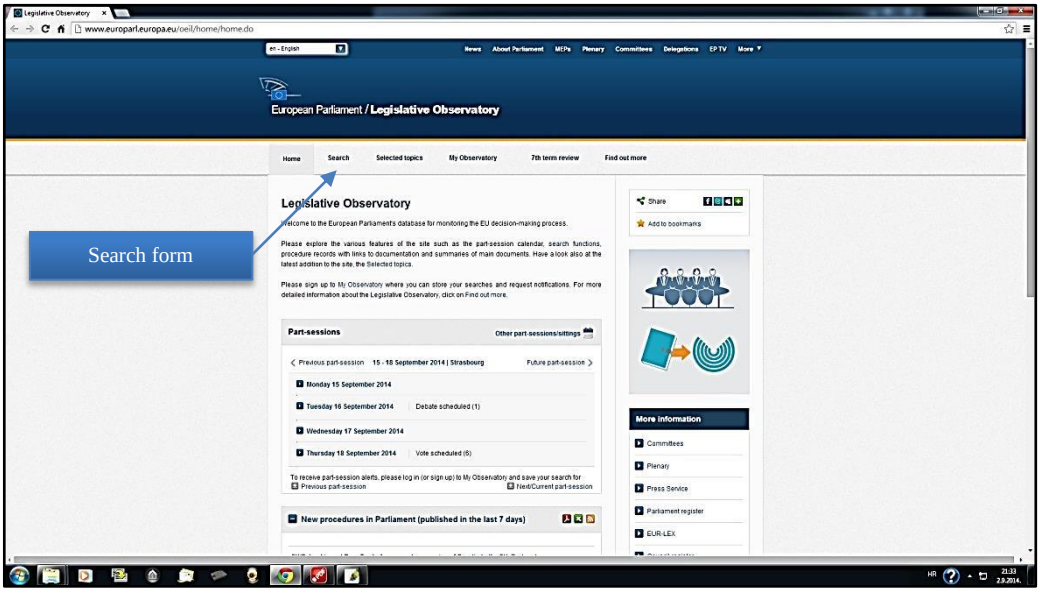


Figure 75 *OEIL (Legislative Observatory) homepage*

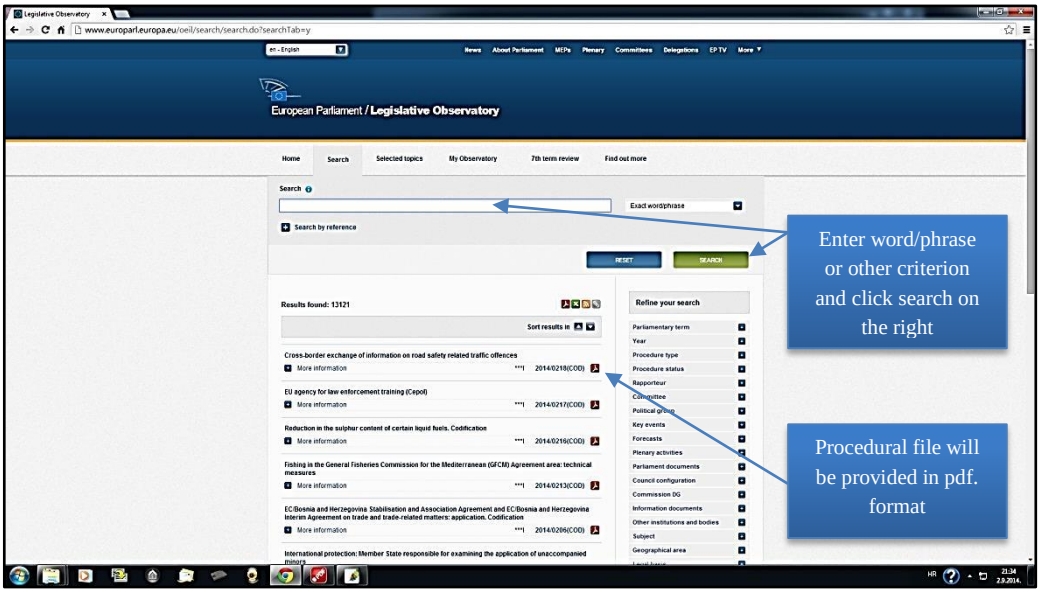


Figure 76 *Search form*

3.14. Summaries of EU Legislation [http://europa.eu/legislation_summaries/index_en.htm]

A part of EUROPA. A website covering the main aspects of EU law in simple and quick manner. Provides approximately 3000 summaries in 11 languages of long EU legislation divided in 32 areas of the EU activities.

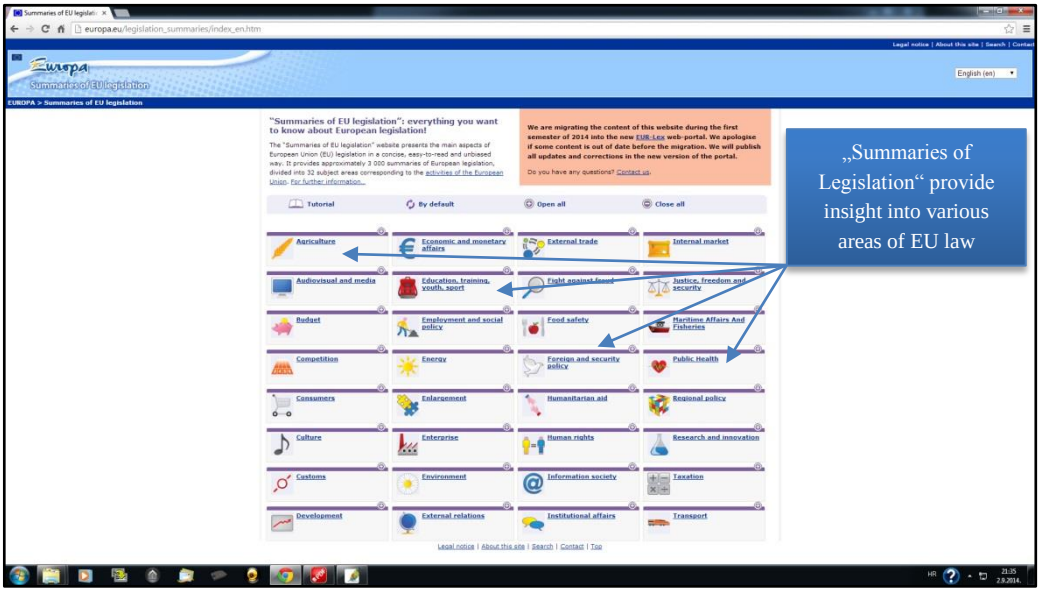


Figure 77 *Summaries of EU legislation homepage*

3.15. Impact Assessment [http://ec.europa.eu/smart-regulation/impact/index_en.htm]

A website containing assessment of possible consequences of EC's proposed measures on economy, social policy and environment. Provides an insight into the need to initiate some EU action and advantages and disadvantages of other possible policy choices. Stakeholders are also included into impact assessments and final impact assessment reports are made public.

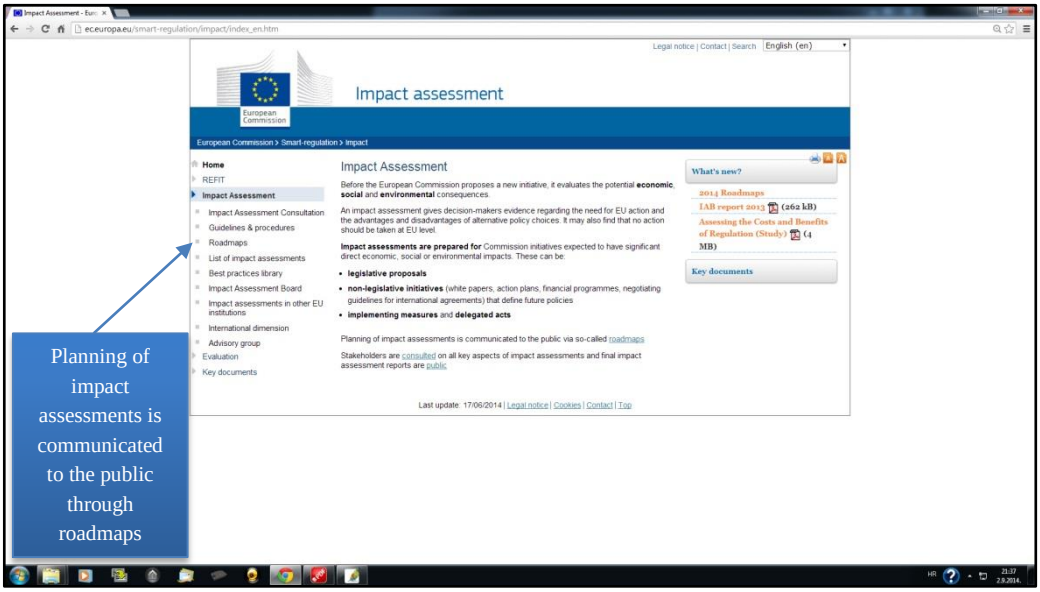


Figure 78 *Impact Assessment homepage*

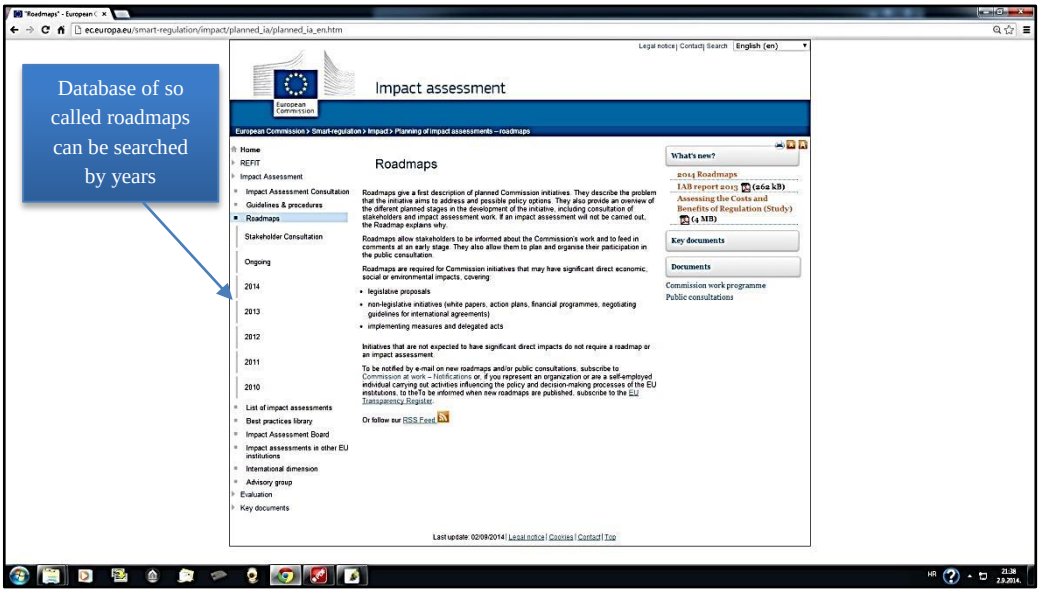


Figure 79 *Impact Assessment subwebpage containing current and previous roadmaps*

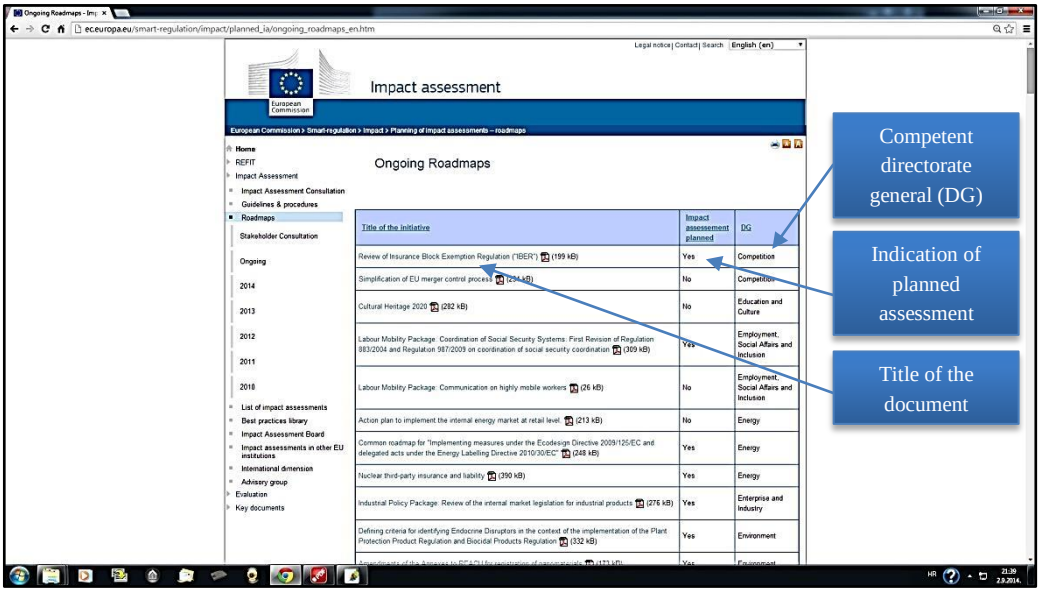


Figure 80 *List of ongoing roadmaps*

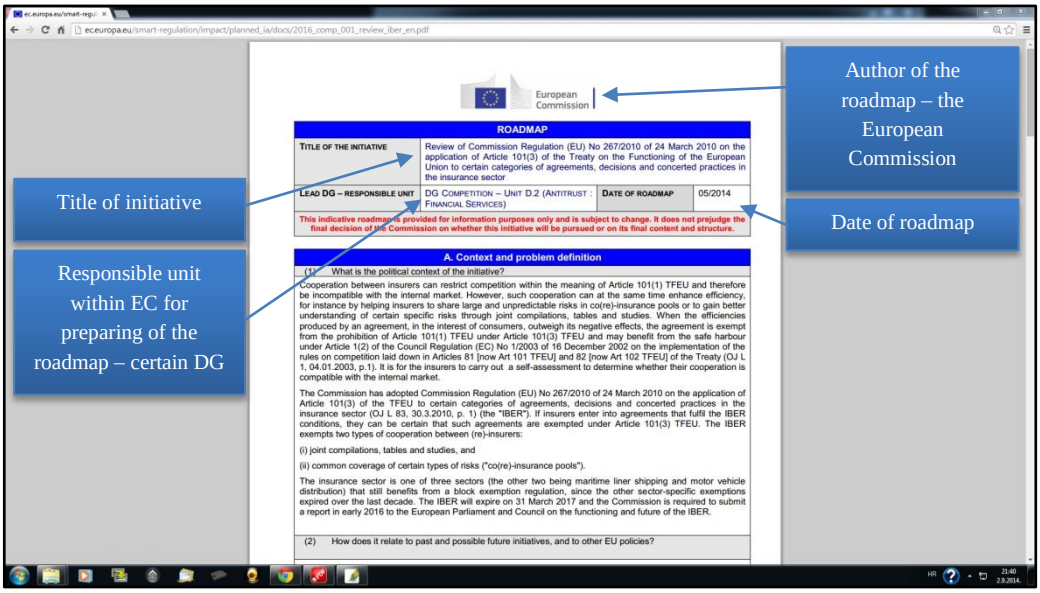


Figure 81 *An example of roadmap*

3.16. IPEX
[http://www.ipex.eu/IPEXL-WEB/search.do]

A website for mutual exchange of information among Member States' national parliaments and the EU Parliament on issues related to the EU. The IPEX's Database of Documents contains EC's documents, parliamentary documents and information on EU. Parliamentary documents are uploaded by national parliaments. This website also contains a Calendar of Interparliamentary Cooperation.

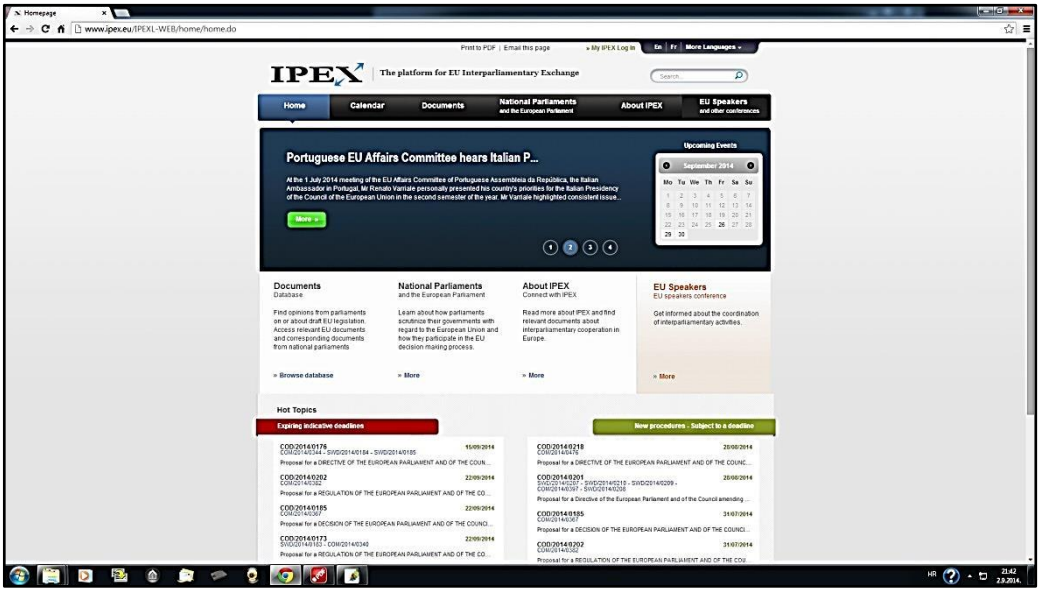


Figure 82 *IPEX homepage*

Figure 83 *IPEX search form*

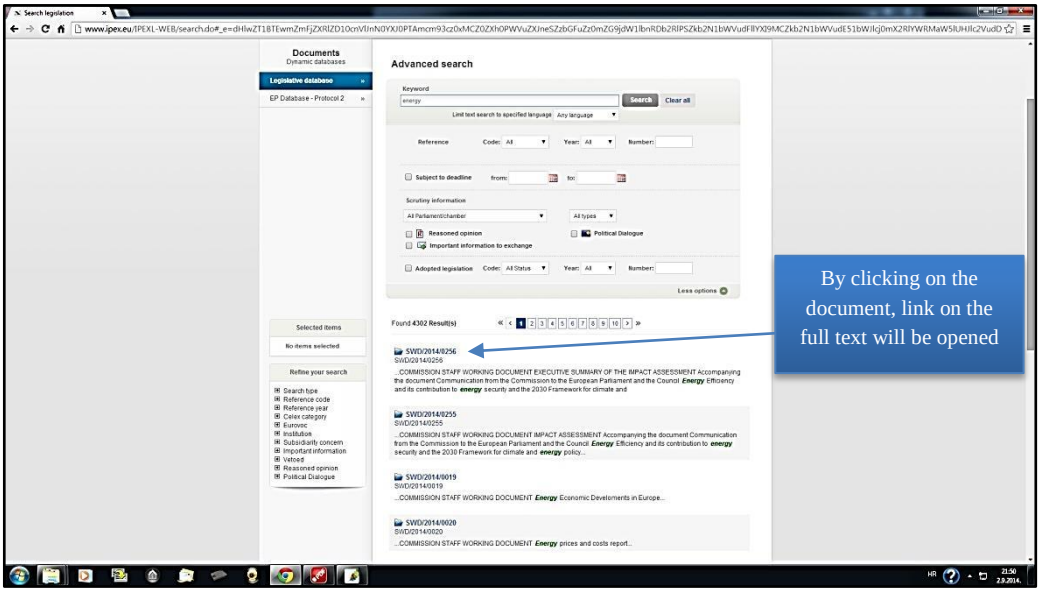


Figure 84 *List of results containing keyword*

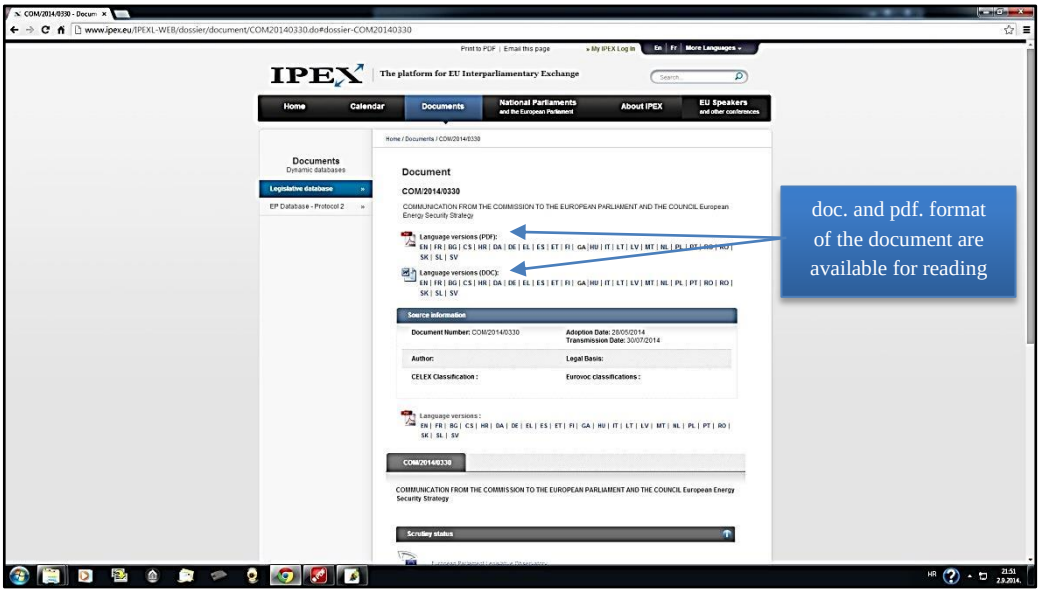


Figure 85 *IPEX subsection containing requested document*

3.17. ECLAS
[http://ec.europa.eu/eclas/F]

A repository containing Commission's library including papers on EU integration process.

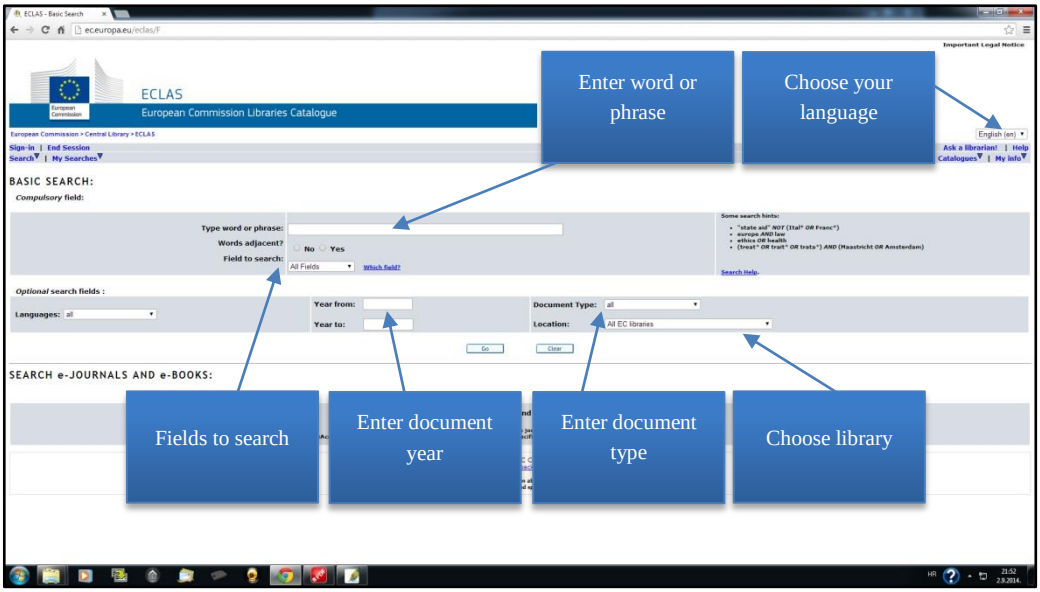


Figure 86 *ECLAS search form*

4. SPECIFIC TERMS RELEVANT FOR SEARCHING DATABASES ON EU LAW

4.1. CELEX number

Each document has a unique number in the EUR – Lex system: CELEX number. The number is composed of 4 elements:

- *1 digit indicates an area i. e. type of source of law (sector)*
- *4 digits indicate a year (in most cases, it is the year of adoption)*
- *1 or 2 letters indicate types of documents (e.g. directive)*
- *4 digits indicate a number under which a document has been published in OJ*

There are special rules for:

- ***treaties:*** *last three digits indicate an article, consolidated version contains a year when a consolidated version has been made*
- ***international agreements:*** *contain a date of edition (would contain numbers 01, 02… if more than just one were published on a same day)*
- ***case-law:*** *number consists of the number given by the Court and the year of opening a case*
- ***corrections (corrigenda)*** *have the same number as the original document plus R (xx), xx = number of corrigendum*
- ***consolidated version of secondary legislation:*** *same number, followed by a date of entry into force of the last amendment*

Author	Mark indicating source of law	Type of document
Commission	*PC*	*COM – proposals and other legislative procedure acts*
Commission	*DC*	*COM – other documents: press releases, recommendations, reports, green papers, white papers*
High Representative	*JC*	*JOIN – joint proposals, press releases, reports, green and white papers of Commission and High Representative*
Commission or Commission and High Representative	*SC*	*SWD – Staff Working Documents (e.g. impact assessment), before 2012 SEC*

The chart of specific CELEX marks (Source: EUR-Lex, FAQs)

4.2. What does COM, JOIN, SEC and SWD and other abbreviations stand for?

COM, JOIN, SEC and SWD stand for preparatory acts marks. Important documents issued in decision making process by Commission e.g. Annual Strategy bear those specific marks.[16] JOIN and SWD have been used since January 2012. The marks for

[16] E.g. COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS,Annual Policy Strategy for 2010, Brussels, 18.2.2009, COM(2009) 73 final. Some of

preparatory acts can be found in chart below. Beside that there are also CdR documents (Opinions of Committee of Regions),[17] ESC documents (Opinions of Economic and Social Committee)[18] and PE doc (Reports of the EU Parliament on legislative procedure),[19] IP (press releases of the European Commission),[20] and PRES (press releases of the Council of the EU)[21]

Author	Mark indicating source of law	Type of document
Commission	PC	COM – proposals and other legislative procedure acts
Commission	DC	COM – other documents: press releases, recommendations, reports, green papers, white papers
High Representative	JC	JOIN – joint proposals, press releases, reports, green and white papers of Commission and High Representative
Commission or Commission and High Representative	SC	SWD – Staff Working Documents (e.g. impact assessment), before 2012 SEC

the relevant policy documents are so called White and Green Paper. The list of all white papers published since 1993. Can be found at http://ec.europa.eu/white-papers/index_en.htm (last visited on 4 June 2014). The list of green papers can be found at http://ec.europa.eu/green-papers/index_en.htm (last visited on 4 June 2014).

[17] See http://cor.europa.eu.

[18] See http://eesc.europa.eu

[19] See http://europarl.europa.eu.

[20] See http://europa.eu/rapid/.

[21] See http://europa.eu/rapid/.

4.3. Consolidated texts

Represent a result of incorporating the subsequent amendments and corrigenda into existing text of a legal act. Given that consolidation results in creating an integral version of currently legally binding texts, such consolidated version should be consulted during research and citated because it stands for authentic text of current law. Consolidated texts of regulations, directives and decisions are made by the EU Publications Office. If it is expected that certain text is going to be in force for a short period of time, there is no consolidation. Minor corrigenda done in several languages will be consolidated in the next amendment. The average period of time required for consolidation is one month after consolidated version has been published in OJEU.

The chart of marks in consolidated texts can be seen below:

BASIC TEXT	B (basic)
modifier	**M (modifier)**
accession treaty	**A (accession treaty)**
corrigendum	**C (corrigendum)**

4.4. European Court Reports

Decisions of the Court of Justice and the Court of First Instance (pursuant to the Lisbon Treaty, General Court) are published in Reports of Cases before the Court of Justice and the Court of First Instance. Official texts can be found in all EU languages. Since 1994, reports of cases in civil service disputes (Civil Service Tribunal, 2005) can be also found in the European Courts Reports. Since there are three courts, each type of

decision has its own mark: C in cases before the Court of Justice, T in cases before the General Court and F in cases before the Civil Service Tribunal. P stands for decisions brought in appeal cases before the Court of Justice against the decisions of General Court. The Court of Justice decisions regularly consist of preliminary opinion made by the Advocate – General and the judgement made by the panel of judges. If there is more than just one case concerning the same subject matter, the cases will be combined in one procedure as Joined Cases.

5. CITATION OF DOCUMENTS

After certain document (primary or secondary source of law, particular case, preparatory act, international agreement etc.) has been found, it should be properly citated so that other interested users can find citated source and respective part of it that has been citated. One should bear in mind that databases, as well as their content, enjoy legal protection. Thus an adequate citation is a prerequisite for permitted use and protection. That refers in particular to two elements: source and author. Authorship on EU publications belongs to the EU itself and not to its institutions, bodies or agencies. In order to make it easier for users of this publications to cite or quote properly the document in course of writing their paper on specific EU topic or preparing a presentation, authors suggest the following rules of citation when EU sources of law are in question.

1. FOUNDING TREATY

- full name – Official Journal (OJ) – serie C – OJ number – OJ publication date – page(s)
- e.g.: *Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing European Communties and Certain Related Acts, OJ C 80, 10. 3. 2001., pp. 1-87.*

2. ACCESSION TREATY

- full name – Official Journal (OJ) - serie L – OJ number – OJ publication date – page(s)

- e.g.: *Treaty between the Kingdom of Belgium, the Republic of Bulgaria (...) and the Republic of Croatia concerning the accession of the Republic of Croatia to the EU, OJ L 112, 24. 4. 2012., pp. 21-34.*

3. REGULATION

- Regulation – body (mentioning form of EU integration) – number – enactment date– subject matter – Official Journal (OJ) – serie L – OJ number – OJ publication date – page(s)
- e.g.: *Council Regulation (EC) No 1009/2000 of 8 May 2000 concerning capital increase of the European Central Bank, pp.1-1.*

4. DIRECTIVE

- Directive – number - name of the body – enactment date – subject matter – Official Journal (OJ) – serie L – OJ number – OJ publication date – page(s)
- *e.g.: Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, OJ L 48, 23.2.2011., pp. 1-10.*

5. DECISION

- number: name of the body – enactment date – subject matter – Official Journal (OJ) – serie L – OJ number – OJ publication date – page(s)
- e.g.: 2013/387/EU: Council Decision of 9 July 2013 on the adoption by Latvia of the euro on 1 January 2014., OJ L 195, 18.7.2013., pp. 24-26.

6. RECOMMENDATION

- name of the body – Recommendation – enactment date – subject matter – OJ– serie C – OJ number – OJ publication date – page(s)
- e.g.: *Council Recommendation of 9 July 2013 on the implementation of broad guidelines for the economic policies of the Member States whose currency is the euro, OJ C 217, 30.7.2013., pp. 97-99.*

7. OPINION

- name of the body – Opinion – enactment date – subject matter – OJ – serie C – OJ number – OJ publication date – page(s)

- e.g.: *Commission Opinion of 23 August 2013 on two draft Regulations of the European Central Bank in the field of monetary and financial statistics, OJ C 244, 24.8.2013., pp. 1-2.*

8. INTERNATIONAL AGREEMENTS BETWEEN THE EU AND OTHER STATES AND INTERNATIONAL ORGANIZATIONS

- full name – Official Journal (OJ) – serie L – OJ number – OJ publication date – page(s)
- e.g.: *Free Trade Agreement between the EU and its Member States, of the one part, and Republic of Korea, of the other part, OJ L 127, 14.5.2011, pp. 1-1426.*

9. INTER – MEMBER STATE AGREEMENTS

- full name – Official Journal (OJ) – serie L – OJ number – OJ publication date – page(s)
- e.g.: *The Schengen acquis – Agreement between the Governments of States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000., p. 19.*

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- CURIA
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  http://curia.europa.eu/jcms/jcms/P_125997/ (6 – June – 2014)
- Official Journal of the EU
  http://publications.europa.eu/official/index_en.htm (25 - May - 2014)
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  http://ec.europa.eu/world/agreements/default.home.do (25 - May - 2014)
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- OEIL
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http://europarl.europa.eu.

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  http://europa.eu/rapid/

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Part II

CASE LAW OF THE EUROPEAN COURT OF JUSTICE

I. General Part

1. DIRECT VERTICAL EFFECT OF THE PRIMARY LAW

Case 26/62, NV AlgemeneTransportenExpeditieOnderneming van Gend en Loos v NederlandseAdministratis der Belastingen [1963] ECR English special edition 1

(Van Gend en Loos)

SUMMARY

Van Gend en Loos was a landmark judgment which established that provisions of the primary law were capable of creating legal rights which could be enforced by both natural and legal persons before the national courts of the Member states. This forms the cornerstone of the doctrine called principle of direct vertical effect. The case is acknowledged as being one of the most important decisions in the development of European Union law.

KEYWORDS

Direct effect, protection of individual rights, nature of the EEC, increase of customs duties.

OVERVIEW

The Dutch company Van Gend en Loos imported in 1960 industrial chemical substance called urea-formaldehyde from West Germany into Netherlands. The Dutch customs authorities (*Tariefcommissie*) charged them a tariff on the import. Since this was still during the transitional period, customs duties between Member States were allowed. However, introduction of new duties or increasing of existing ones was

prohibited (today this prohibition can be found in Article 30 TFEU)[22]. *Tariefcommissie* changed its tariff classification for import of urea-formaldehyde and Van Gend en Loos was ordered to pay higher customs tariff in comparison with earlier instances of import. The Van Gend en Loos paid the tariff but then sought to retrieve the money in the national court. The national court made a request for a preliminary ruling to the Court of Justice, asking whether the then Article 12 of the Treaty of Rome conferred rights on the nationals of a Member State that could be enforced in national courts.

The fundamental substantive problem in the case was the legal nature of the Treaty of Rome and thus primary law in general. A traditional interpretation was that the Treaty was the instrument of International law and as such was not capable of producing direct effects that could be enforced in national courts (creating subjective rights). This view puts the Treaty in the classical realm of International law. The opposite opinions view at least some of the Treaty provision as directly applicable: the Treaty forms distinguish legal regime from the International law. During the proceeding, observations were submitted to the Court by the Belgian, German and Dutch governments. These observations sought to interpret the Treaty as traditional International law instrument or to left the fundamental legal problem to be decided by the national constitutional courts. Advocate General Roemer in his Opinion in the case thought that some provisions of the Treaty could have a direct effect but that Article 12 was not one of them.

The Court of Justice delivering its judgment on 5 February 1963 decided that Article 12 of the Treaty of Rome was capable of creating rights enforceable in national courts. The European Economic Community is a new legal order of international law, which not only imposes obligations on individuals, but is also intended to confer upon them rights which become part of their legal heritage. A traditional scholarly interpretation of this judicial doctrine is that the European Law represents *sui generis* legal order. The *Van Gend en Loos* judgment represents a legal revolution. In the words of Pierre Pescatore, former Judge of the European Court of Justice, *Treaty has created a Community not only of States but also of peoples ... not only Member Sates but also individuals must be visualised as subjects of Community law. This is the consequence*

[22] Article 30 TFEU: *Member States shall refrain from introducing between themselves any new customs duties on imports and exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.*

of a democratic ideal, meaning that in Community, as well as in modern constitutional sate, Governments may not say any more what they are used to doing in international law: L'Etat, c'est moi[23].

TEXT OF JUDGEMENT

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

[23] Pescatore, P; The Doctrine of Direct Effect: An Infant Disease of Community Law, (1983) 8 European Law Review, p. 155.

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 ineffective 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.

(...)

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.**

2. SUPREMACY OF THE EU LAW

Case 6/64, *Flaminio Costa v E.N.E.L.* [1964] ECR English special edition 585

(Costa v. ENEL)

SUMMARY

The *Costa v. ENEL* was a cornerstone judgement which established the doctrine of supremacy of EU Law over the national laws of Member States. This decision also confirms the existence of new legal order and clearly states a procedural obligation of national courts to refer to cases that have reached the highest point of appeal in their respective Member State. The doctrine of supremacy was later challenged by the highest courts of several Member States in a line of jurisprudence. Tensions subsequently led to the development of constitutional pluralism.

KEY WORDS

Supremacy of the European law, preliminary ruling procedure, State monopolies of a commercial character.

OVERVIEW

Flaminio Costa was an Italian citizen, lawyer by profession, who had owned shares in an electricity company and opposed the nationalisation of the electricity sector in Italy. Mr Costa refused to pay his minor electricity bill to the nationalised ENEL Company. Subsequently, he was sued for non-payment. During the proceedings, he evoked *inter alia* the Treaty of Rome provisions on of State monopolies of a commercial character

(today Article 37 TFEU)[24]. The Italian judge of lower level (*Giudice Conciliatore*) referred the case first to the Italian Constitutional Court and then to the European Court of Justice. The Italian Constitutional Court passed the judgement in March 1964, ruling that in accordance with *lex posterior derogat legi prior* (as a general rule of interpretation in national law) the Treaty of Rome, which was incorporated into Italian law in 1958, could not prevail over the electricity nationalisation law which was enacted in 1962.

The fundamental substantive problem in the case was the issue of supremacy of EU Law over the national laws of Member States. The supremacy was particularly important problem in light of earlier introduction of direct effect in *Van Gend en Loos*. The doctrine of supremacy, albeit in some limited areas like the protection of human rights, even in present day is not incontestably accepted by national courts of all Member States. The German Constitutional Court is the leader of this opposition. However, current judicial tensions within the framework of constitutional pluralism are mainly theoretical and characterized by high degree of mutual respect and cooperation between national courts and the European Court of Justice. In the time of *Costa v. ENEL* tension was more series one. The Italian Constitutional Court in the case even wanted to make a request for a preliminary ruling.

The Court of Justice delivering its judgment on 15 July 1964 decided that the law stemming from the Treaty could not be overridden by domestic legal provisions, however framed.

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[24] Article 37 TFEU: *1. Member States shall 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. The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.*
2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.
3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this Article to ensure equivalent safeguards for the employment and standard of living of the producers concerned.

TEXT OF JUDGEMENT

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 No 1203 of 14 October 1957, and having regard to the allegation that Law No 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 'interpre-tation 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 ofthe 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. Forits 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 a 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.

(...)

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.**

3. LEGAL EFFECT OF DIRECTIVES - DIRECT VERTICAL EFFECT

Case 148/78, *Criminal proceedings against Tullio Ratti* [1979] ECR 1629

(Ratti)

SUMMARY

Soon after the establishment of the doctrine of direct effect, a subsequent question of legal interpretation emerged in case-law: are directives too, like Treaties and regulations, capable of producing legal rights which could be enforced before the national courts of the Member States? The *Ratti* judgement is a part of defining jurisprudence on the matter. In this judgement, the European Court of Justice interpreted that directives were capable of producing direct vertical effects but only after the expiration of implementation period. A Member State cannot be excused from its obligations by virtue of non-implementation or incorrect implementation. Consequently, this case introduced principle of estoppel in the EU Law.

KEYWORDS

Direct effect of directives, estoppel principle, period fixed for implementation of directives.

OVERVIEW

The Italian company Silvam, owned by Tulio Ratti, has begun packaging and labelling its containers of solvents in accordance with criteria laid by two Council directives. These criteria were lower than those contained in the existing Italian law. The first of

the directives[25] was not implemented (incorporated/transposed) into Italian law in due time (period for implementation expired in 1974). The period fixed for the implementation of the second directive[26] has not expired in the time of the case. The Italian authorities instigated criminal proceedings against Mr. Ratti for infringement of national legislation on solvents and varnishes. Mr. Ratti argued for direct effect of both directives. Due to the legitimate expectations, he believed, even if the implementation period has not expired, individuals could rely on their provisions. The Italian court referred the matter to the European Court of Justice for preliminary ruling.

The fundamental substantive problem in the case was the legal nature of the directives. Directives provide Member States with a timetable for the implementation of the intended outcome (period fixed for implementation). A Member State is free to choose form and methods of implementation. Logically, the consequence of this basic concept would be that directives, unlike regulations, are not binding before implementation (transposition, incorporation) into national law. This view was also suggested by Advocate General Reisch in his Opinion in the case: *clear distinction must be drawn between regulations and directives, the latter creating obligations only for the Member States. So under no circumstances can one say — as the defendant in the main action has said — that directives may also have the content and effects of a regulation; at most directives may produce similar* effects[27]. Obviously, a problem with this line of argumentation emerges in a situation when Member State fails to implement directive within implementation period or implements it incorrectly.

The Court of Justice delivering its judgment on 5 April 1979 confirmed that directives were capable of producing legal rights which could be enforced before the national courts of the Member States. Furthermore, it interpreted that upon the expiration of the period fixed for the implementation of a directive, a Member State was not allowed to apply its legislation, which has not yet been adapted in compliance with the directive, to a person who has complied with the requirements of the directive. This argumentation created estoppel principle in EU Law. Finally, the Court interpreted that it was not possible for an individual to plead the principle of legitimate expectation

[25] Council Directive 73/173/EEC of 4 June 1973
[26] Council Directive No 77/728/EEC of 7 November 1977
[27] p.1650. of the Opinion

before the expiry of the period prescribed for implementation of directive.

TEXT OF JUDGEMENT

By an order of 8 May 1978, received at the Court on 21 June 1978, the Pretura Penale, Milan, referred several questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation of two Council directives on the approximation of the laws, regulations and administrative provisions of the Member States, the first, No 73/173/EEC of 4 June 1973 on the classification, packaging and labelling of dangerous preparations (solvents) (Official Journal No L 189, p. 7) and the second, No 77/728/EEC of 7 November 1977 on the classification, packaging and labelling of paints, varnishes, printing inks, adhesives and similar products (Official Journal No L 303, p. 23).

2. Those questions are raised in the context of criminal proceedings against the head of an undertaking which produces solvents and varnishes, on a charge of having infringed certain provisions of the Italian Law No 245 of 5 March 1963 (Gazzetta Ufficiale of 21 March 1963, p. 1451) which require manufacturers of products containing benzene, toluene and xylene to affix to the containers of those products labels indicating, not only the fact that those substances are present, but also their total percentage and, separately, the percentage of benzene.

3. As far as solvents are concerned, that legislation ought, at the material time, to have been amended in order to comply with Directive, No 73/173 of 4 June 1973, the provisions of which Member States were supposed to incorporate into their internal legal orders by 8 December 1974 at the latest, an obligation which the Italian Government has not fulfilled.

4. That amendment would have resulted in the repeal of the provision of the Italian Law which the accused is charged with contravening and would consequently have altered the conditions for applying the criminal sanctions contained in the law in question.

5. As regards the packaging and labelling of varnishes, Directive No 77/728 of 7 November 1977 had, at the material time, been adopted by the Council, but by virtue of Article 12 thereof Member States have until 9 November 1979 to bring into force the laws, regulations and administrative provisions necessary to comply therewith.

6. The incorporation of the provisions of that directive into the internal Italian legal order must likewise result in the repeal of the provisions of the Italian law which the accused is charged with contravening.

7. As regards the packaging and labelling of both the solvents and the varnishes produced by his undertaking, the accused complied, in the one case, with the provisions of Directive No 73/173 (solvents), which the Italian Government had failed to incorporate into its internal legal order, and, in the other case, with the provisions of Directive No 77/728 (varnishes), which Member States must implement by 9 November 1979.

8. The replies to the questions submitted, the first four of which concern Directive No 73/173, while the fifth concerns Directive No 77/728, must enable the national court to decide whether the penalties prescribed by Italian Law No 245 for an infringement of its provisions may be applied in the case in question.

A - The interpretation of Directive No 73/173

9. This directive was adopted pursuant to Article 100 of the Treaty and Council Directive No 67/548/EEC of 27 June 1967 (Official Journal, English Special Edition 1967, p. 234), amended on 21 May 1973 (Official Journal of 25 June 1973 No L 167, p. 1), on dangerous substances, in order to ensure the approximation of the laws, regulations and administrative provisions of the Member States on the classification, packaging and labelling of dangerous preparations (solvents).

10. That directive proved necessary because dangerous substances and preparations were subject to rules in the Member States which displayed considerable differences, particularly as regards labelling, packaging and classification according to the degree of risk presented by the said products.

11. Those differences constituted a barrier to trade and to the free movement of goods and directly affected the establishment and functioning of the market in dangerous preparations such as solvents used regularly in industrial, farming and craft activities, as well as for domestic purposes.

12. In order to eliminate those differences the directive made a number of express provisions concerning the classification, packaging and labelling of the products in question (Article 2 (1), (2) and (3) and Articles 4, 5 and 6).

13. As regards Article 8, to which the national court referred in particular, and which provides that Member States may not prohibit, restrict or impede on the grounds of classification, packaging or labelling the placing on the market of dangerous preparations which satisfy the requirements of the directive, although it lays down a general duty, it has no independent value, being no more than the necessary complement of the substantive provisions contained in the aforesaid articles and designed to ensure the free movement of the products in question.

14. The Member States were under a duty to implement Directive No 73/173, in accordance with Article 11 thereof, within 18 months of its notification.

15. All the Member States were so notified on 8 June 1973.

16. The period of 18 months expired on 8 December 1974 and up to the time when the events material in the case occurred the provisions of the directive had not been implemented within the Italian internal legal order.

17. In those circumstances the national court, finding that "there was a manifest contradiction between the Community rules and internal Italian law", wondered "which of the two sets of rules should take precedence in the case before the court" and referred to the Court the first question, asking as follows:

"Does Council Directive 73/173/EEC of 4 June 1973, in particular Article 8 thereof, constitute directly applicable legislation conferring upon individuals personal rights which the national courts must protect?"

18. This question raises the general problem of the legal nature of the provisions of a directive adopted under Article 189 of the Treaty.

19. In this regard the settled case-law of the Court, last reaffirmed by the judgment of 1 February 1977 in Case 51/76 Nederlandse Ondememingen [1977] 1 ECR 126, lays down that, whilst under Article 189 regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of acts covered by that article can never produce similar effects.

20. It would be incompatible with the binding effect which Article 189 ascribes to directives to exclude on principle the possibility of the obligations imposed by them being relied on by persons concerned.

21. Particularly in cases in which the Community authorities have, by means of directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such an act would be weakened if persons were prevented from relying on it in legal proceedings and national courts prevented from taking it into consideration as an element of Community law.

22. Consequently a Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails.

23. It follows that a national court requested by a person who has complied with the provisions of a directive not to apply a national provision incompatible with the directive not incorporated into the internal legal order of a defaulting Member State, must uphold that request if the obligation in question is unconditional and sufficiently precise.

24. Therefore the answer to the first question must be that after the expiration of the period fixed for the implementation of a directive a Member State may not apply its internal law — even if it is provided with penal sanctions — which has not yet been adapted in compliance with the directive, to a person who has complied with the requirements of the directive.

25. In the second question the national court asks, essentially, whether, in incorporating the provisions of the directive on solvents into its internal legal order, the State to which it is addressed may prescribe "obligations and limitations which are more precise and detailed than, or at all events different from, those set out in the directive", requiring in particular information not required by the directive to be affixed to the containers.

26. The combined effect of Articles 3 to 8 of Directive No 73/173 is that only solvents which "comply with the provisions of this directive and the annex thereto" may be placed on the market and that Member States are not entitled to maintain, parallel with

the rules laid down by the said directive for imports, different rules for the domestic market.

27. Thus it is a consequence of the system introduced by Directive No 73/173 that a **Member State may not introduce into its national legislation conditions which are more restrictive than those laid down in the directive in question**, **or which are even more detailed or in any event different**, as regards the classification, packaging and labelling of solvents and that this prohibition on the imposition of restrictions not provided for applies both to the direct marketing of the products on the home market and to imported products.

28. The second question submitted by the national court must be answered in that way.

29. In the third question the national court asks whether the duty to indicate on the container of the solvent offered for sale that it contains benzene, toluene and xylene, specifying the total percentage of those substances and, separately that of benzene, pursuant to Article 8 of Law No 245 of 5 March 1963, may be considered incompatible with the said directive.

30. Article 8 of Italian Law No 245 of 5 March 1963 lays down a duty, "where solvents contain benzene, toluene or xylene, to affix to the containers offered for sale a label mentioning the presence of those substances in the solvents, the total percentage of those substances and, separately, the percentage of benzene .. . ".

31. However, Article 5 of Directive No 73/173 requires in all cases that packages indicate clearly and indelibly the presence of substances classified as toxic under Article 2, such as benzene, and also that they show, but only in certain cases, the presence of substances classified as harmful, such as toluene and xylene in a concentration higher than 5%.

32. On the other hand no indication of the percentage, separate or in the aggregate, of those substances is required.

33. Thus the answer to the national court must be that Directive No 73/173 must be interpreted as meaning that it is not permissible for national provisions to prescribe that containers shall bear a statement of the presence of ingredients of the products in question in terms going beyond those laid down by the said directive.

34. The fourth question is drafted as follows:

"Do the said national provisions, which are applicable without distinction to all goods placed on the domestic market, nevertheless constitute an obstacle, a prohibition or a restriction on trade in and the free movement of such goods, even if such provisions were enacted for the purpose of ensuring greater protection for the physical safety of users of the products in question?"

35. This question is an allusion to Article 36 of the Treaty which permits exceptions to the free movements of goods to the extent to which they are justified on grounds of public security or the protection of health and life of humans and animals.

36. When, pursuant to Article 100 of the Treaty, Community directives provide for the harmonization of measures necessary to ensure the protection of the health of humans and animals and establish Community procedures to supervise compliance therewith, recourse to Article 36 ceases to be justified and the appropriate controls must henceforth be carried out and the protective measures taken in accordance with the scheme laid down by the harmonizing directive.

37. Directive No 73/173 provides that where a Member State established that a dangerous preparation, although satisfying the requirements of that directive, presents a health or safety risk, it may have recourse, temporarily and subject to the supervision of the Commission, to a protective measure provided for in Article 9 of the directive in accordance with the procedure laid down in that article.

38. It follows that national provisions going beyond those laid down in Directive No 73/173 are compatible with Community law only if they have been adopted in accordance with the procedures and formalities prescribed in Article 9 of the said directive.

B - The interpretation of Council Directive No 77/728/EEC of 7 November 1977

39. In a fifth question the national court asks whether Council Directive No 77/72% of 7 November 1977, in particular Article 9 thereof, is immediately and directly applicable with regard to the obligations imposed on Member States to refrain from action as from the date of notification of that directive in a case where a person, acting upon a legitimate expectation, has complied with the provisions of that directive before

the expiry of the period within which the Member State must comply with the said directive.

40. The objective of that directive is analogous to that of Directive No 73/173 in that it lays down similar rules for preparations intended to be used as paints, varnishes, printing inks, adhesives and similar products, and containing dangerous substances.

41. Article 12 of that directive provides that Member States must implement it within 24 months of its notification, which took place on 9 November 1977.

42. That period has not yet expired and the States to which the directive was addressed have until 9 November 1979 to incorporate the provisions of Directive No 77/728 into their internal legal orders.

43. It follows that, for the reasons expounded in the grounds of the answer to the national court's first question, it is only at the end of the prescribed period and in the event of the Member State's default that the directive — and in particular Article 9 thereof — will be able to have the effects described in the answer to the first question.

44. Until that date is reached the Member States remain free in that field.

45. If one Member State has incorporated the provisions of a directive into its internal legal order before the end of the period prescribed therein, that fact cannot produce any effect with regard to other Member States.

46. In conclusion, since a directive by its nature imposes obligations only on Member States, it is not possible for an individual to plead the principle of "legitimate expectation" before the expiry of the period prescribed for its implementation.

47. Therefore the answer to the fifth question must be that Directive No 77/728 of the Council of the European Communities of 7 November 1977, in particular Article 9 thereof, cannot bring about with respect to any individual who has complied with the provisions of the said directive before the expiration of the adaptation period prescribed for the Member State any effect capable of being taken into consideration by national courts.

(...)

Operative part

THE COURT in answer to the questions referred to it by the Pretura Penale, Milan, by an order of 8 May 1978 hereby rules:

1. **After the expiration of the period fixed for the implementation of a directive a Member State may not apply its internal law — even if it is provided with penal sanctions — which has not yet been adapted in compliance with the directive, to a person who has complied with the requirements of the directive.**
2. **It is a consequence of the system introduced by Directive No 73/173 that a Member State may not introduce into its national legislation conditions which are more restrictive than those laid down in the directive in question, or which are even more detailed or in any event different, as regards the classification, packaging and labelling of solvents and that this prohibition on the imposition of restrictions not provided for applies both to the direct marketing of the products on the home market and to imported products.**
3. **Directive No 73/173 must be interpreted as meaning that it is not permissible for national provisions to prescribe that containers shall bear a statement of the presence of ingredients of the products in question in terms going beyond those laid down by the said directive.**
4. **National provisions going beyond those laid down in Directive No 73/173 are compatible with Community law only if they have been adopted in accordance with the procedures and formalities prescribed in Article 9 of the said directive.**
5. **Directive No 77/728 of the Council of the European Communities of 7 November 1977, in particular Article 9 thereof, cannot bring about with respect to any individual who has complied with the provisions of the said directive before the expiration of the adaptation period prescribed for the Member State any effect capable of being taken into consideration by national courts.**

II. Free Movement of Goods

4. PROHIBITION OF QUANTITATIVE RESTRICTIONS AND MEASURES HAVING EQUIVALENT EFFECT- I

Case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837

(Dassonville)

SUMMARY

The *Dassonville* judgment is important, almost ontological, an early step in the evolution of interpretation of measures having equivalent effect to quantitative restrictions on imports between the Member States. A definition was extremely broad and it has become known as the Dasonville formula: all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

KEY WORDS

Measures having equivalent effect, quantitative restrictions, distinctly applicable rules, free movements of goods.

OVERVIEW

Belgium had a rule preventing the sale of goods bearing a designation of origin without a certificate of authenticity. The traders, Gustave Dassonville and his son Benoît, purchased a Scotch whisky in France in 1970 where no such measure existed. They made their own certificate of authenticity and were subsequently accused of forging the certificate. The Belgian court held them to be in breach of the national law. The

national court also made a request for a preliminary ruling to the Court of Justice *inter alia* regarding the possibility that the aforementioned Belgian provisions represented a measure having equivalent effect to prohibition of quantitative restrictions on imports between the Member States contained in the Treaty.

The fundamental substantive problem in the case was a definition of what does measure having equivalent effect to quantitative restriction on imports between the Member States prohibited by the Treaty represent (today Article 34 TFEU)[28]. The Court has already earlier defined the notion of quantitative restriction in the *Geddo*[29] case broadly, but the scope of definition was not really clear at that time. Obviously, this matter was to be resolved by judicial regulatory policy. It should be noted that Directive 70/50/EEC[30] not formally applicable to the case also contained a broad definition of what does the measure having equivalent effect constitute. An underlying issue, not directly tackled in the *Dassonville,* was equivalency: how can products legally purchased in France be illegal for trading in Belgium? This issue will directly be addressed in the subsequent case-law development.

The Court of Justice delivering its judgment on 11 July 1974 introduced now famous Dassonville formula: all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions. The judgement also interprets that reasonable national restrains may not be caught by the Treaty provisions on prohibition of quantitative restrictions. This is the beginning of what has become known as the rule of reason in the EU Internal market law.

TEXT OF JUDGEMENT

By Judgment of 11 January 1974, received at the Registry of the Court on 8 February 1974, the Tribunal de Première Instance of Brussels referred, under Article 177 of the EEC Treaty, two questions on the interpretation of Articles 30, 31, 32, 33, 36 and 85 of

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[28] Article 34 TFEU: *Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.*

[29] Case 2/73 *Riseria Luigi Geddo v Ente Nazionale Risi*, [1973] ECR 865

[30] Directive 70/50/EEC on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty (OJ L 13, 19.1.1970).

the EEC Treaty, relating to the requirement of an official document issued by the government of the exporting country for products bearing a designation of origin.

2. By the first question it is asked whether a national provision prohibiting the import of goods bearing a designation of origin where such goods are not accompanied by an official document issued by the government of the exporting country certifying their right to such designation constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.

3. This question was raised within the context of criminal proceedings instituted in Belgium against traders who duly acquired a consignment of Scotch whisky in free circulation in France and imported it into Belgium without being in possession of a certificate of origin from the British customs authorities, thereby infringing Belgian rules.

4. It emerges from the file and from the oral proceedings that a trader, wishing to import into Belgium Scotch whisky which is already in free circulation in France, can obtain such a certificate only with great difficulty, unlike the importer who imports directly from the producer country.

5. All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

6. In the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to prevent unfair practices in this connexion, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals.

7. Even without having to examine whether or not such measures are covered by Article 36, they must not, in any case, by virtue of the principle expressed in the second sentence of that Article, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

8. That may be the case with formalities, required by a Member State for the purpose of proving the origin of a product, which only direct importers are really in a position to satisfy without facing serious difficulties.

9. Consequently, the requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.

10. By the second question it is asked whether an agreement the effect of which is to restrict competition and adversely to affect trade between Member States when taken in conjunction with a national rule with regard to certificates of origin is void when that agreement merely authorizes the exclusive importer to exploit that rule for the purpose of preventing parallel imports or does not prohibit him from doing so.

11. An exclusive dealing agreement falls within the prohibition of Article 85 when it impedes, in law or in fact, the importation of the products in question from other Member States into the protected territory by persons other than the exclusive importer.

12. More particularly, an exclusive dealing agreement may adversely affect trade between Member States and can have the effect of hindering competition if the concessionaire is able to prevent parallel imports from other Member States into the territory covered by the concession by means of the combined effects of the agreement and a national law requiring the exclusive use of a certain means of proof of authenticity.

13. For the purpose of judging whether this is the case, account must be taken not only of the rights and obligations flowing from the provisions of the agreement, but also of the legal and economic context in which it is situated and, in particular, the possible existence of similar agreements concluded between the same producer and concessionaires established in other Member States.

14. In this connexion, the maintenance within a Member State of prices appreciably higher than those in force in another Member State may prompt an examination as to whether the exclusive dealing agreement is being used for the purpose of preventing

importers from obtaining the means of proof of authenticity of the product in question, required by national rules of the type envisaged by the question.

15. However, the fact that an agreement merely authorizes the concessionaire to exploit such a national rule or does not prohibit him from doing so, does not suffice, in itself, to render the agreement null and void.

(...)

Operative part

THE COURT in answer to the questions referred to it by the Tribunal de Première Instance of Brussels by Judgment of 11 January 1974, hereby rules:

1. **The requirement of a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.**
2. **The fact that an agreement merely authorizes the concessionaire to exploit such a national rule or does not prohibit him from doing so does not suffice, in itself, to render the agreement null and void.**

5. PROHIBITION OF QUANTITATIVE RESTRICTIONS AND MEASURES HAVING EQUIVALENT EFFECT – II

Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649

(Cassis de Dijon)

SUMMARY

The *Cassis de Dijon* case represents a seminal judicial interpretation of measures having equivalent effect to the quantitative restrictions. The judgment established the principle of mutual recognition by virtue of which goods lawfully marketed in one Member State should be freely admitted into other Member States. Indistinctly applicable (basically non-discriminatory) measures can be excluded from application of this principle, not only on the basis of justifications contained in the Treaty, but also by virtue of mandatory requirements, concept encapsulated by the Cassis judgement. Thus, subsequently to the *Dassonville* case, the Court confirmed in *Cassis* that there was no need for any discriminatory element in order for a national measure to be caught under the Treaty prohibition on quantitative restrictions.

KEY WORDS

Mandatory requirements, measures having equivalent effect, quantitative restrictions, distinctly applicable rules, free movements of goods.

OVERVIEW

The German company Rewe-Zentral AG in 1976 intended to import Cassis de Dijon, a type of French fruit cream liqueur, into Germany. Rewe-Zentral was refused to do so

by the competent administrative German authorities (*Bundesmonopolverwaltung für Branntwein*). At that time, German law stated that fruit liqueur, in order to be called as such, must contain a minimum share of alcohol of 25%. French liqueurs are traditionally weaker and the Crème de cassis from Dijon contained just 15% of alcohol. Rewe-Zentral appealed the decision claiming *inter alia* that the aforementioned provisions of German law constituted a measure having equivalent effect to quantitative restriction on imports, prohibited by the Treaty. The German court referred the case to the European Court of Justice. The provision of national law in question was clearly indistinctly applicable.

The fundamental legal substantive problem in the case was twofold. First, at that time it was not clear whether indistinctly applicable measures (basically non-discriminatory in nature) should at all be considered as having equivalent effect to quantitative restrictions and thus under the scope of Article 34 of the Treaty. Secondly, even if indistinctly applicable measure were to be considered under the reach of prohibition on quantitative restrictions contained in the Treaty, it was not clear what degree of scrutiny should be applied to them. One option was the general regime of justifications for quantitative restrictions contained in the Treaty (Article 36 TFEU)[31], the same one as for distinctly applicable measures. Another option was recognition of wider range of justifications and thus overall lower level of scrutiny for indistinctly applicable measures in comparison to distinctly applicable measures.

The Court of Justice delivering its judgment on 20 February 1979 untangled the fundamental legal problem in an elaborative manner. Indistinctly applicable measures can be justified not only by virtue of justifications contained in the Treaty (today Article 36 TFEU) but also by virtue of new, judge-made concept: mandatory requirements. The Court introduced in *Cassis* the following mandatory requirements: effectiveness of fiscal supervision, protection of public health, fairness of commercial transactions and defence of the consumer. However, the list of mandatory requirements

[31] Article 36 TFEU: *The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.*
Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

is non-exhaustive. This additional possibility for justification of indistinctly applicable measures represents lower level of scrutiny in comparison to distinctly applicable measures. Furthermore, a concept of mandatory requirements, as an open one, leaves a wide margin for regulatory choices in future development of case-law. A mere evoking of objective justifications contained in the Treaty or mandatory requirements from the case-law is not sufficient. In order to be justified, a restrictive measure has to be necessary. This necessity evolves in proportionality test, the cornerstone legal mechanism in the EU Internal Market Law. The Court found German prohibition in marketing of fruit liquors containing lower share of alcohol than 25% as non-proportional, thus within the scope of Treaty prohibition on quantitative restrictions. Maybe the most important consequence of the Cassis judgement was the establishment of the principle of mutual recognition: goods lawfully marketed in one Member State should be freely admitted into other Member States.

TEXT OF JUDGEMENT

1 By order of 28 April 1978, which was received at the Court on 22 May, the Hessisches Finanzgericht referred two questions to the Court under Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of Articles 30 and 37 of the EEC Treaty, for the purpose of assessing the compatibility with Community law of a provision of the German rules relating to the marketing of alcoholic beverages fixing a minimum alcoholic strength for various categories of alcoholic products.

2. It appears from the order making the reference that the plaintiff in the main action intends to import a consignment of "Cassis de Dijon" originating in France for the purpose of marketing it in the Federal Republic of Germany.

The plaintiff applied to the Bundesmonopolverwaltung (Federal Monopoly Administration for Spirits) for authorization to import the product in question and the monopoly administration informed it that because of its insufficient alcoholic strength the said product does not have the characteristics required in order to be marketed within the Federal Republic of Germany.

3. The monopoly administration's attitude is based on Article 100 of the Branntweinmonopolgesetz and on the rules drawn up by the monopoly administration pursuant to that provision, the effect of which is to fix the minimum alcohol content of

specified categories of liqueurs and other potable spirits (Verordnung über den Mindestweingeistgehalt von Trinkbranntweinen of 28 February 1958, Bundesanzeiger No 48 of 11 March 1958).

Those provisions lay down that the marketing of fruit liqueurs, such as "Cassis de Dijon", is conditional upon a minimum alcohol content of 25%, whereas the alcohol content of the product in question, which is freely marketed as such in France, is between 15 and 20%.

4. The plaintiff takes the view that the fixing by the German rules of a minimum alcohol content leads to the result that well-known spirits products from other Member States of the Community cannot be sold in the Federal Republic of Germany and that the said provision therefore constitutes a restriction on the free movement of goods between Member States which exceeds the bounds of the trade rules reserved to the latter.

In its view it is a measure having an effect equivalent to a quantitative restriction on imports contrary to Article 30 of the EEC Treaty.

Since, furthermore, it is a measure adopted within the context of the management of the spirits monopoly, the plaintiff considers that there is also an infringement of Article 37, according to which the Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured or marketed exists between nationals of Member States.

5. In order to reach a decision on this dispute the Hessisches Finanzgericht has referred two questions to the Court, worded as follows:

1) Must the concept of measures having an effect equivalent to quantitative restrictions on imports contained in Article 30 of the EEC Treaty be understood as meaning that the fixing of a minimum wine-spirit content for potable spirits laid down in the German Branntweinmonopolgesetz, the result of which is that traditional products of other Member States whose wine-spirit content is below the fixed limit cannot be put into circulation in the Federal Republic of Germany, also comes within this concept?
2) May the fixing of such a minimum wine-spirit content come within the concept of "discrimination regarding the conditions under which goods are procured

and marketed ... between nationals of Member States" contained in Article 37 of the EEC Treaty?

6. The national court is thereby asking for assistance in the matter of interpretation in order to enable it to assess whether the requirement of a minimum alcohol content may be covered either by the prohibition on all measures having an effect equivalent to quantitative restrictions in trade between Member States contained in Article 30 of the Treaty or by the prohibition on all discrimination regarding the conditions under which goods are procured and marketed between nationals of Member States within the meaning of Article 37.

7. It should be noted in this connexion that Article 37 relates specifically to State monopolies of a commercial character.

That provision is therefore irrelevant with regard to national provisions which do not concern the exercise by a public monopoly of its specific function — namely, its exclusive right — but apply in a general manner to the production and marketing of alcoholic beverages, whether or not the latter are covered by the monopoly in question.

That being the case, the effect on intra-Community trade of the measure referred to by the national court must be examined solely in relation to the requirements under Article 30, as referred to by the first question.

8. In the absence of common rules relating to the production and marketing of alcohol — a proposal for a regulation submitted to the Council by the Commission on 7 December 1976 (Official Journal C 309, p. 2) not yet having received the Council's approval — it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.

Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

9. The Government of the Federal Republic of Germany, intervening in the proceedings, put forward various arguments which, in its view, justify the

application of provisions relating to the minimum alcohol content of alcoholic beverages, adducing considerations relating on the one hand to the protection of public health and on the other to the protection of the consumer against unfair commercial practices.

10. As regards the protection of public health the German Government states that the purpose of the fixing of minimum alcohol contents by national legislation is to avoid the proliferation of alcoholic beverages on the national market, in particular alcoholic beverages with a low alcohol content, since, in its view, such products may more easily induce a tolerance towards alcohol than more highly alcoholic beverages.

11. Such considerations are not decisive since the consumer can obtain on the market an extremely wide range of weakly or moderately alcoholic products and furthermore a large proportion of alcoholic beverages with a high alcohol content freely sold on the German market is generally consumed in a diluted form.

12. The German Government also claims that the fixing of a lower limit for the alcohol content of certain liqueurs is designed to protect the consumer against unfair practices on the part of producers and distributors of alcoholic beverages.

This argument is based on the consideration that the lowering of the alcohol content secures a competitive advantage in relation to beverages with a "higher alcohol content, since alcohol constitutes by far the most expensive constituent of beverages by reason of the high rate of tax to which it is subject.

Furthermore, according to the German Government, to allow alcoholic products into free circulation wherever, as regards their alcohol content, they comply with the rules laid down in the country of production would have the effect of imposing as a common standard within the Community the lowest alcohol content permitted in any of the Member States, and even of rendering any requirements in this field inoperative since a lower limit of this nature is foreign to the rules of several Member States.

13. As the Commission rightly observed, the fixing of limits in relation to the alcohol content of beverages may lead to the standardization of products placed on the market and of their designations, in the interests of a greater transparency of commercial transactions and offers for sale to the public.

However, this line of argument cannot be taken so far as to regard the mandatory fixing of minimum alcohol contents as being an essential guarantee of the fairness of commercial transactions, since it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of products.

14. It is clear from the foregoing that the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community.

In practice, the principle effect of requirements of this nature is to promote alcoholic beverages having a high alcohol content by excluding from the national market products of other Member States which do not answer that description.

It therefore appears that the unilateral requirement imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Article 30 of the Treaty.

There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules.

15. Consequently, the first question should be answered to the effect that the concept of "measures having an effect equivalent to quantitative restrictions on imports" contained in Article 30 of the Treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another Member State is concerned.

(...)

Operative part

THE COURT in answer to the questions referred to it by the Hessisches Finanzgericht by order of 28 April 1978, hereby rules:

The concept of "measures having an effect equivalent to quantitative restrictions on imports" contained in Article 30 of the EEC Treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another Member State is concerned.

6. SELLING ARRANGEMENTS – CONCEPT

Joined cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097

(Keck and Mithouard)

SUMMARY

The *Keck and Mithouard* judgment represents a culmination in judicial interpretation of measures having equivalent effect. The European Court of Justice decided to change its established case-law on the matter and narrowed the scope of Article 34 TFEU. The *Keck and Mithouard* judgment introduced a different legal regime for measures regulating product requirements and measures regulating selling arrangements. When it comes to the product requirements, that is, national rules relating to goods themselves, a judicial interpretation established by the *Cassis de Dijon* case remained in place. However, the Keck *and Mithouard* judgment introduced a new category: selling arrangements. National rules concerning selling arrangements fall outside the scope of Treaty prohibition on quantitative restrictions under the condition that they apply to all relevant traders operating within the national territory and affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

KEY WORDS

Selling arrangements, product requirements, measures having equivalent effect, quantitative restrictions, distinctly applicable rules, free movements of goods.

OVERVIEW

The French national legal rules prohibited traders to sell goods at a price lower than their actual purchase price (resale at loss). The law did not ban sales at loss for manufactures. The breech of this rule was considered as a criminal offence. Bernard Keck and Daniel Mithouard, both traders, were prosecuted France in two separate proceedings for a resale at loss. They argued that general prohibition of a resale at loss contained in the French national law was incompatible with various provisions of the Treaty, including free movement of goods rules. Both cases were in 1991 referred to the European Court of Justice to a preliminary ruling procedure.

The fundamental legal substantive problem developed in the case was a definition of what does exactly constitute a restriction on trade between the Member States. Within the broad definition of the Dassonville formula and established case law starting from the *Cassis de Dijon* judgement, all national rules which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade were to be considered as measures having an effect. Specifically this interpretation was confirmed in several cases relating to the national rules regulating selling arrangements decided before the *Keck and Mithouard*, most notable being *Torfaen*[32] and *Cinéthèque*[33]. A legal commentator Eric White advocated in his influential 1989 paper[34] a different regime for national rules regulating selling arrangements. The basic idea was in distinction between dual burden and equal burden rules. According to his view, rules regulating selling arrangements, under condition that imported products enjoy equal access to the market as domestic ones, are of equal burden and should not be under the scope of prohibition on quantitative restrictions contained in the Treaty. However, the exact demarcation between two types of rules is not clear. It should be noted that in the time when the *Keck and Mithouard* was decided, the Court of Justice experienced a considerable increase in number of cases related to the prohibition of quantitative restrictions and measures having equivalent effect.

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[32] Case C-145/88 *Torfaen Borough Council v B & Q plc.* , [1989] ECR 3851

[33] Joined cases 60 and C 61/84 *Cinéthèque SA and others v Fédération nationale des cinémas français,* [1985] ECR 2605.

[34] White, E; *In Serach of the Limits to Article 30 of the EEC Treaty*; Common Market Law Review 26, 1989.

The Court of Justice delivering its judgment on 24 November 1993 accepted a proposed distinction between product requirements and selling arrangements. Thus, it departed from the previous case-law and limited the scope of application of Article 34 TFEU. Application of national provisions restricting or prohibiting certain selling arrangements to products from other Member States is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment as long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

TEXT OF JUDGEMENT

1. By two judgments of 27 June 1991, received at the Court on 16 October 1991, the Tribunal de Grande Instance, Strasbourg, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of the rules of the Treaty concerning competition and freedom of movement within the Community.

2. Those questions were raised in connection with criminal proceedings brought against Mr Keck and Mr Mithouard, who are being prosecuted for reselling products in an unaltered state at prices lower than their actual purchase price ('resale at a loss'), contrary to Article 1 of French Law No 63-628 of 2 July 1963, as amended by Article 32 of Order No 86-1243 of 1 December 1986.

3. In their defence Mr Keck and Mr Mithouard contended that a general prohibition on resale at a loss, as laid down by those provisions, is incompatible with Article 30 of the Treaty and with the principles of the free movement of persons, services, capital and free competition within the Community.

4. The Tribunal de Grande Instance, taking the view that it required an interpretation of certain provisions of Community law, stayed both sets of proceedings and referred the following question to the Court for a preliminary ruling:

“Is the prohibition in France of resale at a loss under Article 32 of Order No 86-1243 of 1 December 1986 compatible with the principles of the free movement of goods, services and capital, free competition in the Common Market and non discrimination

on grounds of nationality laid down in the Treaty of 25 March 1957 establishing the EEC, and more particularly in Articles 3 and 7 thereof, since the French legislation is liable to distort competition:

a) firstly, because it makes only resale at a loss an offence and exempts from the scope of the prohibition the manufacturer, who is free to sell on the market the product which he manufactures, processes or improves, even very slightly, at a price lower than his cost price;
b) secondly, in that it distorts competition, especially in frontier zones, between the various traders on the basis of their nationality and place of establishment?"

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

6. It should be noted at the outset that the provisions of the Treaty relating to free movement of persons, services and capital within the Community have no bearing on a general prohibition of resale at a loss, which is concerned with the marketing of goods. Those provisions are therefore of no relevance to the issue in the main proceedings.

7. Next, as regards the principle of non-discrimination laid down in Article 7 of the Treaty, it appears from the orders for reference that the national court questions the compatibility with that provision of the prohibition of resale at a loss, in that undertakings subject to it may be placed at a disadvantage vis-à-vis competitors in Member States where resale at a loss is permitted.

8. However, the fact that undertakings selling in different Member States are subject to different legislative provisions, some prohibiting and some permitting resale at a loss, does not constitute discrimination for the purposes of Article 7 of the Treaty. The national legislation at issue in the main proceedings applies to any sales activity carried out within the national territory, regardless of the nationality of those engaged in it (see the judgment in Case 308/86 Ministère Public v Lambert [1988] ECR 4369).

9. Finally, it appears from the question submitted for a preliminary ruling that the national court seeks guidance as to the possible anti-competitive effects of the rules in question by reference exclusively to the foundations of the Community set out in

Article 3 of the Treaty, without however making specific reference to any of the implementing rules of the Treaty in the field of competition.

10. In these circumstances, having regard to the written and oral argument presented to the Court, and with a view to giving a useful reply to the referring court, the appropriate course is to look at the prohibition of resale at a loss from the perspective of the free movement of goods.

11. By virtue of Article 30, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. The Court has consistently held that any measure which is capable of directly or indirectly, actually or potentially, hindering intra-Community trade constitutes a measure having equivalent effect to a quantitative restriction.

12. National legislation imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States.

13. Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion. But the question remains whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.

14. In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.

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

16. By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

17. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty.

18. Accordingly, the reply to be given to the national court is that Article 30 of the EEC Treaty is to be interpreted as not applying to legislation of a Member State imposing a general prohibition on resale at a loss.

(...)

Operative part

THE COURT in answer to the questions referred to it by the Tribunal de Grande Instance, Strasbourg, by two judgments of 27 June 1991, hereby rules:

Article 30 of the EEC Treaty is to be interpreted as not applying to legislation of a Member State imposing a general prohibition on resale at a loss.

7. SELLING ARRANGEMENTS – MARKET ACCESS

Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* [2000] ECR I-151

(Heimdienst)

SUMMARY

The judgment in *Keck and Mithouard* created a legal interpretative issue of no small importance: are all non-discriminatory national rules regulating selling arrangements that effect trade between the Member States excluded from the scope of Treaty prohibition of quantitative restrictions? The *Heimdienst* is a case in a series of post-*Keck* jurisprudence clearing the matter. In *Heimdienst*, the Court of Justice allowed application of Treaty provision on prohibition of quantitative restriction for non-discriminatory selling arrangements under the condition that they create impediment to market access for products from other Member States.

KEY WORDS

Selling arrangements, market access, measures having equivalent effect, quantitative restrictions, indistinctly applicable rules, free movements of goods.

OVERVIEW

The Austrian law did not allow for bakers, butchers and grocers under trading licence to sell from door to door or to sell on rounds in administrative district in which they are not permanently established (the exception was if they were established in neighbouring district). The Austrian company TK-Heimdienst Sass GmbH infringed this particular rule of national law and started selling on rounds in administrative

district not territorially linked with district of their business establishment. Schutzverband, an association for the protection of economic interests of undertakings, brought an action against the Heimdienst before national court seeking, *inter alia*, an order restraining them from offering groceries for sale on rounds in administrative districts not linked with their place of establishment. Although the aforementioned provisions of national law are clearly selling arrangements, the national court suspected that they amounted to disguise a restriction on trade between the Member States and referred the case to the European Court of Justice.

The fundamental substantive problem in the case was sustainability of the *Keck and Mithouard* interpretation on selling arrangements. The *Keck and Mithouard* interpretation creates two important legal problems. First, it is not clear which is the exact demarcation between the rules on product requirements and rules on selling arrangements. In several post-Keck cases, like in the *Familiapress*[35], the Court treated rules regulating the method of trading as rules on product requirements (and not selling arangments). This was done in an attempt to avoid application of the *Keck* intepretation. The second problem is the justifibality for exluding all non-directly discriminatory national rules regulating selling arrangements from the Treaty prohibition on quantitative restrictions. A disguised obstacle to trade within the Member States can be as equaly harmful as directly discirminatory restrictions. This second problem is, of course, linked with the first one.

The Court of Justice delivering its judgment on 13 January 2000 interpreted the rules regulating selling arrangements even if applicable non-discriminatory to domestic and traders from other Member States can constitute a measure with equivalent effect to quantitative restriction. The Court established the following criterion: impediment to market access. This criterion is used in order to determine situations when non-discriminatory selling arrangements are within the scope of Treaty prohibition on quantitative restrictions. Basically, selling arrangements applying to all operators trading in the national territory of one Member State can in fact impede the access to the market for products from other Member States more than it impede the access for domestic products. Thus, such national rules should be considered as measure having equivalent effect.

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[35] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, [1997] ECR I-3689

TEXT OF JUDGEMENT

1. By order of 30 June 1998, registered at the Court on 13 July 1998, the Oberster Gerichtshof (Supreme Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 30 of the EC Treaty (now, after amendment, Article 28 EC).

2. That question was raised in proceedings between the Schutzverband gegen unlauteren Wettbewerb (hereinafter `the Schutzverband') and TK-Heimdienst Sass GmbH (hereinafter `TK-Heimdienst') relating to the latter's sales activities on rounds.

National legislative background

3. Under Article 53a(1) of the Gewerbeordnung 1994 (Austrian Code of Business and Industry 1994, hereinafter `the GewO'), bakers, butchers and grocers are permitted to offer for sale on rounds from locality to locality or from door to door goods which they are authorised to offer for sale under their trading licence. Article 53a(2) of the GewO provides that such sales on rounds may only be carried on in a Verwaltungsbezirk (Austrian administrative district covering several municipalities) by traders who also carry on their trade from a permanent establishment in that Verwaltungsbezirk or in a municipality adjacent thereto. Only goods which are offered for sale at such permanent establishments may be offered for sale on rounds.

4. It is clear from the order for reference that, under Austrian case-law, any person who infringes the provisions of Article 53a of the GewO in order to gain a competitive advantage over law-abiding competitors is acting contrary to public policy for the purposes of Article 1 of the Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition) if the breach is objectively capable of injuring free competition in the area of the provision of services.

The main proceedings

5. TK-Heimdienst, whose registered office is at Haiming in Tyrol and which also has branches in Völs, Tyrol and Wolfurt, Vorarlberg, is a retail trader. It also makes deliveries of deep-frozen goods to consumers. During the course of their rounds, which are arranged according to fixed itineraries laid down in advance and which take place

at regular intervals, TK-Heimdienst's drivers distribute catalogues showing the frozen products stocked by TK-Heimdienst and order forms. Orders may be placed at the registered office or with the drivers direct and the delivery is then made in the course of the next round. The delivery vehicles also carry a certain quantity of products for direct sale without prior orders having been placed. There is one such delivery round in the Verwaltungsbezirk of Bludenz which is not, according to the order for reference, adjacent to Haiming, Völs or Wolfurt.

6. The Schutzverband, which is an association for the protection of the economic interests of undertakings, one of whose main purposes is to combat unfair competition, brought an action under Article 53a of the GewO seeking, inter alia, an order restraining TK-Heimdienst from offering groceries for sale on rounds in a particular Austrian Verwaltungsbezirk in cases where it does not trade from permanent establishments in that Verwaltungsbezirk or in any municipality adjacent thereto.

7. That application was granted by the first-instance court, whose decision was upheld by the appeal court. It is clear from the order for reference that the latter considered Article 53a of the GewO to be merely a means of regulating certain selling arrangements in the sense envisaged in the judgment in Keck and Mithouard (Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097) and does not therefore fall within the prohibition laid down in Article 30 of the Treaty.

8. Referring to the Court's case-law on Article 30 of the Treaty, and in particular Keck and Mithouard, cited above, the Oberster Gerichtshof, before which the case came by way of `Revision' (appeal on a point of law), considers that the fact that Article 53a is not product-specific but rather regulates a particular mode of selling, that it applies to all relevant economic operators carrying on their activity in Austria, and that it merely has the effect of restricting the pool of authorised sellers, suggests that that provision should be classified as a selling arrangement compatible with Article 30 of the Treaty. According to the national court, the provision in question reflects a peculiarity specific to Austria, since it is designed to protect the supplying of goods at short distance, to the advantage of local businesses, which is an objective whose attainment might otherwise be jeopardised in view of the topographic diversity of Austria.

9. However, the Oberster Gerichtshof points out that it could, on the other hand, be argued that the fact that Article 53a of the GewO is capable of amounting to a disguised restriction as defined, in particular, in Joined Cases 87/85 and 88/85 (Legia

and Gyselinx [1986] ECR 1707) and Case C-239/90 (Boscher [1991] ECR I-2023). Unlike Austrian traders, a trader from another Member State wishing to offer goods for sale on rounds in Austria would have to set up and operate at least one other permanent establishment in the Republic of Austria in addition to his business in the Member State where he has his registered office.

10. In those circumstances, the Oberster Gerichtshof decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

"Is Article 30 of the EC Treaty to be interpreted as precluding legislation under which bakers, butchers and grocers may not offer for sale on rounds from locality to locality or from door to door goods which they are entitled to sell under the terms of their trading licence unless they also carry on their trade from a permanent establishment situated in the administrative district in which they offer the goods for sale in the abovementioned manner or in a municipality adjacent thereto, and furthermore may offer for sale on rounds from locality to locality or from door to door only such goods as are also offered for sale at the said permanent establishment?"

Admissibility

11. The Schutzverband submits that the question referred for a preliminary ruling is inadmissible. First of all, Article 53a of the GewO constitutes a selling arrangement and the case-law concerning such arrangements, in particular Keck and Mithouard, cited above, and Commission v Greece (Case C-391/92 [1995] ECR I-1621), provides an adequate basis for determining whether it is compatible with Community law, without there being any need to refer a question for a preliminary ruling. Secondly, the facts in the case in the main proceedings are not relevant to other Member States.

12. It must be observed that the procedure provided for in Article 177 of the Treaty is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of Community law which they need in order to decide the disputes before them (see, in particular, the order in Case C-361/97 Nour [1998] ECR I-3101, paragraph 10).

13. It is settled case-law 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 submitted by the national court 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 and Case C-200/97 Ecotrade [1998] ECR I-7907, paragraph 25).

14. In this case, the question referred by the national court is whether the effect of national legislation such as that in point in the main proceedings is confined to the Member State concerned or whether, rather, it constitutes a potential impediment to intra-Community trade capable of falling within Article 30 of the Treaty. The objection raised by the Schutzverband does not therefore relate to admissibility but to the substance of the case.

15. It is therefore appropriate to answer the question referred.

Substance

16. By its question the national court is essentially asking whether Article 30 of the Treaty precludes national legislation under which bakers, butchers and grocers can make sales on rounds in a given administrative district, such as an Austrian Verwaltungsbezirk, only if they also trade from a permanent establishment in that administrative district or an adjacent municipality where they offer for sale the same goods as they do on rounds.

17. The Schutzverband and the Austrian Government submit that Article 53a(2) of the GewO merely regulates a selling arrangement and applies to all the relevant economic operators who carry on business in Austria, which is in conformity with the decision in Keck and Mithouard, cited above. According to the Schutzverband, that provision merely limits the pool of persons authorised to make sales on rounds.

18. The Schutzverband furthermore claims that it is always open to traders in Member States adjacent to Austria to make deliveries direct to Austrian consumers on the other side of the border if they carry on business in a municipality adjacent to the Austrian Verwaltungsbezirk where they intend to make sales on rounds. Traders from other

Member States are therefore at liberty to export the goods referred to in Article 53a of the GewO to Austria even if they do not have permanent establishment in Austria.

19. TK-Heimdienst argues first of all that Article 53a(2) of the GewO does not fall within the scope of the Keck and Mithouard case because, since it reserves the sale of groceries on rounds exclusively to sellers established locally, it is not purely a marketing rule. Secondly, it claims that the provision does not apply without distinction to all the economic operators concerned, contrary to the requirements which, according to that judgment, must be satisfied in order for legislation limiting or prohibiting particular selling arrangements to be valid.

20. The Commission, on the other hand, contends that Article 53a(2) of the GewO constitutes a selling arrangement. It in no way seeks to regulate the free movement of goods between Member States. It is not linked to the characteristics of the goods nor does it draw any distinction between goods manufactured in Austria and goods from other Member States. Furthermore, it applies to all relevant economic operators carrying on business in Austria.

21. However, TK-Heimdienst argues, as does the Commission, that Article 53a(2) of the GewO constitutes a disguised restriction of intra-Community trade because it constitutes in reality more of a restriction for operators from other Member States, imposing on them additional difficulties or costs, or both (Case 155/82 Commission v Belgium [1983] ECR 531; Case 247/81 Commission v Germany [1984] ECR 1111; Legia and Gyselinx, cited above; and Case C-189/95 Franzén [1997] ECR I-5909). A baker, butcher or grocer from another Member State wishing to offer his goods for sale on rounds in Austria would be forced to purchase and retain at least one further establishment in Austria. That would necessarily give rise to additional costs and make that mode of selling unprofitable, particularly for small traders. It would be particularly difficult, if not impossible, for their goods, which come from other Member States, to gain access to the Austrian market.

22. It is settled case-law that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions and thus prohibited by Article 30 of the Treaty (see, in particular, Case 8/74 Dassonville [1974] ECR 837, paragraph 5).

23. However, the Court held at paragraph 16 of Keck and Mithouard, cited above, that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements in the territory of the Member State concerned does not fall within Article 30 of the Treaty so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

24. National legislation such as Article 53a(2) of the GewO, which provides that bakers, butchers and grocers may not make sales on rounds in a given administrative district, such as an Austrian Verwaltungsbezirk, unless they also carry on their trade at a permanent establishment situated in that administrative district or in an adjacent municipality, where they also offer for sale the same goods as they do on their rounds, relates to the selling arrangements for certain goods in that it lays down the geographical areas in which each of the operators concerned may sell his goods by that method.

25. However, it does not affect in the same manner the marketing of domestic products and that of products from other Member States.

26. Such legislation imposes an obligation on bakers, butchers and grocers who already have a permanent establishment in another Member State and who wish to sell their goods on rounds in a particular administrative district such as an Austrian Verwaltungsbezirk to set up or purchase another permanent establishment in that administrative district or in an adjacent municipality, whilst local economic operators already meet the requirement as to a permanent establishment. **Consequently, in order for goods from other Member States to enjoy the same access to the market of the Member State of importation as domestic goods, they have to bear additional costs** (see Legia and Gyselinx, paragraph 15 and Franzén, paragraph 71).

27. That conclusion is not affected by the fact that, in each part of the national territory, the legislation affects both the sale of products from other parts of the national territory and the sale of products imported from other Member States (see Joined Cases C-277/91, C-318/91 and C-319/91 Ligur Carni and Others [1993] ECR I-6621, paragraph 37). For a national measure to be categorised as discriminatory or protective for the purposes of the rules on the free movement of goods, it is not necessary for it to have the effect of favouring national products as a whole or of placing only imported

products at a disadvantage and not national products (see Joined Cases C-1/90 and C-176/90 Aragonesa de Publicidad and Publivía [1991] ECR I-4151, paragraph 24).

28. That being so, it is of no consequence whether, as the Schutzverband contends, the national legislation in question also applies to economic operators with a permanent establishment in an adjacent municipality in another Member State. Even if it did, it would not cease to be restrictive merely because in part of the territory of the Member State concerned, namely the border area, it affects the marketing of national products and that of products from other Member States in the same manner.

29. It follows that the application to all operators trading in the national territory of national legislation such as that in point in the main proceedings in fact impedes access to the market of the Member State of importation for products from other Member States more than it impedes access for domestic products (see, to this effect, Case C-384/93 Alpine Investments [1995] ECR I-1141, paragraph 37).

30. The restrictive effects of such legislation cannot, contrary to the contention of the Schutzverband, be considered to be of a nature too random and indirect for the obligation which it lays down to be regarded as such as to impede trade between Member States. In that connection, it need merely be observed that goods from other Member States could never be offered for sale on rounds in an administrative district, such as an Austrian Verwaltungsbezirk, which is not situated in a border area.

31. It follows that national legislation prohibiting butchers, bakers and grocers from making sales on rounds in a particular administrative district, such as an Austrian Verwaltungsbezirk, if they do not also carry on business in a permanent establishment situated in that administrative district or in an adjacent municipality, where they also sell the goods offered for sale on rounds, is capable of impeding intra-Community trade.

32. However, the national court indicates that the purpose of the national legislation is to protect the supplying of goods at short distance, to the advantage of local businesses, an objective which would otherwise be jeopardised in a country as topologically varied as Austria. It is therefore appropriate to consider whether that legislation is justified on that basis.

33. In that connection, it must first be pointed out that aims of a purely economic nature cannot justify a barrier to the fundamental principle of the free movement of goods (see Case C-120/95 Decker [1998] ECR I-1831, paragraph 39).

34. However although in certain circumstances it may be possible to justify an impediment to intra-Community trade on the basis that it is necessary to avoid deterioration in the conditions under which goods are supplied at short distance in relatively isolated areas of a Member State, legislation such as that in point in the main proceedings, which applies to the whole of the national territory, is in any event disproportionate to that objective.

35. The Austrian Government has stated, however, that the purpose of Article 53a(1) of the GewO, which authorises butchers, bakers and grocers to make sales on rounds, is to guarantee short-distance supplies in the extreme conditions created by the varied topography of Austria, whereas the restriction laid down in Article 53a(2) of the GewO is based on hygienic considerations.

36. In that connection, it must be observed that, whilst it is true that the protection of public health is one of the grounds capable of justifying derogations from Article 30 of the Treaty, that objective can be attained by measures that have effects less restrictive of intra-Community trade than a provision such as Article 53a(2) of the GewO, for example, by rules on refrigerating equipment in the vehicles used.

37. The answer to the question put to the Court must therefore be that Article 30 of the Treaty precludes national legislation which provides that bakers, butchers and grocers may not make sales on rounds in a given administrative district, such as an Austrian Verwaltungsbezirk, unless they also pursue their commercial activity at a permanent establishment situated in that administrative district or in an adjacent municipality, where they offer for sale the same goods as they do on rounds.

(...)

Operative part

THE COURT, in answer to the question referred to it by the Oberster Gerichtshof by order of 30 June 1998, hereby rules:

Article 30 of the EC Treaty (now, after amendment, Article 28 EC) precludes national legislation which provides that bakers, butchers and grocers may not make sales on rounds in a given administrative district, such as an Austrian Verwaltungsbezirk, unless they also pursue their commercial activity at a permanent establishment situated in that administrative district or in an adjacent municipality, where they offer for sale the same goods as they do on rounds.

III. Freedom to Provide Services and Freedom of Establishment

8. FREEDOM TO PROVIDE SERVICES – DIRECT EFFECT OF TREATY PROVISIONS

Case 33/74 Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, Judgment of the Court of 3 December 1974.

(Van Binsbergen)

SUMMARY

The Van Binsbergen is a cornerstone judgment when defining freedom to provide services. This judgment also defines that Treaty provisions regarding services have direct effect on national laws.

KEYWORDS

Freedom to provide services, Restrictions, Requirement of professional establishment, Objective necessity, Lawful requirement

OVERVIEW

The Van Binsbergen was the first case in which the ECJ dealt with determining the scope of the freedom to provide services, just a few months after the cornerstone judgment in the Dassonville case. Mr Van Binsbergen authorized the Dutch legal counsel Mr. Kortmann to represent him at the Dutch court. For the duration of the proceedings, Mr. Kortman changed his residence from the Netherlands to Belgium. Based on the Dutch procedural law, such change of residence prevented him from further representation at the court in this case. The question arose whether this was the restriction of the freedom to provide services. The ECJ held that a Member State could not legally determine the requirements for residency in the state prohibiting persons

residing in another Member State to provide services because the freedom to provide services was not a subject to the special conditions under national law. The judgment defines the test for justification of the national restrictions which contains several conditions that must be met in order to limit the freedom to provide services guaranteed by Article 56 TFEU (exArticle 59 of the EEC Treaty).

The first condition is that the restriction must be adopted in order to achieve a legitimate public interest which is not contrary to the objectives of the European Union law. The second condition is that the restriction applies in non-discriminatory manner to all citizens, while the third condition is that the restrictions placed in front of providers are proportional to the legitimate rules that apply. The fourth condition for the test of justification, as stated in the Van Binsbergen's request, is that restrictive measure is consistent with respect to fundamental rights. The first paragraph of Article 56 TFEU (exArticle 59 and the third paragraph of Article 60 of EEC Treaty) must be interpreted in a way that the national law of a Member State cannot, by imposing a requirement as to habitual residence within that state, deny persons established in another Member State the right to provide services, where the provision of services is not subject to any special condition under the national law applicable.

However, by taking into account a particular nature of the services to be provided, specific requirements imposed on the person providing the service cannot be considered incompatible with the Treaty, where they have as their purpose the application of professional rules justified by the general good - in particular rules relating to organization, qualifications, professional ethics, supervision and liability - which are binding upon any person established in the state in which the service is provided, where the person providing the service would escape from the ambit of those rules by being established in another Member State .

Likewise, a Member State cannot deny the right to take measures to prevent the exercise by a person providing services, whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he was established within that state.

TEXT OF THE JUDGMENT

1. By order of 18 april 1974, lodged at the registry of the Court on 15 may, the Centrale Raad van Beroep put to the Court, under article 177 of the EEC Treaty, questions relating to the interpretation of articles 59 and 60 of the Treaty establishing the European Economic Community concerning freedom to provide services within the Community.

2. These questions arose incidentally, during the course of an action before the said Court, and are concerned with the **admission before that Court of the person whom the appellant in the main action chose to act as his legal representative.**

3. It appears from the file that the appellant had entrusted the defense of his interests to a legal representative of Netherlands nationality entitled to act for parties before courts and tribunals where representation by an advocaat is not obligatory.

4. Since this legal representative had, during the course of the proceedings, transferred his residence from the Netherlands to Belgium, his capacity to represent the party in question before the Centrale Raad van Beroep was contested on the basis of a provision of Netherlands law under which only persons established in the Netherlands may act as legal representatives before that Court.

5. In support of his claim the person concerned invoked the provisions of the treaty relating to freedom to provide services within the community, and the Centrale Raad van Beroep referred to the court two questions relating to the interpretation of articles 59 and 60 of the Treaty.

6. The Court is requested to interpret articles 59 and 60 in relation to a provision of national law **whereby only persons established in the territory of the state concerned are entitled to act as legal representatives before certain courts or tribunals.**

7. Article 59, the first paragraph of which is the only provision in question in this connexion, provides that: "within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of member states who are established in a state of the community other than that of the person for whom the services are intended".

8. **Having defined the concept "services"** within the meaning of the Treaty in its first and second paragraphs, article 60 lays down in the third paragraph that, **without prejudice to the provisions of the chapter relating to the right of establishment, the person providing a service may, in order to provide that service, temporarily pursue his activity in the state where the service is provided, under the same conditions as are imposed by that state on its own nationals.**

9. The question put by the national court therefore seeks to determine whether the requirement that legal representatives be permanently established within the territory of the state where the service is to be provided can be reconciled with the prohibition, under articles 59 and 60, on all restrictions on freedom to provide services within the Community.

10. The restrictions to be abolished pursuant to articles 59 and 60 **include all requirements imposed on the person providing the service by reason in particular of his nationality or of the fact that he does not habitually reside in the state where the service is provided, which do not apply to persons established within the national territory or which may prevent or otherwise obstruct the activities of the person providing the service.**

11. In particular, a requirement that the **person providing the service must be habitually resident within the territory of the state where the service is to be provided** may, according to the circumstances, have the result of depriving article 59 of all useful effect, in view of the fact that **the precise object of that article is to abolish restrictions on freedom to provide services imposed on persons who are not established in the state where the service is to be provided.**

12. However, taking into account the particular nature of the services to be provided, **specific requirements imposed on the person providing the service cannot be considered incompatible with the treaty where they have as their purpose the application of professional rules justified by the general good** - in particular rules relating to organization, qualifications, professional ethics, supervision and liability - which are binding upon any person established in the state in which the service is provided, where the person providing the service would escape from the ambit of those rules being established in another member state .

13. Likewise, a member state cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state; such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services .

14. In accordance with these principles, **the requirement that persons whose functions are to assist the administration of justice must be permanently established for professional purposes** within the jurisdiction of certain courts or tribunals cannot be considered incompatible with the provisions of articles 59 and 60, where such requirement is objectively justified by the need to ensure observance of professional rules of conduct connected, in particular, with the administration of justice and with respect for professional ethics .

15. That cannot, however, be the case when the provision of certain services in a member state is not subject to any sort of qualification or professional regulation and when the requirement of habitual residence is fixed by reference to the territory of the state in question.

16. In relation to a professional activity the exercise of which is similarly unrestricted within the territory of a particular member state, the requirement of residence within that state constitutes a restriction which is incompatible with articles 59 and 60 of the Treaty if the administration of justice can satisfactorily be ensured by measures which are less restrictive, such as the choosing of an address for service.

17. It must therefore be stated in reply to the question put to the Court that the first paragraph of article 59 and the third paragraph of article 60 of the EEC Treaty must be interpreted **as meaning that the national law of a member state cannot, by imposing a requirement as to habitual residence within that state, deny persons established in another member state the right to provide services, where the provision of services is not subject to any special condition under the national law applicable.**

18. The Court is also asked whether the first paragraph of article 59 and the third paragraph of article 60 of the EEC treaty are directly applicable and create individual rights which national courts must protect.

19. This question must be resolved with reference to the whole of the Chapter relating to services, taking account, moreover, of the provisions relating to the right of establishment to which reference is made in article 66.

20. With a view to the progressive abolition during the transitional period of the restrictions referred to in article 59, article 63 has provided for the drawing up of a " general programme" - laid down by council decision of 18 December 1961 (1962, p. 32) - to be implemented by a series of directives .

21. Within the scheme of the chapter relating to the provision of services, these directives are intended to accomplish different functions, the first being to abolish, during the transitional period, restrictions on freedom to provide services, the second being to introduce into the law of member states a set of provisions intended to facilitate the effective exercise of this freedom, in particular by the mutual recognition of professional qualifications and the coordination of laws with regard to the pursuit of activities as self-employed persons .

22. These directives also have the task of resolving the specific problems resulting from the fact that where the person providing the service is not established, on a habitual basis, in the state where the service is performed he may not be fully subject to the professional rules of conduct in force in that state .

23. As regards the phased implementation of the chapter relating to services, article 59, interpreted in the light of the general provisions of article 8 (7) of the treaty, expresses the intention to abolish restrictions on freedom to provide services by the end of the transitional period, the latest date for the entry into force of all the rules laid down by the treaty.

24. The provisions of article 59, the application of which was to be prepared by directives issued during the transitional period, therefore became unconditional on the expiry of that period.

25. The provisions of that article abolish all discrimination against the person providing the service by reason of his nationality or the fact that he is established in a member state other than that in which the service is to be provided.

26. Therefore, as regards at least the specific requirement of nationality or of residence, articles 59 and 60 impose a well-defined obligation, the fulfillment of which by the member states cannot be delayed or jeopardized by the absence of provisions which were to be adopted in pursuance of powers conferred under articles 63 and 66 .

27. Accordingly, the reply should be that the first paragraph of article 59 and the third paragraph of article 60 have direct effect and may therefore be relied on before national courts, at least in so far as they seek to abolish any discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a member state other than that in which the service is to be provided.

(...)

Operative part

THE COURT, in answer to the questions referred to it by the Centrale Raad van Beroep by order of 18 April 1974, hereby rules:

1. **The first paragraph of article 59 and the third paragraph of article 60 of the EEC treaty must be interpreted as meaning that the national law of a member state cannot, by imposing a requirement as to habitual residence within that state, deny persons established in another member state the right to provide services, where the provision of services is not subject to any special condition under the national law applicable;**
2. **The first paragraph of article 59 and the third paragraph of article 60 have direct effect and may therefore be relied on before national courts, at least in so far as they seek to abolish any discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a member state other than that in which the service is to be provided.**

9. FREEDOM TO PROVIDE SERVICES

Case 263/86 Belgian State v René Humbel and Marie-Thérèse Edel Judgment of the Court of 27 September 1988, European Court reports 1988 Page 05365

(Humbel)

SUMMARY

Since economic aspect of the service is a cornerstone in deciding whether an activity is to be concerned as a service in Humbel judgment, ECJ defines that education provided under the national education system cannot be regarded as services within the meaning of the Treaty.

KEY WORDS

Social Policy, Vocational training, Freedom to provide services, national education system, Free movement of persons, Workers, Access of a worker's children to education provided by the host State.

OVERVIEW

In the Humbel judgement, ECJ deals with educational issues regarding Mr and Ms Humbel and their son Frédéric Humbel, French nationals, residing in Luxembourg, where Mr Humbel was employed. They were obliged to pay a scholarship for Frederic's educational programme in Belgium that was not supposed for Belgian nationals. The ECJ dealt with the problem whether various years of a study programme could be assessed individually or they must have been considered within the framework of the programme as a whole, particularly in the light of the programme purpose, providing, however, that the programme formed a coherent single entity and

could not be divided into two parts, one of which does not constitute a vocational training, while the other does.

The ECJ judgment defined that secondary education provided under the national education system could not be regarded as services for the purpose of Article 59 of the EEC Treaty. The first paragraph of Article 60 of the EEC Treaty provides that only services "normally provided for remuneration" are to be considered as "services" within the meaning of the Treaty. The essential characteristic of remuneration, which lies in the fact that it constitutes a consideration for the service in question, is absent in the case of courses provided under the national education system because, first of all, the State, in establishing and maintaining such a system, is not seeking to be engaged in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields and, secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents .

A nature of that activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system.

Article 12 of Regulation No 1612/68, which provides that children of a national of a Member State who is or has been employed in the territory of another Member State are to be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory, refers not only to rules relating to admission but also to general measures intended to facilitate educational attendance. However, the wording used in that provision lays obligations only on the Member State in which the migrant worker resides. It does not, therefore, preclude a Member State from imposing an enrolment fee or "minerval", as a condition for admission to ordinary schooling within its territory, on children of migrant workers residing in another Member State, even when the nationals of the other Member State in question are not required to pay such a fee.

TEXT OF THE JUDGMENT

1. By an order of 16 May 1986, which was received at the Court on 21 October 1986, the justice de paix, Neufchâteau (Belgium), referred to the Court for a preliminary

ruling under Article 177 of the EEC Treaty three questions on the interpretation in particular of Articles 59 et seq. and 128 of the Treaty for the purpose of settling a dispute relating to the payment of a fee (the "minerval") charged to nationals of other Member States for access to a State educational establishment .

2. Those questions were raised in the course of proceedings brought by the Belgian State against Mr and Mrs Humbel, the defendants in the main proceedings, in their capacity as guardians of their son Frédéric, claiming payment of the sum of BFR 35 000, the amount of the minerval due in respect of the course of secondary education followed by Frédéric during the school year 1984-85 at the Institut d' enseignement général et technique de l' Etat (State Institute for General and Technical Education) at Libramont (Belgium).

3. It is apparent from the case file that Frédéric Humbel and his parents are French nationals. They reside in Luxembourg, where the father is employed.

4. According to the file**, the education provided in the establishment in question is secondary education provided under the national education system**. The programme of study followed by Frédéric Humbel lasts a total of six years, made up of three consecutive stages - an "observation" stage, a "guidance" stage and a "determination" stage - each lasting two years. The course for which he was enrolled for the 1984-85 year was the second year of study in the guidance stage. It forms part of the basic general education element and does not, therefore, include any specifically vocational subjects. The course subsequently followed by him during the determination stage, however, is considered under national law to be vocational training, and no minerval is charged for attending such courses .

5. When Frédéric Humbel **refused to pay a minerval of BFR 35 000, which was not charged to Belgian students, the Belgian State brought the proceedings.**

6. The national court hearing the case stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

1) **Does the course of study attended by Frédéric Humbel at the Institut technique de l' Etat, Libramont, constitute vocational training?**
2) **If the said course of study does not constitute vocational training, can Frédéric Humbel be regarded as a person for whom services are intended within the meaning of Articles 59 et seq . of the EEC Treaty and can he be**

required to pay a 'minerval' as a condition for admission to a course of general education?

3) In so far as Luxembourg nationals are entitled to enrol their children in Belgian educational establishments without paying any 'minerval' whatsoever, is not a French worker resident in the Grand Duchy of Luxembourg entitled to claim the same treatment?

7. Reference is made to the Report for the Hearing for fuller details of the legal background, the facts of the case and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court .

First question

8. The first question seeks to determine whether a course of study such as the one described above may be considered to constitute **vocational training for the purposes of the EEC Treaty.**

9. In that regard the defendants maintain that even if the year of study in question, taken in isolation, does not appear to meet the criteria for vocational training as formulated by the Court in its judgment of 13 February 1985 in Case 293/83 Gravier v City of Liège ((1985)) ECR 593, it nevertheless constitutes such training inasmuch as it enables pupils to carry on to the "determination" stage and thus to strictly technical education. The Belgian State, on the other hand, argued at the hearing that the course attended by Frédéric Humbel constitutes general secondary education which does not provide vocational training as defined in the Gravier judgment. The United Kingdom considers that the course of study in question is a course of general secondary education and thus does not constitute "vocational training" for the purposes of the EEC Treaty. The Commission, finally, feels that the documents before the Court are insufficient to enable the nature of the course attended to be determined.

10. In its judgment in the Gravier case, cited above, the Court ruled that **any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is vocational training, whatever the age and level**

of training of the pupils or students, and even if the training programme includes an element of general education.

11. The present case raises more particularly the question **whether a year of study which does not in itself meet that definition is to be considered to constitute vocational training when it is an integral part of a study programme which must be regarded as such.**

12. It should be stressed in that connection that the various years of a study programme cannot be assessed individually but must be considered within the **framework of the programme as a whole, particularly in the light of the programme' s purpose** - provided, however, that the programme forms a coherent single entity and cannot be divided into two parts, one of which does not constitute vocational training while the other does (see the judgment of 2 February 1988 in Case 24/86 Blaizot and Others v University of Liège and Others ((1988)) ECR 379). It is for the national court to apply those criteria to the facts of the case before it.

13. The answer to the first question should therefore be that **a year of study which is part of a programme forming an indivisible body of instruction preparing for a qualification for a particular profession, trade or employment or providing the necessary training and skills for such a profession, trade or employment constitutes vocational training** for the purposes of the EEC Treaty .

Second question

14. The second question seeks to determine **whether courses taught in a technical institute which form part of the secondary education provided under the national education system are to be regarded as services** for the purposes of Article 59 of the EEC Treaty, properly construed. If they are to be so regarded, the national court wishes to know **whether Article 59 precludes the charging of a minerval which pupils who are nationals of the host State are not required to pay.**

15. The first paragraph of Article 60 of the EEC Treaty provides that **only services "normally provided for remuneration" are to be considered to be "services" within the meaning of the Treaty.**

16. Even though the concept of remuneration is not expressly defined in Articles 59 et seq. of the EEC Treaty, its legal scope may be deduced from the provisions of the second paragraph of Article 60 of the Treaty, which states that **"services" include in particular activities of an industrial or commercial character and the activities of craftsmen and the professions.**

17. The essential characteristic of remuneration thus lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service.

18. That characteristic is, however, absent in the case of courses provided under the national education system. First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents.

19. The nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system. A fortiori, the mere fact that foreign pupils alone are required to pay a minerval can have no such effect.

20. The answer to the first branch of the second question should therefore be that **courses taught in a technical institute which form part of the secondary education provided under the national education system cannot be regarded as services for the purposes of Article 59 of the EEC Treaty, properly construed.**

21. In view of that answer, there is no need to consider the second branch of the question.

Third question

22. In its third question, the national court wishes to know whether Community law precludes a Member State from imposing an enrolment fee ("minerval"), as a condition for admission to schooling within its territory, on children of migrant workers residing in another Member State even when the nationals of that other Member State are not required to pay such a fee .

23. It must first of all be noted that this question arises only in cases which do not involve vocational training within the meaning of Article 128 of the EEC Treaty . The judgment in the Gravier case, cited above, means that the prohibition of discrimination on grounds of nationality contained in Article 7 of the EEC Treaty always applies to vocational training, whatever the circumstances.

24. In order to reply to the question, it may be observed that the only provision of Community law which may be relevant is Article 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition, 1968 (II), p . 475), which provides that the children of a national of a Member State who is or has been employed in the territory of another Member State are to be admitted to that State' s general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory . The Court has interpreted that provision as referring not only to rules relating to admission, but also to general measures intended to facilitate educational attendance (judgment of 3 July 1974 in Case 9/74 Casagrande v Landeshauptstadt Muenchen ((1974)) ECR 773). However, the wording used in Article 12 of the regulation lays obligations only on the Member State in which the migrant worker resides.

25. The answer to the third question should therefore be that Article 12 of Regulation No 1612/68, properly construed, does not preclude a Member State from imposing an enrolment fee (" minerval "), as a condition for admission to ordinary schooling within its territory, on children of migrant workers residing in another Member State even when the nationals of that other Member State are not required to pay such a fee.

(...)

Operative part

THE COURT, in answer to the questions referred to it by the justice de paix, Neufchâteau, by order of 16 May 1986, hereby rules :

1. **A course year which is part of an overall course of study forming a coherent whole and preparing for a qualification for a particular profession, trade or employment or providing the necessary training and**

skills for such a profession, trade or employment constitutes vocational training for the purposes of the EEC Treaty .

2. **Courses taught in a technical institute which form part of the secondary education provided under the national education system cannot be regarded as services within the meaning of Article 59 of the EEC Treaty, properly construed.**
3. **Article 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, properly construed, does not preclude a Member State from imposing an enrolment fee (" minerval "), as a condition for admission to ordinary schooling within its territory, on children of migrant workers residing in another Member State even when the nationals of that other Member State are not required to pay such a fee.**

10. FREEDOM TO PROVIDE HEALTHCARE SERVICES

Case C-158/96 Raymond Kohll v Union des caisses de maladie, Judgment of the Court of 28 April 1998 European Court reports 1998 Page I-01931

(Kohll)

SUMMARY

The Kohll is a cornerstone judgment in the area of healthcare services. It deals with a cross-border healthcare when treatment is planned to be carried out by the national of another Member State. It defines which expenses should be covered by the national healthcare security system. The judgement provides freedom of services at the same time as the judgment in case Decker, providing that the freedom of goods was delivered by the ECJ.

KEY WORDS

Freedom to provide services, Reimbursement of medical expenses incurred in another Member State, Prior authorisation of the competent institution, Public health, Dental treatment, Social security for migrant workers, Powers of the Member States to organize their social security systems, Limits, Compliance with Community law, National rules on reimbursement of medical expenses incurred in another Member State, Dental treatment.

OVERVIEW

A fact that national rules fall within the sphere of social security cannot exclude the application of Articles 59 and 60 of the Treaty.

While Community law does not detract from the powers of the Member States to organise their social security systems, they must nevertheless comply with Community law when exercising those powers.

Article 22 of Regulation No 1408/71 is intended to allow an insured person, authorised by the competent institution, to go to another Member State to receive a treatment appropriate for his condition, to receive sickness benefits in kind on account of the competent institution but in accordance with the provisions of the legislation of the State in which the services are provided, in particular where there is a need for the transfer because of the state of health of the person concerned, without any additional expenditures for that person. It is not intended to regulate nor in any way to prevent a reimbursement by Member States, at the tariffs in force in the competent State, of costs incurred in connection with treatment provided in another Member State, even without prior authorisation.

Articles 59 and 60 of the Treaty preclude national rules under which reimbursement, in accordance with the scale of the State of insurance, of the cost of dental treatment provided by an orthodontist established in another Member State is subject to authorisation by the insured person's social security institution.

Such rules deter insured persons from approaching the providers of medical services established in another Member State and constitute, for them and their patients, a barrier to freedom to provide services.

They are not justified by the risk of seriously undermining the financial balance of the social security system, since reimbursement of the costs of dental treatment provided in other Member States in accordance with the tariff of the State of insurance has no significant effect on financing of the social security system, nor are they justified on grounds of public health within the meaning of Articles 55 and 66 of the Treaty in order to protect the quality of medical services provided to insured persons in other Member States and to maintain a balanced medical and hospital service open to all. Since the conditions for taking up and pursuing the profession of doctor and dentist have been the subject of several coordinating or harmonising directives, doctors and dentists established in other Member States must provide for all guarantees equivalent to those provided by doctors and dentists established on the national territory, for the purpose of freedom to provide services. It has not been argued that such rules are

indispensable for maintenance of an essential treatment facility or medical service on the national territory of that Member State.

TEXT OF THE JUDGMENT

1. By judgment of 25 April 1996, received at the Court on 9 May 1996, the Luxembourg Cour de Cassation (Court of Cassation) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 59 and 60 of that Treaty.

2. Those questions arose in proceedings between Mr. Kohll, a Luxembourg national, and the Union des Caisses de Maladie (hereinafter `UCM'), with which he is insured, **concerning a request by a doctor established in Luxembourg for authorisation for his daughter, who is a minor, to receive treatment from an orthodontist established in Trier** (Germany).

3. By decision of 7 February 1994 following a negative opinion of the social security medical supervisors, the request was rejected on the grounds that the proposed treatment was not urgent and that it could be provided in Luxembourg. That decision was confirmed on 27 April 1994 by a decision of the UCM board.

4. Mr. Kohll appealed against that decision to the Conseil Arbitral des Assurances Sociales (Social Insurance Arbitration Council), arguing that the provisions relied on were contrary to Article 59 of the Treaty. The appeal was dismissed by decision of 6 October 1994.

5. Mr. Kohll appealed against the latter decision to the Conseil Supérieur des Assurances Sociales (Higher Social Insurance Council), which by judgment of 17 July 1995 upheld the contested decision on the ground that Article 20 of the Luxembourg Codes des Assurances Sociales (Social Insurance Code) and Articles 25 and 27 of the UCM statutes were consistent with Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (see the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, OJ 1997 L 28, p. 1).

6. It appears from Article 20(1) of the Code des Assurances Sociales, as amended by the Law of 27 July 1992, which entered into force on 1 January 1994, that with the exception of emergency treatment received in the event of illness or accident abroad, insured persons may be treated abroad or approach a treatment centre or centre providing ancillary facilities abroad only after obtaining the prior authorisation of the competent social security institution.

7. The terms and conditions for granting authorisation are laid down by Articles 25 to 27 of the UCM statutes, in the version which entered into force on 1 January 1995. Article 25 prescribes in particular that authorisation may not be given for services which are not reimbursable under the national rules. Article 26 states that the cost of duly authorised treatment is to be reimbursed in accordance with the tariffs applicable to persons insured under the social security system of the State in which the treatment is provided. Under Article 27, finally, authorisation will be granted only after a medical assessment and on production of a written request from a doctor established in Luxembourg indicating the doctor or hospital centre recommended and the facts and criteria which make it impossible for the treatment in question to be carried out in Luxembourg.

8. Article 22 of Regulation No 1408/71 provides in particular:

1) An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:
(...)

(c) who is authorised by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his condition, shall be entitled:

(i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence in accordance with the provisions of the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided shall be governed, however, by the legislation of the competent State;

(ii) to cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers. However, by agreement

between the competent institution and the institution of the place of stay or residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the provisions of the legislation of the competent State.

2) (...)
The authorisation required under paragraph 1(c) may not be refused where the treatment in question is among the benefits provided for by the legislation of the Member State on whose territory the person concerned resides and where he cannot be given such treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of the disease.
3) The provisions of paragraphs 1 and 2 shall apply by analogy to members of the family of an employed or self-employed person.

9. Mr. Kohll appealed against the judgment of the Conseil Supérieur des Assurances Sociales, arguing in particular that it had considered only whether the national rules were consistent with Regulation No 1408/71, and not whether they were consistent with Articles 59 and 60 of the Treaty.

10. Since it considered that that argument raised a question concerning the interpretation of Community law, the Cour de Cassation stayed the proceedings and referred the following two questions to the Court for a preliminary ruling:

1) Are Articles 59 and 60 of the Treaty establishing the EEC to be interpreted as precluding rules under which reimbursement of the cost of benefits is subject to authorisation by the insured person's social security institution if the benefits are provided in a Member State other than the State in which that person resides?
2) Is the answer to Question 1 any different if the aim of the rules is to maintain a balanced medical and hospital service accessible to everyone in a given region?

11. By those questions, which should be taken together, **the national court essentially asks whether Articles 59 and 60 of the Treaty preclude the application of social security rules such as those at issue in the main proceedings.**

12. Mr Kohll submits that Articles 59 and 60 of the Treaty preclude such national rules which make reimbursement, in accordance with the scale of the Member State of insurance, of the cost of dental treatment provided by an orthodontist established in another Member State subject to authorisation by the insured person's social security institution.

13. UCM and the Luxembourg, Greek and United Kingdom Governments contend that those provisions are not applicable, or, in the alternative, do not preclude the rules in question from being maintained. The German, French and Austrian Governments agree with the alternative submission.

14. The Commission submits that the rules constitute a barrier to the freedom to provide services but may be justified, under certain conditions, by overriding reasons relating to the general interest.

15. Having regard to the observations submitted, the questions to be considered concern **first the application of the principle of freedom of movement in the field of social security, then the effect of Regulation No 1408/71, and finally the application of the provisions on freedom to provide services.**

Application of the fundamental principle of freedom of movement in the field of social security

(...)

17. It must be observed, first of all, that, according to settled case-law, **Community law does not detract from the powers of the Member States to organise their social security systems** (Case 238/82 Duphar and Others v Netherlands [1984] ECR 523, paragraph 16, and Case C-70/95 Sodemare and Others v Regione Lombardia [1997] ECR I-3395, paragraph 27).

18. **In the absence of harmonisation at Community level, it is therefore for the legislation of each Member State to determine, first, the conditions concerning the right or duty to be insured with a social security scheme** (Case 110/79 Coonan v Insurance Officer [1980] ECR 1445, paragraph 12, and Case C-349/87 Paraschi v Landesversicherungsanstalt Württemberg [1991] ECR I-4501, paragraph 15) and, second, the conditions for entitlement to benefits (Joined Cases C-4/95 and C-5/95 Stöber and Piosa Pereira v Bundesanstalt für Arbeit [1997] ECR I-511, paragraph 36).

19. As the Advocate General observes in points 17 to 25 of his Opinion, the Member States must nevertheless **comply with Community law when exercising those powers.**

20. The Court has held that the **special nature of certain services does not remove them from the ambit of the fundamental principle of freedom of movement** (Case 279/80 Webb [1981] ECR 3305, paragraph 10).

21. Consequently, the fact that the national rules at issue in the main proceedings fall within the sphere of social security cannot exclude the application of Articles 59 and 60 of the Treaty.

(...)

23. In the proceedings before the Court, Mr Kohll submitted that he sought reimbursement by UCM of the amount he would have been entitled to if the treatment had been carried out by the only specialist established in Luxembourg at the material time.

24. On that point, UCM considers that the principle that a person is subject to one social security tariff only would indeed be complied with if the Luxembourg tariff were applied, but claims that Regulation No 1408/71 would compel it to reimburse expenditure according to the tariffs in force in the State in which the service was provided.

25. It must be stated **that the fact that a national measure may be consistent with a provision of secondary legislation**, in this case Article 22 of Regulation No 1408/71**, does not have the effect of removing that measure from the scope of the provisions of the Treaty.**

26. Moreover, as the Advocate General observes in points 55 and 57 of his Opinion, Article 22(1) of Regulation No 1408/71 is intended to allow an insured person, authorised by the competent institution to go to another Member State to receive there treatment appropriate to his condition, to receive sickness benefits in kind, on account of the competent institution but in accordance with the provisions of the legislation of the State in which the services are provided, in particular where the need for the transfer arises because of the state of health of the person concerned, without that person incurring additional expenditure.

(…)

29. The dispute before the national court concerns treatment provided by an orthodontist established in another Member State, outside any hospital infrastructure. That service, provided for remuneration, must be regarded as a service within the meaning of Article 60 of the Treaty, which expressly refers to activities of the professions.

30. It must therefore be examined whether rules such as those at issue in the main proceedings constitute a restriction on freedom to provide services, and if so, whether they may be objectively justified.

(…)

31. Mr Kohll and the Commission submit that **the fact that reimbursement of the cost of medical services, in accordance with the legislation of the State of insurance, is subject to prior authorisation by the institution of that State where the services are provided in another Member State constitutes a restriction on freedom to provide services within the meaning of Articles 59 and 60 of the Treaty.**

(…)

33. It should be noted that, according to the Court's case-law, **Article 59 of the Treaty precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State** (Case C-381/93 Commission v France [1994] ECR I-5145, paragraph 17).

34. While the national rules at issue in the main proceedings do not deprive insured persons of the possibility of approaching a provider of services established in another Member State, they do nevertheless make reimbursement of the costs incurred in that Member State subject to prior authorisation, and deny such reimbursement to insured persons who have not obtained that authorisation. Costs incurred in the State of insurance are not, however, subject to that authorisation.

35. **Consequently, such rules deter insured persons from approaching providers of medical services established in another Member State and constitute, for them**

and their patients, a barrier to freedom to provide services (see Joined Cases 286/82 and 26/83 Luisi and Carbone v Ministero del Tesoro [1984] ECR 377, paragraph 16, and Case C-204/90 Bachmann v Belgium [1992] ECR I-249, paragraph 31).

36. The Court must therefore examine whether a measure of the kind at issue in this case may be objectively justified.

37. UCM and the Governments of the Member States which have submitted observations submit that freedom to provide services is not absolute and that reasons connected with the control of health expenditure must be taken into consideration. **The requirement of prior authorisation constitutes the only effective and least restrictive means of controlling expenditure on health and balancing the budget of the social security system.**

38. According to UCM, the Luxembourg Government and the Commission, **the risk of upsetting the financial balance of the social security scheme**, which aims to ensure **a balanced medical and hospital service available to all its insured**, constitutes an overriding reason in the general interest capable of justifying restrictions on freedom to provide services.

39. The Commission adds that **the refusal of the national authorities to grant prior authorisation must be justified by a genuine and actual risk of upsetting the financial balance of the social security scheme.**

40. On the latter point, Mr Kohll submits that the financial burden on the budget of the Luxembourg social security institution is the same whether he approaches a Luxembourg orthodontist or one established in another Member State, since he asked for medical expenses to be reimbursed at the rate applied in Luxembourg. The rules at issue therefore cannot be justified by the need to control health expenditure.

41. **It must be recalled that aims of a purely economic nature cannot justify a barrier to the fundamental principle of freedom to provide services** (see, to that effect, Case C-398/95 SETTG v Ypourgos Ergasias [1997] ECR I-3091, paragraph 23). However, it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier of that kind.

(…)

45. It should be noted, first of all, that under Articles 56 and 66 of the EC Treaty Member States may limit freedom to provide services on grounds of public health.

46. However, that does not permit them to exclude the public health sector, as a sector of economic activity and from the point of view of freedom to provide services, from the application of the fundamental principle of freedom of movement (see Case 131/85 Gül v Regierungspräsident Düsseldorf [1986] ECR 1573, paragraph 17).

47. The conditions for taking up and pursuing the profession of doctor and dentist have been the subject of several coordinating or harmonising directives (see Council Directive 78/686/EEC of 25 July 1978 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (OJ 1978 L 233, p. 1); Council Directive 78/687/EEC of 25 July 1978 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of the activities of dental practitioners (OJ 1978 L 233, p. 10); and Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications (OJ 1993 L 165, p. 1)).

48. It follows that doctors and dentists established in other Member States must be afforded all guarantees equivalent to those accorded to doctors and dentists established on national territory, for the purposes of freedom to provide services.

49. Consequently, **rules such as those applicable in the main proceedings cannot be justified on grounds of public health in order to protect the quality of medical services provided in other Member States.**

50. As **to the objective of maintaining a balanced medical and hospital service open to all, that objective, although intrinsically linked to the method of financing the social security system, may also fall within the derogations on grounds of public health** under Article 56 of the Treaty, in so far as it contributes to the attainment of a high level of health protection.

51. Article 56 of the Treaty **permits Member States to restrict the freedom to provide medical and hospital services in so far as the maintenance of a treatment**

facility or medical service on national territory is essential for the public health and even the survival of the population (see, with respect to public security within the meaning of Article 36 of the Treaty, Case 72/83 Campus Oil v Minister for Industry and Energy [1984] ECR 2727, paragraphs 33 to 36).

52. However, neither UCM nor the Governments of the Member States which have submitted observations have shown that the rules at issue were necessary to provide a balanced medical and hospital service accessible to all. None of those who have submitted observations has argued that the rules were indispensable for the maintenance of an essential treatment facility or medical service on national territory.

53. The conclusion must therefore be drawn that the rules at issue in the main proceedings **are not justified on grounds of public health.**

54. In those circumstances, the answer must be that **Articles 59 and 60 of the Treaty preclude national rules under which reimbursement, in accordance with the scale of the State of insurance, of the cost of dental treatment provided by an orthodontist established in another Member State is subject to authorisation by the insured person's social security institution.**

(...)

Operative part

THE COURT, in answer to the questions referred to it by the Luxembourg Cour de Cassation by judgment of 25 April 1996, hereby rules:

> **Articles 59 and 60 of the EC Treaty preclude national rules under which reimbursement, in accordance with the scale of the State of insurance, of the cost of dental treatment provided by an orthodontist established in another Member State is subject to authorisation by the insured person's social security institution.**

11. FREEDOM TO PROVIDE SERVICES – GAMES ON CHANCE

Case C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler, Judgment of the Court of 24 March 1994. European Court reports 1994 Page I-01039

(Schindler)

SUMMARY

This is one of the first judgment in a row of judgments dealing with games on chance. It defines that games on chance are part of the freedom to provide services when they are provided across the border. It also gives an answer on what are applicable justifications for the restrictions imposed by the Member State.

KEY WORDS

Freedom to provide services, Lottery, Lottery operated in another Member State, Restrictions, National legislation prohibiting lotteries, Justification, Protection of consumers and maintenance of order in society.

OVERVIEW

Import of lottery advertisements and tickets into a Member State, as regarding the participation of residents of that State in a lottery conducted in another Member State, relates to a "service" within the meaning of Article 60 of the Treaty and accordingly falls within the scope of Article 59 of the Treaty.

Lottery activities, as services normally provided for remuneration constituted by the price of the ticket, do not, even as regarding the cross-border sending and distribution of material objects necessary for their organization or operation, fall within the scope

of rules on the free movement of goods. Nor do they fall within the scope of rules on the free movement of persons, or of those on free movement of capital, which concern capital movements as such and not all monetary transfers necessary to economic activities.

Moreover, their classification as services is not affected by a fact that they are subject to particularly strict regulation and close to control by the public authorities in various Member States of the Community, since they cannot be regarded as activities which harmful nature causes them to be prohibited in all the Member States and which position under Community law may be linked to that of activities involving illegal products.

Finally, neither the chance character of the winnings, as consideration for the payment received by the operator, nor the fact that, although lotteries are operated with a view to profit, participation in them may be recreational, nor even the fact that profits arising from a lottery may generally only be allocated in the public interest, prevents lottery activities from having an economic nature.

National legislation which prohibits, subject to specified exceptions, the holding of lotteries in a Member State and which thus wholly precludes lottery operators from other Member States from promoting their lotteries and selling their tickets, whether directly or via independent agents, in the Member State which enacted that legislation, restricts, even though it is applicable without distinction, the freedom to provide services.

However, since the legislation in question involves no discrimination on grounds of nationality, that restriction may be justified if it is for the protection of consumers and maintenance of order in society.

The particular features of lotteries justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regarding the manner in which lotteries are operated, the size of stakes, allocation of the profits they yield, and to decide either to restrict or to prohibit them.

TEXT OF THE JUDGMENT

1. By order of 3 April 1992, received at the Court on 18 June 1992, the High Court of Justice of England and Wales (Queen' s Bench Division) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty six questions on the interpretation of Articles 30, 36, 56 and 59 of the Treaty in order to determine whether national legislation prohibiting the holding of certain lotteries in a Member State was compatible with those provisions.

2. Those questions were raised in the course of proceedings between the Commissioners of Customs and Excise (hereinafter "the Commissioners"), plaintiffs in the main proceedings, and Gerhart and Joerg Schindler concerning the dispatch of advertisements and application forms for a lottery organized in the Federal Republic of Germany to United Kingdom nationals.

3. Gerhart and Joerg Schindler are independent agents of the "Sueddeutsche Klassenlotterie" (hereinafter "SKL"), a public body responsible for organizing what are known as "Class" lotteries on behalf of four Laender of the Federal Republic of Germany. As such agents, they promote SKL lotteries and unquestionably sell tickets for those lotteries.

4. Gerhart and Joerg Schindler dispatched envelopes from the Netherlands to United Kingdom nationals. Each envelope contained a letter inviting the addressee to participate in the 87th issue of the SKL, application forms for participating in that lottery and a pre-printed reply envelope.

(...)

6. Section 1 of the Revenue Act 1898 as then in force provided:

"The importation of the following articles is prohibited, that is to say:

> (i) (...)
>
> (ii) Any advertisement or other notice of, or relating to, the drawing or intended drawing of any lottery, which, in the opinion of the Commissioners of Customs and Excise is imported for the purpose of publication in the United Kingdom, in contravention of any Act relating to lotteries."

7. Section 1 of the Lotteries and Amusements Act 1976 prohibits lotteries which do not constitute gaming within the meaning of the United Kingdom legislation on gaming (in particular the Gaming Act 1968), namely the distribution of winnings in money or money' s worth on the basis of chance where money has been staked by the players. However, by way of exception to that prohibition, the law permits certain types of lottery, mainly small-scale lotteries for charitable and similar purposes.

8. According to the order for reference, the 87th issue of the SKL was prohibited by virtue of those provisions.

9. Section 2 of the Act of 1976 as then in force provided:

"... every person who in connection with any lottery promoted or proposed to be promoted either in Great Britain or elsewhere -

> (...)
>
> (d) brings, or invites any person to send, into Great Britain for the purpose of sale or distribution any ticket in, or advertisement of, the lottery; or
>
> (e) sends or attempts to send out of Great Britain any money or valuable thing received in respect of the sale or distribution, or any document recording the sale or distribution, or the identity of the holder, of any ticket or chance in the lottery; or
>
> (...)
>
> (g) causes, procures or attempts to procure any person to do any of the abovementioned acts, shall be guilty of an offence."

10. In proceedings brought by the Commissioners for condemnation of the items seized, Gerhart and Joerg Schindler, defendants in the main proceedings, argued before the High Court of Justice that section 1(ii) of the Revenue Act 1898 and section 2 of the Lotteries and Amusements Act 1976 were incompatible with Article 30, or in the alternative Article 59, of the Treaty since they prohibited the importation into a Member State of tickets, letters and application forms relating to a lottery lawfully conducted in another Member State.

11. **The Commissioners contended that tickets and advertisements for a lottery did not constitute "goods" within the meaning of the Treaty**, that neither Article 30

nor Article 59 of the Treaty applied to the prohibition on importation in the United Kingdom legislation since that legislation applied to all large-scale lotteries whatever their origin and that in any event the prohibition was justified by the United Kingdom Government' s concern to limit lotteries for social policy reasons and to prevent fraud.

12. Considering that resolution of that dispute required an interpretation of Community law, the High Court of Justice stayed the proceedings and referred the following questions to the Court:

1) Do tickets in, or advertisements for, a lottery which is lawfully conducted in another Member State constitute goods for the purposes of Article 30 of the Treaty of Rome?
2) If so, does Article 30 apply to the prohibition by the United Kingdom of the importation of tickets or advertisements for major lotteries, given that the restrictions imposed by United Kingdom law on the conduct of such lotteries within the United Kingdom apply without discrimination on grounds of nationality and irrespective of whether the lottery is organized from outside or within the United Kingdom?
3) If so, do the concerns of the United Kingdom to limit lotteries for social policy reasons and to prevent fraud constitute legitimate public policy or public morality considerations to justify the restrictions of which complaint is made, whether under Article 36 or otherwise, in the circumstances of the present case?
4) Does the provision of tickets in, or the sending of advertisements for, a lottery which is lawfully conducted in another Member State constitute the provision of services for the purposes of Article 59 of the Treaty of Rome?
5) If so, does Article 59 apply to the prohibition by the United Kingdom of the importation of tickets or advertisements for major lotteries, given that the restrictions imposed by United Kingdom law on the conduct of such lotteries within the United Kingdom apply without discrimination on grounds of nationality and irrespective of whether the lottery is organized from outside or within the United Kingdom?
6) If so, do the concerns of the United Kingdom to limit lotteries for social policy reasons and to prevent fraud constitute legitimate public policy or public morality considerations to justify the restrictions of which complaint is made, whether under Article 56 read with Article 66 or otherwise, in the circumstances of the present case?

13. Read in the light of the arguments adduced before it by the parties to the main proceedings and the reasons given in its order for reference, the question put by the national court is essentially whether Articles 30 and 59 of the Treaty preclude the legislation of a Member State from prohibiting, subject to exceptions, lotteries in its territory - as does the United Kingdom legislation - and consequently the importation of material intended to enable its residents to participate in foreign lotteries.

14. The first and fourth questions are put by the national court to ascertain whether the importation of lottery advertisements and tickets into a Member State with a view to the participation by residents of that State in a lottery operated in another Member State constitutes an importation of goods and falls under Article 30 of the Treaty or whether such an activity amounts to a provision of services which as such comes within the scope of Article 59 of the Treaty.

15. In those circumstances, those two questions should be considered together.

The first and fourth questions

16. In assessing whether Articles 30 and 59 of the Treaty apply, the Belgian, German, Irish, Luxembourg and Portuguese Governments argue **that lotteries are not an "economic activity"** within the meaning of the Treaty. They submit that **lotteries have traditionally been prohibited in the Member States, or are operated either directly by the public authorities or under their control, solely in the public interest. They consider that lotteries have no economic purpose since they are based on chance. In any case, lotteries are in the nature of recreation or amusement rather than economi**c. The Belgian and Luxembourg Governments add that it is clear from Council Directive 75/368/EEC of 16 June 1975 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of various activities (ex ISIC Division 01 to 85) and, in particular, transitional measures in respect of those activities (Official Journal 1975 L 167, p. 22) that lotteries fall outside the scope of the Treaty except where they are operated by individuals with a view to profit.

17. The Spanish, French and United Kingdom Governments and the Commission argue that **operating lotteries is a "service"** within the meaning of Article 60 of the Treaty. They submit that **such an activity relates to services normally provided for**

remuneration to the operator of the lottery or to the participants in it, but not covered by the rules on the free movement of goods.

18. Finally, the defendants in the main proceedings argue that their activity comes within the scope of Article 30 of the Treaty. They submit that the advertisements and documents announcing or concerning a lottery draw are "goods" within the meaning of the Treaty, that is to say in accordance with the Court' s definition in Joined Cases 60 and 61/84 Cinéthèque v Fédération Nationale des Cinémas Français [1985] ECR 2605 they are manufactured material objects.

19. Since some governments argue that lotteries are not "economic activities" within the meaning of the Treaty, it must be made clear that **the importation of goods or the provision of services for remuneration** (see on the latter point the judgments in Case 13/76 Donà v Mantero [1976] ECR 1333, at paragraph 12, and Case 196/87 Steymann v Staatssecretaris van Justitie [1988] ECR 6159, at paragraph 10) **are to be regarded as "economic activities" within the meaning of the Treaty.**

20. That being so, it will be sufficient to consider whether lotteries fall within the scope of one or other of the articles of the Treaty referred to in the order for reference.

21. The national court asks whether lotteries fall, at least in part, within the ambit of Article 30 of the Treaty to the extent that they involve the large-scale sending and distribution, in this case in another Member State, of material objects such as letters, promotional leaflets or lottery tickets.

22. The activity pursued by the defendants in the main proceedings appears, admittedly, to be limited to sending advertisements and application forms, and possibly tickets, on behalf of a lottery operator, SKL. However, those activities are only specific steps in the organization or operation of a lottery and cannot, under the Treaty, be considered independently of the lottery to which they relate. The importation and distribution of objects are not ends in themselves. Their sole purpose is to enable residents of the Member States where those objects are imported and distributed to participate in the lottery.

23. The point relied on by Gerhart and Joerg Schindler, that on the facts of the main proceedings agents of the SKL send material objects into Great Britain in order to advertise the lottery and sell tickets therein, and that material objects which have been

manufactured are goods within the meaning of the Court' s case-law, is not sufficient to reduce their activity to one of exportation or importation.

24. **Lottery activities are thus not activities relating to "goods"**, falling, as such, under Article 30 of the Treaty.

25. They are however to be regarded as "services" within the meaning of the Treaty.

26. The first paragraph of Article 60 of the Treaty provides:

"Services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons."

27. The services at issue are those provided by the operator of the lottery to enable purchasers of tickets to participate in a game of chance with the hope of winning, by arranging for that purpose for the stakes to be collected, the draws to be organized and the prizes or winnings to be ascertained and paid out.

28. Those services are normally provided for remuneration constituted by the price of the lottery ticket.

29. The services in question are cross-border services when, as in the main proceedings, they are offered in a Member State other than that in which the lottery operator is established.

30. Finally, **lotteries are governed neither by the Treaty rules on the free movement of goods** (see paragraph 24 above), **nor by the rules on the free movement of persons, which concern only movements of persons, nor by the rules on free movement of capital, which concern only capital movements though not all monetary transfers necessary to economic activities** (see the judgment in Case 7/78 Regina v Thompson [1978] ECR 2247).

31. Admittedly, as some Member States point out, lotteries are subject to particularly strict regulation and close control by the public authorities in the various Member States of the Community. However, they are not totally prohibited in those States. On the contrary, they are commonplace. In particular, although in principle lotteries are prohibited in the United Kingdom, small-scale lotteries for charitable and similar

purposes are permitted, and, since the enactment of the appropriate law in 1993, so is the national lottery.

32. In these circumstances, **lotteries cannot be regarded as activities whose harmful nature causes them to be prohibited in all the Member States and whose position under Community law may be likened to that of activities involving illegal products** (see, in relation to drugs, the judgment in Case 294/82 Einberger v Hauptzollamt Freiburg [1984] ECR 1177) even though, as the Belgian and Luxembourg Governments point out, the law of certain Member States treats gaming contracts as void. Even if the morality of lotteries is at least questionable, it is not for the Court to substitute its assessment for that of the legislatures of the Member States where that activity is practised legally (see the judgment in Case C-159/90 Society for the Protection of Unborn Children Ireland [1991] ECR I-4685, at paragraph 20).

33. Some governments stress the chance character of lottery winnings. However, a normal lottery transaction consists of the payment of a sum by a gambler who hopes in return to receive a prize or winnings. The element of chance inherent in that return does not prevent the transaction having an economic nature.

34. It is also the case that, like amateur sport, **a lottery may provide entertainment for the players who participate**. However, that recreational aspect of the lottery does not take it out of the realm of the provision of services. Not only does it give the players, if not always a win, at least the hope of a win, it also yields a gain for the operator. Lotteries are operated by private or public persons with a view to profit since, in most cases, not all the money staked by the participants is redistributed as prizes or winnings.

35. Although in many **Member States the law provides that the profits made by a lottery may be used only for certain purposes, in particular in the public interest, or may even be required to be paid into the State budget, the rules on the allocation of profits do not alter the nature of the activity in question or deprive it of its economic character.**

36. Finally, in excluding from its ambit lottery activities other than those conducted by individuals with a view to profit, Directive 75/368, mentioned above, did not thereby deny those activities the character of "services". The sole object of that directive is to make it easier, by way of transitional measures, for nationals of other Member States to

pursue specified activities as self-employed persons. Thus, neither the object nor the effect of the directive is, or indeed could have been, to exclude lotteries from the scope of Articles 59 and 60 of the Treaty.

37. Consequently, the reply to be given to the first and fourth questions should be that the importation of lottery advertisements and tickets into a Member State with a view to the participation by residents of that State in a lottery operated in another Member State relates to a "service" within the meaning of Article 60 of the Treaty and accordingly falls within the scope of Article 59 of the Treaty.

(...)

The fifth question

39. The essence of the national court's fifth question is whether national legislation which, like the United Kingdom legislation on lotteries, prohibits, subject to specified exceptions, the holding of lotteries in a Member State constitutes an obstacle to the freedom to provide services.

40. The Commission and the defendants in the main proceedings argue that, on any view of the matter, **such legislation, being in fact discriminatory, restricts the freedom to provide services.**

(...)

43. According to the case-law of the Court (see the judgment in Case C-76/90 Saeger v Dennemeyer [1991] ECR I-4221, at paragraph 12) **national legislation may fall within the ambit of Article 59 of the Treaty, even if it is applicable without distinction, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.**

44. It is sufficient to note that this is the case with national legislation such as the United Kingdom legislation on lotteries which wholly precludes lottery operators from other Member States from promoting their lotteries and selling their tickets, whether directly or through independent agents, in the Member State which enacted that legislation.

45. Accordingly, the reply to the fifth question should be **that national legislation which, like the United Kingdom legislation on lotteries, prohibits, subject to specified exceptions, the holding of lotteries in a Member State is an obstacle to the freedom to provide services.**

The sixth question

46. The national court's sixth question raises the issue whether the Treaty provisions relating to the freedom to provide services preclude legislation such as the United Kingdom lotteries legislation, where there **are concerns of social policy and of the prevention of fraud to justify it.**

47. First, as the national court states, **legislation such as the United Kingdom legislation involves no discrimination on the basis of nationality and must consequently be regarded as being applicable without distinction.**

48. It is common ground that a prohibition such as that laid down in the United Kingdom legislation, which applies to the operation of large-scale lotteries and in particular to the advertising and distribution of tickets for such lotteries, applies irrespective of the nationality of the lottery operator or his agents and whatever the Member State or States in which the operator or his agents are established. **It does not therefore discriminate on the basis of the nationality of the economic agents concerned or of the Member State in which they are established.**

49. The Commission and the defendants in the main proceedings argue, however, **that legislation such as the United Kingdom lotteries legislation is in fact discriminatory.** They submit that, although such legislation prohibits large lotteries in the United Kingdom in an apparently non-discriminatory manner, it permits the simultaneous operation by the same person of several small lotteries, which is equivalent to one large lottery and further the operation of games of chance which are comparable in nature and scale to large lotteries, such as football pools or "bingo".

50. It is true that the prohibition in question in the main proceedings does not apply to all types of lottery, small-scale lotteries not conducted for private gain being permitted in the national territory and the prohibition being set in the more

general context of the national legislation on gambling which permits certain forms of gambling similar to lotteries, such as football pools or "bingo".

51. However, even though the amounts at stake in the games so permitted in the United Kingdom may be comparable to those in large-scale lotteries and even though those games involve a significant element of chance they differ in their object, rules and methods of organization from those large-scale lotteries which were established in Member States other than the United Kingdom before the enactment of the National Lottery etc. Act 1993. They are therefore not in a comparable situation to the lotteries prohibited by the United Kingdom legislation and, contrary to the arguments of the Commission and the defendants in the main proceedings, cannot be assimilated to them.

52. In those circumstances legislation such as the United Kingdom legislation cannot be considered to be discriminatory.

53. That leads to the question whether Article 59 of the Treaty precludes such legislation which, although not discriminatory, nonetheless as stated above at paragraph 45 restricts the freedom to provide services.

(...)

57. According to the information provided by the referring court, the United Kingdom legislation, before its amendment by the 1993 Act establishing the national lottery, pursued the following objectives: to prevent crime and to ensure that gamblers would be treated honestly; **to avoid stimulating demand in the gambling sector which has damaging social consequences when taken to excess; and to ensure that lotteries could not be operated for personal and commercial profit but solely for charitable, sporting or cultural purposes.**

58. Those considerations, which must be taken together, **concern the protection of the recipients of the service and, more generally, of consumers as well as the maintenance of order in society. The Court has already held that those objectives figure among those which can justify restrictions on freedom to provide services** (see the judgments in Joined Cases 110 and 111/78 Ministère Public v Van Wesemael [1979] ECR 35, at paragraph 28; Case 220/83 Commission v France [1986] ECR 3663, at paragraph 20; Case 15/78 Société Générale Alsacienne de Banque v Koestler [1978] ECR 1971, at paragraph 5).

59. Given the peculiar nature of lotteries, which has been stressed by many Member States, those considerations are such as to justify restrictions, as regards Article 59 of the Treaty, which may go so far as to prohibit lotteries in a Member State.

60. First of all, it is not possible to **disregard the moral, religious or cultural aspects of lotteries, like other types of gambling,** in all the Member States. **The general tendency of the Member States is to restrict, or even prohibit, the practice of gambling and to prevent it from being a source of private profit.** Secondly, lotteries involve a high risk of crime or fraud, given the size of the amounts which can be staked and of the winnings which they can hold out to the players, particularly when they are operated on a large scale. Thirdly, they are an incitement to spend which may have damaging individual and social consequences. A final ground which is not without relevance, although it cannot in itself be regarded as an **objective justification, is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture.**

61. Those particular factors justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. In those circumstances, it is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.

62. When a Member State prohibits in its territory the operation of large-scale lotteries and in particular the advertising and distribution of tickets for that type of lottery, the prohibition on the importation of materials intended to enable nationals of that Member State to participate in such lotteries organized in another Member State cannot be regarded as a measure involving an unjustified interference with the freedom to provide services. Such a prohibition on import is a necessary part of the protection which that Member State seeks to secure in its territory in relation to lotteries.

63. Accordingly, the reply to be given to the sixth question must be that the Treaty provisions relating to freedom to provide services do not preclude legislation such as

the United Kingdom lotteries legislation, in view of the concerns of social policy and of the prevention of fraud which justify it.

(...)

Operative part

THE COURT, in answer to the questions referred to it by the High Court of Justice (Queen's Bench Division, Commercial Court) by order of 3 April 1992, hereby rules:

1. **The importation of lottery advertisements and tickets into a Member State with a view to the participation by residents of that State in a lottery operated in another Member State relates to a "service" within the meaning of Article 60 of the Treaty and accordingly falls within the scope of Article 59 of the Treaty;**
2. **National legislation which, like the United Kingdom legislation on lotteries, prohibits, subject to specified exceptions, the holding of lotteries in a Member State is an obstacle to the freedom to provide services;**
3. **The Treaty provisions relating to freedom to provide services do not preclude legislation such as the United Kingdom lotteries legislation, in view of the concerns of social policy and of the prevention of fraud which justify it.**

12. FREEDOM TO PROVIDE SERVICES VS FREEDOM OF ESTABLISHMENT

Case C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano European Court reports [1995] Page I-04165

(Gebhard)

SUMMARY

The Gebhard was a cornerstone judgment when defining difference between the freedom of establishment and free movement of services. It creates a rule by which the freedom of establishment encompasses temporary performance of an activity, while the freedom of services is performing activities on occasional basis. the second rule imposed by the judgment was in defining restrictions and their justifications by so called Gebhard test.

KEY WORDS

Freedom of movement for persons, Freedom of establishment, Restrictions resulting from the obligation to comply in the host Member State with rules relating to the pursuit of certain activities, Requirement for a diploma, Obligation of the national authorities to take account of the equivalence of diplomas or training.

OVERVIEW

Judgment in the Gebhard case is a so called cornerstone judgment when discussing two important rules. The first rule provides criteria for distinguishing the freedom of establishment and freedom to provide services and the second one is the rule that defines the conditions that must be met for a national measure restricting the freedom

of movement to be allowed. A subject to dispute was the issue related to activities of the German lawyer Mr. Gebhard, who was a member of the German Bar Association, although its practice was not carried out in Germany, but in Italy, where he lived. His income was entirely taxed in Italy, where he had his residence. He was practicing as a lawyer for domestic clients, the Italian citizens and foreign citizens and he used Italian title "avvocato." The Milan Bar Council dealt with the request by groups of lawyers against Mr. Gebhard, who complained that the title "avvocato" used in the header of the memorandum and practical training in the law office was contrary to the Italian law. The fundamental question to be asked was on criteria that have to be applied in assessing whether the activity is temporary or not, due to the persistent and repeating nature of the services provided by lawyers in the framework of Directive 77/249/EC. It is a situation in which the EU citizen of EU Member State moves to another EU Member State to regulate his activity under the Chapter of the TFEU on freedom of movement for workers, the chapter on the right of establishment or the chapter on services where each application precludes the application of other provisions. The right of establishment provided for by the provisions of Articles 49-55 TFEU (ex. Articles 43-48 TEC Nice, at the time of the judgment of 1995 it was about the provisions of Articles 52-58 of the EC Treaty, Rome) is guaranteed for both legal persons within the meaning of Article 55 TFEU and natural persons who are nationals of Member States. In accordance with prescribed conditions and exceptions, it allows running and performing all kinds of activities of self-employed persons. A national of a Member State who pursues a professional activity on a stable and continuous basis in another Member State, where he holds himself out from an established professional base to, amongst others, nationals of that State comes under the chapter relating to the right of establishment and not to the chapter relating to services. A temporary nature of activities in question has to be determined in the light of its duration, regularity, periodicity and continuity. This does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question. The possibility for a national of a Member State to exercise his right of establishment and the conditions for his exercise of that right must be determined in the light of activities which he intends to pursue on the territory of the host Member State.

Conditions required from a Member State, which may consist in particular of an obligation or restrictions that are liable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the Treaty, such as freedom of establishment, can be justified if they comply with requirements: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.

TEXT OF THE JUDGEMENT

1. By order of 16 December 1993, received at the Court on 8 February 1994, the Consiglio Nazionale Forense (National Council of the Bar) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty **two questions on the interpretation of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services** (OJ 1977 L 78, p. 17).

2. The questions have been raised in the course of disciplinary proceedings opened by the Consiglio dell' Ordine degli Avvocati e Procuratori di Milano (Council of the Order of Advocates and Procurators of Milan, hereinafter "the Milan Bar Council") against Mr Gebhard, who is accused of contravening his obligations under Law No 31 of 9 February 1982 on **freedom for lawyers who are nationals of a Member State of the European Community to provide services** (GURI No 42 of 12 February 1982) **on the ground that he pursued a professional activity in Italy on a permanent basis in chambers set up by himself whilst using the title avvocato.**

3. According to the case-file and information provided in answer to the written questions put by the Court, Mr Gebhard, **a German national, has been authorized to practise as a Rechtsanwalt in Germany** since 3 August 1977. **He is a member of the Bar of Stuttgart, where he is an "independent collaborator"** in a set of chambers (Buerogemeinschaft) although he does not have chambers of his own in Germany.

4. Mr Gebhard has resided since March 1978 in Italy, where he lives with his wife, an Italian national, and his three children. His income is taxed entirely in Italy, his country of residence.

5. **Mr Gebhard has pursued a professional activity in Italy since 1 March 1978, initially as a collaborator** (con un rapporto di libera collaborazione) in a set of chambers of lawyers practicing in association in Milan, and subsequently, from 1 January 1980 until the beginning of 1989, as an associate member (associato) of those chambers. No criticism has been made of him in relation to his activities in those chambers.

6. **On 30 July 1989, Mr Gebhard opened his own chambers in Milan in which Italian avvocati and procuratori work in collaboration with him.** In response to a written question from the Court, **Mr Gebhard stated that he instructed them from time to time to act in judicial proceedings involving Italian clients in Italy.**

7. **Mr Gebhard avers that his activity in Italy is essentially non-contentious, assisting and representing German-speakers (65% of his turnover) and representing Italian-speakers in Germany and Austria (30% of his turnover).** The remaining 5% is accounted for by assistance to Italian practitioners whose clients are faced with problems of German law.

8. A number of Italian practitioners, including the Italian avvocati with whom Mr Gebhard was associated until 1989, lodged a complaint with the Milan Bar Council. They complained of his use of the title avvocato on the letterhead of notepaper which he used for professional purposes, of his having appeared using the title avvocato directly before the Pretura and the Tribunale di Milano and of his having practised professionally from "Studio Legale Gebhard".

9. **The Milan Bar Council prohibited Mr Gebhard from using the title avvocato. Thereafter, on 19 September 1991, it decided to open disciplinary proceedings against him** on the ground that he had contravened his obligations under Law No 31/82 by pursuing a professional activity in Italy on a permanent basis in chambers set up by himself whilst using the title avvocato.

10. On 14 October 1991 Mr Gebhard applied to the Milan Bar Council to be entered on the roll of members of the Bar. **His application was based on Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration** (OJ 1989 L 19, p. 16) and on his having completed a

ten-year training period in Italy. It does not appear that the Bar Council has taken any formal decision on that application.

11. The disciplinary proceedings opened on 19 September 1991 were completed by a decision of 30 December 1992 by which the Milan Bar Council imposed on Mr Gebhard the sanction of suspension from pursuing his professional activity (sospensione dell' esercizio dell' attività professionale) for six months.

12. Mr Gebhard appealed against that decision to the Consiglio Nazionale Forense, making it clear, however, that he was also appealing against the implied rejection of his application to be entered on the roll. In particular, he argued in his appeal that Directive 77/249 entitled him to pursue his professional activities from his own chambers in Milan.

13. Directive 77/249 applies to the activities of lawyers pursued by way of provision of services. It states that a lawyer providing services is to adopt the professional title used in the Member State from which he comes, expressed in the language or one of the languages of that State, with an indication of the professional organization by which he is authorized to practise or the court of law before which he is entitled to practise pursuant to the laws of that State (Article 3).

14. The directive draws a **distinction between (a) activities relating to the representation of a client in legal proceedings or before public authorities and (b) all other activities.**

15. **In pursuing activities relating to representation, the lawyer must observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes (Article 4(2)). As far as the pursuit of all other activities is concerned, the lawyer remains subject to the conditions and rules of professional conduct of the Member State from which he comes,** without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and secrecy (Article 4(4)).

16. Article 4(1) of Directive 77/249 provides that "Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State."

17. Directive 77/249 was implemented in Italy by Law No 31/82, Article 2 of which provides as follows:

"Nationals of Member States authorized to practise as lawyers in the Member State from which they come] shall be permitted to pursue lawyers' professional activities on a temporary basis (con carattere di temporaneità) in contentious and non-contentious matters in accordance with the detailed rules laid down in this title.

For the purpose of the pursuit of the professional activities referred to in the preceding paragraph, the establishment on the territory of the Republic either of chambers or of a principal or branch office is not permitted."

18. In those circumstances, the Consiglio Nazionale Forense stayed the proceedings and referred questions to the Court for a preliminary ruling:

> "(a) as to whether Article 2 of Law No 31 of 9 February 1982 on freedom for lawyers who are nationals of the Member States of the European Community to provide services (enacted in implementation of Council Directive 77/249/EEC of 22 March 1977) which prohibits 'the establishment on the territory of the Republic either of chambers or of a principal or branch office' , is compatible with the rules laid down by that directive, given that in the directive there is no reference to the fact that the possibility of opening an office could be interpreted as reflecting a practitioner' s intention to carry on his activities, not on a temporary or occasional basis, but on a regular basis;
>
> (b) as to the criteria to be applied in assessing whether activities are of a temporary nature, with respect to the continuous and repetitive nature of the services provided by lawyers practising under the system referred to in the abovementioned directive of 22 March 1977."

(...)

20. The situation of a Community national who moves to another Member State of the Community in order there to pursue an economic activity is governed by the chapter of the Treaty on the free movement of workers, or the chapter on the right of establishment or the chapter on services, these being mutually exclusive.

21. Since the questions referred are concerned essentially with **the concepts of "establishment" and "provision of services"**, the chapter on workers can be disregarded as having no bearing on those questions.

22. **The provisions of the chapter on services are subordinate to those of the chapter on the right of establishment** in so far, first, as the wording of the first paragraph of Article 59 assumes that **the provider and the recipient of the service concerned are "established" in two different Member States** and, second, as the first paragraph of Article 60 specifies **that the provisions relating to services apply only if those relating to the right of establishment do not apply.** It is therefore necessary to consider the scope of the concept of "establishment".

23. The right of establishment, provided for in Articles 52 to 58 of the Treaty, **is granted both to legal persons within the meaning of Article 58 and to natural persons who are nationals of a Member State of the Community.** Subject to the exceptions and conditions laid down, **it allows all types of self-employed activity to be taken up and pursued on the territory of any other Member State, undertakings to be formed and operated, and agencies, branches or subsidiaries to be set up.**

(...)

25. **The concept of establishment** within the meaning of the Treaty is therefore a **very broad one**, allowing a Community national to participate, **on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom,** so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons (see, to this effect, Case 2/74 Reyners v Belgium [1974] ECR 631, paragraph 21).

26. In contrast, **where the provider of services moves to another Member State,** the provisions of the chapter on services, in particular the third paragraph of Article 60, envisage that **he is to pursue his activity there on a temporary basis.**

27. As the Advocate General has pointed out, **the temporary nature of the activities** in question has to be determined in the light, not only of the duration of the provision of the service, but also **of its regularity, periodicity or continuity. The fact that the provision of services is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State** (including an office, chambers or consulting rooms) **in so far as such infrastructure is necessary for the purposes of performing the services in question.**

28. However, that situation is to be distinguished from that of **Mr Gebhard** who, as a national of a Member State, **pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base** to, amongst others, nationals of that State. Such a national comes under the provisions of the chapter relating to the right of establishment and not those of the chapter relating to services.

(...)

31. **The provisions relating to the right of establishment cover the taking-up and pursuit of activities** (see, in particular, the judgment in Reyners, paragraphs 46 and 47). Membership of a professional body may be a condition of taking up and pursuit of particular activities. It cannot itself be constitutive of establishment.

32. It follows that the question whether it is possible for a national of a Member State to exercise his right of establishment and the conditions for exercise of that right must be determined in the light of the activities which he intends to pursue on the territory of the host Member State.

33. Under the terms of the second paragraph of Article 52, freedom of establishment is to be exercised under the conditions laid down for its own nationals by the law of the country where establishment is affected.

34. In the event that the specific activities in question are not subject to any rules in the host State, so that a national of that Member State does not have to have any specific qualification in order to pursue them, a national of any other Member State is entitled to establish himself on the territory of the first State and pursue those activities there.

35. However, the taking-up and pursuit of certain self-employed activities may be conditional on complying with certain provisions laid down by law, regulation or administrative action justified by the general good, such as rules relating to organization, qualifications, professional ethics, supervision and liability (see Case C-71/76 Thieffry v Conseil de l' Ordre des Avocats à la Cour de Paris [1977] ECR 765, paragraph 12). Such provisions may stipulate in particular that pursuit of a particular activity is restricted to holders of a diploma, certificate or other evidence of formal qualifications, to persons belonging to a professional body or to persons subject to particular rules or supervision, as the case may be. They may also lay down the conditions for the use of professional titles, such as avvocato.

36. Where the taking-up or pursuit of a specific activity is subject to such conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with them. It is for this reason that Article 57 provides that the Council is to issue directives, such as Directive 89/48, for the mutual recognition of diplomas, certificates and other evidence of formal qualifications or, as the case may be, for the coordination of national provisions concerning the taking-up and pursuit of activities as self-employed persons.

37. It follows, however, from the Court' s case-law **that national measures liable to hinder or make less attractive the exercise of fundamental freedoms** guaranteed by the Treaty must fulfil four conditions: **they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it** (see Case C-19/92 Kraus v Land Baden-Wuerttemberg [1993] ECR I-1663, paragraph 32).

38. Likewise, in applying their national provisions, Member States may not ignore the knowledge and qualifications already acquired by the person concerned in another Member State (see Case C-340/89 Vlassopoulou v Ministerium fuer Justiz, Bundes- und Europaangelegenheiten Baden-Wuerttemberg [1991] ECR I-2357, paragraph 15). Consequently, they must take account of the equivalence of diplomas (see the judgment in Thieffry, paragraphs 19 and 27) and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned (see the judgment in Vlassopoulou, paragraph 16).

39. Accordingly, it should be stated in reply to the questions from the Consiglio Nazionale Forense that:

- **the temporary nature of the provision of services**, envisaged in the third paragraph of Article 60 of the EC Treaty, **is to be determined in the light of its duration, regularity, periodicity and continuity**;
- **the provider of services**, within the meaning of the Treaty, **may equip himself in the host Member State with the infrastructure** necessary for the purposes of performing the services in question;
- a national of a Member State who pursues a professional activity on a **stable and continuous basis** in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State comes under the provisions of the chapter relating to the right of establishment and not those of the chapter relating to services;
- the possibility for a national of a Member State to exercise his right of establishment, and the conditions for his exercise of that right, must be determined in the light of the activities which he intends to pursue on the territory of the host Member State;
- where the taking-up of a specific activity is not subject to any rules in the host State, a national of any other Member State will be entitled to establish himself on the territory of the first State and pursue that activity there. On the other hand, where the taking-up or the pursuit of a specific activity is subject to certain conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with them;
- however, **national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it;**
- likewise, Member States must take account of the equivalence of diplomas and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned.

(...)

Operative part

THE COURT, in answer to the questions referred to it by the Consiglio Nazionale Forense, by order of 16 December 1993, hereby rules:

1. **The temporary nature of the provision of services, envisaged in the third paragraph of Article 60 of the EC Treaty, is to be determined in the light of its duration, regularity, periodicity and continuity.**
2. **The provider of services, within the meaning of the Treaty, may equip himself in the host Member State with the infrastructure necessary for the purposes of performing the services in question.**
3. **A national of a Member State who pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State comes under the provisions of the chapter relating to the right of establishment and not those of the chapter relating to services.**
4. **The possibility for a national of a Member State to exercise his right of establishment, and the conditions for the exercise of that right, must be determined in the light of the activities which he intends to pursue on the territory of the host Member State.**
5. **Where the taking-up of a specific activity is not subject to any rules in the host State, a national of any other Member State will be entitled to establish himself on the territory of the first State and pursue that activity there. On the other hand, where the taking-up or the pursuit of a specific activity is subject to certain conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with them.**
6. **National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.**

7. **Member States must take account of the equivalence of diplomas and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned.**

13. FREEDOM OF ESTABLISHMENT – CROSS-BORDER TRANSFER OF THE SEAT

Case 81/87 The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc. Judgment of the Court of 27 September 1988. ECR 1988 Page 05483

(Daily Mail)

SUMMARY

A subject matter of deciding was the cross-border transfer of the seat of the company Daily Mail in the United Kingdom to the Netherlands while maintaining a legal personality in the United Kingdom. A reason for transfering the company seat was reducing the tax burden on companies in the home Member State.

KEYWORDS

Free movement of persons - Freedom of establishment - Company incorporated under the legislation of a Member State and having its registered office there - Right to transfer the central management and control of a company to another Member State

OVERVIEW

A subject matter of deciding was the cross-border transfer of the seat of the company Daily Mail in the United Kingdom to the Netherlands while maintaining a legal personality in the United Kingdom. A reason for transfering the company seat was reducing the tax burden on companies in the home Member State. Such transfer was in accordance with the regulations of the home Member State (the United Kingdom) which provided for a possibility for companies with a registered office in the United

Kingdom to set its management bodies outside the UK without thereby losing its legal personality or cease to be considered as company incorporated in UK. However, a change in place of residence would have implications on the tax liabilities of the company as it would have been a change in the tax system that applies to the company's liabilities. By transfering the seat, the company would become a Dutch taxpayer and would cease to be a taxpayer in the United Kingdom. Legislation of the home Member State of such a possibility was conditional on obtaining the prior consent of the Ministry of Finance of the United Kingdom. Since the competent ministry refused to give such consent, the question is whether the transfer of central management of the company is conditional on awarding the prior approval of the competent authority or the assignment of prior approval is contrary to the provisions on freedom of establishment guaranteed in the EC Treaty.

Specifically, on the basis of national legislation relating to the taxation, the company was considered as a resident of the United Kingdom in terms of taxation applicable in the place where there is a central place of management of the company. In this way, the English law allows the company to apply the English law and at the same time to be a Dutch resident, considering that according to the English law, from which the transfer of the management company does not lead to termination of the company. From the above it is clear that in this case the tax liability is applied by the national law to the place where the management of the company is, while the company law applied is determined by the registered seat of the company.

The ECJ judgment states that the purpose of the provisions relating to establishment is to ensure that foreign individuals and companies in another Member State are treated the same way as nationals of that Member State. It is alleged that the companies' creation of national law "which actually affirms the right of Member States to its regulations governing the establishment and organization of companies. At the same time, the provisions of the EEC Treaty (now TFEU) do not allow the home Member State to designate measures that would have an impact on the prevention of its nationals or companies incorporated under its law to be established in another Member State. The Court points out that the English law, in accordance with the provisions of the EC Treaty, allows the establishment of branches, subsidiaries, agencies or companies in another Member State. Particularly important was the conclusion of the court in which the right of Member States to their national regulations governing the

establishment and organization of companies was emphasized, as well as their obligation to allow the existence of different legal rules in relation to the company seat and its transmission. The judgment emphasized that the application of EC Treaty (now TFEU) required the European institutions to resolve differences in national legislation by passing special legislation or international agreements since the differences were not resolved by the provisions of the EC Treaty (now TFEU) relating to the establishment. This thesis of the European Court opens doors of opportunity in planning issues of cross-border transmission of establishment by adopting regulations or directives. By interpreting the provisions of the EC Treaty (now TFEU) on the freedom of establishment, the European Court points out that they can not be interpreted in such a way that a company incorporated under the law of a Member State entitles the transfer of central management to another Member State while retaining the status of a company incorporated under the regulations of home country members.

TEXT OF THE JUDGMENT

1. By an order of 6 February 1987, which was received at the Court on 19 March 1987, the High Court of Justice, Queen' s Bench Division, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Articles 52 and 58 of the Treaty and Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (Official Journal 1973, L 172, p . 14).

2. Those questions arose in proceedings between Daily Mail and General Trust PLC, the applicant in the main proceedings (hereinafter refered to as "the applicant"), and HM Treasury for a declaration, inter alia, that the applicant is not required to obtain consent under United Kingdom tax legislation in order to cease to be resident in the United Kingdom for the purpose of establishing its residence in the Netherlands.

3. It is apparent from the documents before the Court that under United Kingdom company legislation a company such as the defendant, incorporated under that legislation and having its registered office in the United Kingdom, may establish its

central management and control outside the United Kingdom without losing legal personality or ceasing to be a company incorporated in the United Kingdom.

4. According to the relevant United Kingdom tax legislation, only companies which are resident for tax purposes in the United Kingdom are as a rule liable to United Kingdom corporation tax. A company is resident for tax purposes in the place in which its central management and control is located.

5. Section 482 (1) (a) of the Income and Corporation Taxes Act 1970 prohibits companies resident for tax purposes in the United Kingdom from ceasing to be so resident without the consent of the Treasury.

6. In 1984 the applicant, which is an investment holding company, applied for consent under the abovementioned national provision in order to transfer its central management and control to the Netherlands, whose legislation does not prevent foreign companies from establishing their central management there; the company proposed, in particular, to hold board meetings and to rent offices for its management in the Netherlands. Without waiting for that consent, it subsequently decided to open an investment management office in the Netherlands with a view to providing services to third parties.

7. It is common ground that **the principal reason for the proposed transfer of central management and control was to enable the applicant, after establishing its residence for tax purposes in the Netherlands, to sell a significant part of its non-permanent assets and to use the proceeds of that sale to buy its own shares, without having to pay the tax to which such transactions would make it liable under United Kingdom tax law, in regard in particular to the substantial capital gains on the assets which the applicant proposed to sell. After establishing its central management and control in the Netherlands the applicant would be subject to Netherlands corporation tax**, but the transactions envisaged would be taxed only on the basis of any capital gains which accrued after the transfer of its residence for tax purposes.

8. After a long period of negotiations with the Treasury, which proposed that it should sell at least part of the assets before transferring its residence for tax purposes out of the United Kingdom, the applicant initiated proceedings before the High Court of Justice, Queen's Bench Division, in 1986. Before that court, it claimed that Articles 52

and 58 of the EEC Treaty gave it the right to transfer its central management and control to another Member State without prior consent or the right to obtain such consent unconditionally.

9. In order to resolve that dispute, the national court stayed the proceedings and referred the following questions to the Court of Justice:

(1) Do Articles 52 and 58 of the EEC Treaty preclude a Member State from prohibiting a body corporate with its central management and control in that Member State from transferring without prior consent or approval that central management and control to another Member State in one or both of the following circumstances, namely where :
    (a) payment of tax upon profits or gains which have already arisen may be avoided;
    (b) were the company to transfer its central management and control, tax that might have become chargeable had the company retained its central management and control in that Member State would be avoided?
(2) Does Council Directive 73/148/EEC give a right to a corporate body with its central management and control in a Member State to transfer without prior consent or approval its central management and control to another Member State in the conditions set out in Question 1? If so, are the relevant provisions directly applicable in this case?
(3) If such prior consent or approval may be required, is a Member State entitled to refuse consent on the grounds set out in Question 1?
(4) What difference does it make, if any, that under the relevant law of the Member State no consent is required in the case of a change of residence to another Member State of an individual or firm?

10. Reference is made to the Report for the Hearing for a fuller account of the facts and the background to the main proceedings, the provisions of national legislation at issue and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

11. The first question seeks in essence to determine **whether Articles 52 and 58 of the Treaty give a company incorporated under the legislation of a Member State and having its registered office there the right to transfer its central management and**

control to another Member State. If that is so, the national court goes on to ask whether the Member State of origin can make that right subject to the consent of national authorities, the grant of which is linked to the company's tax position.

12. With regard to the first part of the question, the applicant claims essentially that **Article 58 of the Treaty expressly confers on the companies to which it applies the same right of primary establishment in another Member State as is conferred on natural persons by Article 52.** The transfer of the central management and control of a company to another Member State amounts to the establishment of the company in that Member State because the company is locating its centre of decision-making there, which constitutes genuine and effective economic activity.

13. The United Kingdom argues essentially that the provisions of the Treaty do not give companies a general right to move their central management and control from one Member State to another. The fact that the central management and control of a company is located in a Member State does not itself necessarily imply any genuine and effective economic activity on the territory of that Member State and cannot therefore be regarded as establishment within the meaning of Article 52 of the Treaty.

14. The Commission emphasizes first of all that in the present state of Community law, **the conditions under which a company may transfer its central management and control from one Member State to another are still governed by the national law of the State in which it is incorporated and of the State to which it wishes to move.** In that regard, the Commission **refers to the differences between the national systems of company law.** Some of them permit the transfer of the central management and control of a company and, among those, certain attach no legal consequences to such a transfer, even in regard to taxation. Under other systems, the transfer of the management or the centre of decision-making of a company out of the Member State in which it is incorporated results in the loss of legal personality. However, **all the systems permit the winding-up of a company in one Member State and its reincorporation in another.** The Commission considers that where the transfer of central management and control is possible under national legislation, the right to transfer it to another Member State is a right protected by Article 52 of the Treaty.

15. Faced with those diverging opinions, the Court must first point out, as it has done on numerous occasions, **that freedom of establishment constitutes one of the**

fundamental principles of the Community and that the provisions of the Treaty guaranteeing that freedom have been directly applicable since the end of the transitional period. Those provisions secure the right of establishment in another Member State not merely for Community nationals but also for the companies referred to in Article 58.

16. Even though **those provisions are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58.** As the Commission rightly observed, the rights guaranteed by Articles 52 et seq. would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State. In regard to natural persons, the right to leave their territory for that purpose is expressly provided for in Directive 73/148, which is the subject of the second question referred to the Court.

17. In the case of a company, **the right of establishment is generally exercised by the setting-up of agencies, branches or subsidiaries, as is expressly provided for in the second sentence of the first paragraph of Article 52.** Indeed, that is the form of establishment in which the applicant engaged in this case by opening an investment management office in the Netherlands. A company may also exercise its right of establishment by taking part in the incorporation of a company in another Member State, and in that regard Article 221 of the Treaty ensures that it will receive the same treatment as nationals of that Member State as regards participation in the capital of the new company.

18. The provision of United Kingdom law at issue in the main proceedings imposes no restriction on transactions such as those described above. Nor does it stand in the way of a partial or total transfer of the activities of a company incorporated in the United Kingdom to a company newly incorporated in another Member State, if necessary after winding-up and, consequently, the settlement of the tax position of the United Kingdom company. It requires Treasury consent only where such a company seeks to transfer its central management and control out of the United Kingdom while maintaining its legal personality and its status as a United Kingdom company.

19. In that regard it should be borne in mind that, **unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law.** They exist only by virtue of the varying national legislation which determines their incorporation and functioning.

20. As the Commission has emphasized**, the legislation of the Member States varies widely in regard to both the factor providing a connection to the national territory required for the incorporation of a company and the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor.** Certain States require that not merely the registered office but also the real head office, that is to say the central administration of the company, should be situated on their territory, and the removal of the central administration from that territory thus presupposes the winding-up of the company with all the consequences that winding-up entails in company law and tax law. The legislation of other States permits companies to transfer their central administration to a foreign country but certain of them, such as the United Kingdom, make that right subject to certain restrictions, and the legal consequences of a transfer, particularly in regard to taxation, vary from one Member State to another .

21. **The Treaty has taken account of that variety in national legislation.** In defining, in Article 58, **the companies which enjoy the right of establishment, the Treaty places on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company.** Moreover, Article 220 of the Treaty provides for the conclusion, so far as is necessary, of agreements between the Member States with a view to securing inter alia the retention of legal personality in the event of transfer of the registered office of companies from one country to another . No convention in this area has yet come into force.

22. It should be added that none of the directives on the coordination of company law adopted under Article 54 (3) (g) of the Treaty deal with the differences at issue here.

23. It must therefore be held that the Treaty regards the differences in national legislation concerning the required connecting factor and the question whether - and if so how - the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules **concerning the right of establishment but must be dealt with by future legislation or conventions.**

24. Under those circumstances, **Articles 52 and 58 of the Treaty cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State.**

25. The answer to the first part of the first question must therefore be that in the present state of Community law **Articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State.**

(...)

27. In its second question, the national court asks whether the provisions of Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services give a company a right to transfer its central management and control to another Member State.

28. It need merely be pointed out in that regard that the title and provisions of that **directive refer solely to the movement and residence of natural persons and that the provisions of the directive cannot, by their nature, be applied by analogy to legal persons.**

29. The answer to the second question must therefore be that Directive 73/148, properly construed, confers no right on a company to transfer its central management and control to another Member State .

Operative part

THE COURT, in answer to the questions referred to it by the High Court of Justice, Queen's Bench Division, by order of 6 February 1987, hereby rules :

1. **In the present state of Community law, Articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State .**

2. Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States

14. FREEDOM OF ESTABLISHMENT - ESTABLISHMENT OF A BRANCH

Case C-212/97 Centros Ltd and Erhvervs- og Selskabsstyrelsen, Judgment of the Court 9 March 1999 ECR [1999] Page I-1459

(Centros)

SUMMARY

The Centros Judgement is the first in a series of judgments that followed (Überseering and Inspire Art), which states that the Member States' obligation is to recognize companies that are legally established in another Member State.

KEY WORDS

Freedom of establishment, Establishment of a branch by a company not carrying on any actual business, Circumvention of national law, Refusal to register.

OVERVIEW

Unlike the judgment in Daily Mail in which the restriction of freedom of establishment was determined by the home Member State, in the judgments that followed (in the cases of Centros, Überseering and Inspire Art) the restrictions were determined by the Member State of destination.

A subject to the Centros decision was the implementation of the freedom of establishment while founding the company in a Member State with a more favorable arrangement to avoid more restrictive national regulations which determined the request for payment of a higher share capital during the establishment of the company.

This would gain the ability for a subsequent establishment of a branch in state with more restrictive rules as "foreign" companies.

Danish citizens established the company Centros Ltd. in the United Kingdom in order to avoid the requirement for payment of share capital required for the establishment of the company in Denmark. The company had its registered office in the UK, achieving its primary establishment although operating entirely in Denmark. The Centros Ltd. has sought for registration of a branch in Denmark and was rejected on the grounds that it never performed any activity in the United Kingdom, and the request in fact aimed at the establishment and creation of primary establishment, not the registration of a branch, given that it overrode the national, Danish, regulations, especially those related to the payment of the minimum share capital.

The Centros Ltd. referred to the exercise of freedom of secondary establishment noting that the company was legally incorporated in the United Kingdom and it is authorized to establish a branch in Denmark. Both the United Kingdom and Denmark have applied the theory of registered office.

The European Court points out that the provisions on freedom of establishment aim to enable companies that are established in accordance with the law of a Member State and having their registered office, central administration or the central place of business within the Union to carry out activities in another Member State through subsidiaries, affiliates or agencies. The purpose of the provisions on freedom of establishment just allows the establishment of companies in other Member States and the activity anywhere in the whole Union. It did not abuse the freedom of establishment if nationals of a Member State establish a company in another Member State whose regulations are less restrictive, and then set up a branch of that company in another Member State. The fact that the company is not active in one Member State is not sufficient to prove the existence of abuse or fraudulent conduct of the company or its founders.

Denmark has justified the restriction and high payment amount of the share capital as creditor protection society and the need to prevent fraudulent bankruptcies. The European Court notes that refusing to register the branch is not a creditor protection, given that the same can be achieved with less restrictive measures. Reasons for creditor protection can not be an excuse, given that the creditors know that the company is incorporated in accordance with English law, which applies to it and that the company

performs activities in the United Kingdom, that its subsidiary is registered in Denmark and the Danish creditors would be equally at risk. Since the company is incorporated in the United Kingdom, the Danish creditors have information that the company applies different rules than it would apply in Denmark and thus certain instruments of community law have been set up for their protection.

The Centros Judgement is the first in a series of judgments that followed (Überseering and Inspire Art), which states that the Member States' obligation is to recognize companies that are legally established in another Member State. The Court in its judgment in the case of Centros does not recall the judgment in Daily Mail and General Trust, and in this case favors the right of the Union in relation to national law, stressing that the establishment of the company in a country that has less restrictive legislation does not abuse, but represents rather the realization of the freedom of establishment. Since in the case of Centros the home country did not apply the theory of the real seat, the Court did not explicitly state that the theory was contrary to the law of the Union. By broadly interpreting this judgment, it can be concluded that the founders may decide to create a society in countries that offer them a legal framework that reduce their costs regardless of where the assets of the company, employees or investors are.

TEXT OF THE JUDGMENT

1. By order of 3 June 1997, received at the Court on 5 June 1997 the Højesteret referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 52, 56 and 58 of the Treaty.

2. That question was raised in proceedings between **Centros Ltd, a private limited company registered on 18 May 1992 in England and Wales, and Erhvervs- og Selskabsstyrelsen (the Trade and Companies Board, 'the Board') which comes under the Danish Department of Trade, concerning that authority's refusal to register a branch of Centros in Denmark.**

3. It is clear from the documents in the main proceedings that **Centros has never traded since its formation. Since United Kingdom law imposes no requirement on limited liability companies as to the provision for and the paying-up of a minimum share capital, Centros's share capital, which amounts to GBP 100, has been neither paid up nor made available to the company. It is divided into two**

shares held by Mr and Mrs Bryde, Danish nationals residing in Denmark. Mrs Bryde is the director of Centros, whose registered office is situated in the United Kingdom, at the home of a friend of Mr Bryde.

4. Under Danish law, **Centros, as a 'private limited company', is regarded as a foreign limited liability company. The rules governing the registration of branches ('filialer') of such companies are laid down by the Anpartsselskabslov (Law on private limited companies).**

5. In particular, Article 117 of the Law provides:

"1. Private limited companies and foreign companies having a similar legal form which are established in one Member State of the European Communities may do business in Denmark through a branch."

6. During the summer of 1992, Mrs Bryde requested the Board to register a branch of Centros in Denmark.

7. The Board **refused that registration on the grounds, *inter alia*, that Centros, which does not trade in the United Kingdom, was in fact seeking to establish in Denmark, not a branch, but a principal establishment, by circumventing the national rules concerning, in particular, the paying-up of minimum capital fixed at DKK 200 000** by Law No 886 of 21 December 1991.

8. Centros brought an action before the Østre Landsret against the refusal of the Board to effect that registration.

9. The Østre Landsret upheld the arguments of the Board in a judgment of 8 September 1995, whereupon Centros appealed to the Højesteret.

10. In those proceedings, Centros maintains that it satisfies the conditions imposed by the law on private limited companies relating to the registration of a branch of a foreign company. Since it was lawfully formed in the United Kingdom, it is entitled to set up a branch in Denmark pursuant to Article 52, read in conjunction with Article 58, of the Treaty.

11. **According to Centros the fact that it has never traded since its formation in the United Kingdom has no bearing on its right to freedom of establishment.** In its judgment in Case 79/85 *Segers* v *Bedrijfsvereniging voor Bank-en Verzekeringswegen, Groothandel en Vrije Beroepen* [1986] ECR 2375, the Court ruled that Articles 52 and

58 of the Treaty prohibited the competent authorities of a Member State from excluding the director of a company from a national sickness insurance scheme solely on the ground that the company had its registered office in another Member State, even though it did not conduct any business there.

12. The Board submits that its refusal to grant registration is not contrary to Articles 52 and 58 of the Treaty since the establishment of a branch in Denmark would seem to be a way of avoiding the national rules on the provision for and the paying-up of minimum share capital. Furthermore, its refusal to register is justified by the need to protect private or public creditors and other contracting parties and also by the need to endeavour to prevent fraudulent insolvencies.

13. In those circumstances, the Højesteret has decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

"Is it compatible with Article 52 of the EC Treaty, in conjunction with Articles 56 and 58 thereof, to refuse registration of a branch of a company which has its registered office in another Member State and has been lawfully founded with company capital of GBP 100 (approximately DKK 1 000) and exists in conformity with the legislation of that Member State, where the company does not itself carry on any business but it is desired to set up the branch in order to carry on the entire business in the country in which the branch is established, and where, instead of incorporating a company in the latter Member State, that procedure must beregarded as having been employed in order to avoid paying up company capital of not less than DKK 200 000 (at present DKR 125 000)?"

14. By its question, the national court is in substance asking **whether it is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the legislation of another Member State in which it has its registered office but where it does not carry on any business when the purpose of the branch is to enable the company concerned to carry on its entire business in the State in which that branch is to be set up, while avoiding the formation of a company in that State, thus evading application of the rules governing the formation of companies which are, in that State, more restrictive so far as minimum paid-up share capital is concerned.**

15. As a preliminary point, it should be made clear that the Board does not in any way deny that **a joint stock or private limited company with its registered office in another Member State may carry on business in Denmark through a branch. It therefore agrees, as a general rule, to register in Denmark a branch of a company formed in accordance with the law of another Member State. In particular, it has added that, if Centros had conducted any business in England and Wales, the Board would have agreed to register its branch in Denmark.**

16. According to the Danish Government, Article 52 of the Treaty is not applicable in the case in the main proceedings, since the situation is purely internal to Denmark. Mr and Mrs Bryde, Danish nationals, have formed a company in the United Kingdom which does not carry on any actual business there with the sole purpose of carrying on business in Denmark through a branch and thus of avoiding application of Danish legislation on the formation of private limited companies. It considers that in such circumstances **the formation by nationals of one Member State of a company in another Member State does not amount to a relevant external element in the light of Community law and, in particular, freedom of establishment.**

17. In this respect, it should be noted that **a situation in which a company formed in accordance with the law of a Member State in which it has its registered office desires to set up a branch in another Member State falls within the scope of Community law.** In that regard, it is immaterial that the company was formed in the first Member State only for the purpose of establishing itself in the second, where its main, or indeed entire, business is to be conducted (see, to this effect, *Segers*paragraph 16).

18. That Mrs and Mrs Bryde formed the company Centros in the United Kingdom for the purpose of avoiding Danish legislation requiring that a minimum amount of share capital be paid up has not been denied either in the written observations or at the hearing. That does not, however, mean that the **formation by that British company of a branch in Denmark is not covered by freedom of establishment forthe purposes of Article 52 and 58 of the Treaty.** The question of the application of those articles of the Treaty is different from the question whether or not a Member State may adopt measures in order to prevent attempts by certain of its nationals to evade domestic legislation by having recourse to the possibilities offered by the Treaty.

19. As to the question whether, as Mr and Mrs Bryde claim, **the refusal to register in Denmark a branch of their company formed in accordance with the law of another Member State in which its has its registered office constitutes an obstacle to freedom of establishment,** it must be borne in mind that **that freedom, conferred by Article 52 of the Treaty on Community nationals, includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as are laid down by the law of the Member State of establishment for its own nationals.** Furthermore, under Article 58 of the Treaty **companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are to be treated in the same way as natural persons who are nationals of Member States.**

20. The immediate consequence of this is that **those companies are entitled to carry on their business in another Member State through an agency, branch or subsidiary.** The location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular State in the same way as does nationality in the case of a natural person (see, to that effect, *Segers*, paragraph 13, Case 270/83 *Commission* v *France*[1986] ECR 273, paragraph 18, Case C-330/91 *Commerzbank* [1993] ECR I-4017, paragraph 13, and Case C-264/96 *ICI* [1998] I-4695, paragraph 20).

21. Where it is the practice of a Member State, in certain circumstances, to refuse to register a branch of a company having its registered office in another Member State, the result is that companies formed in accordance with the law of that other Member State are prevented from exercising the freedom of establishment conferred on them by Articles 52 and 58 of the Treaty.

22. Consequently, that practice constitutes an obstacle to the exercise of the freedoms guaranteed by those provisions.

23. According to the Danish authorities, however, Mr and Mrs Bryde cannot rely on those provisions, since the sole purpose of the company formation which they have in mind is to circumvent the application of the national law governing formation of private limited companies and therefore constitutes abuse of the freedom of establishment. In their submission, the Kingdom of Denmark is therefore entitled to take steps to prevent such abuse by refusing to register the branch.

24. It is true that according to the case-law of the Court a **Member State is entitled to take measures designed to prevent certain of its nationals from attempting, undercover of the rights created by the Treaty,** improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law (see, in particular, regarding freedom to supply services, Case 33/74 *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid*[1974] ECR 1299, paragraph 13, Case C-148/91 *Veronica Omroep Organisatie* v *Commissariaat voor de Media* [1993] ECR I-487, paragraph 12, and Case C-23/93 *TV 10* v *Commissariaat voor de Media* [1994] ECR I-4795, paragraph 21; regarding freedom of establishment, Case 115/78 *Knoors* [1979] ECR 399, paragraph 25, and Case C-61/89 *Bouchoucha* [1990] ECR I-3551, paragraph 14; regarding the free movement of goods, Case 229/83 *Leclerc and Others* v *'Au Blé Vert' and Others*[1985] ECR 1, paragraph 27; regarding social security, Case C-206/94 *Brennet* v *Paletta* [1996] ECR I-2357, *'Paletta II*', paragraph 24; regarding freedom of movement for workers, Case 39/86 *Lair* v *Universität Hannover* [1988] ECR 3161, paragraph 43; regarding the common agricultural policy, Case C-8/92 *General Milk Products* v *Hauptzollamt Hamburg-Jonas* [1993] ECR I-779, paragraph 21, and regarding company law, Case C-367/96 *Kefalas and Others* v *Greece* [1998] ECR I-2843, paragraph 20).

25. However, although, in such circumstances, the national courts may, case by case, take account - on the basis of objective evidence - of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions (*Paletta II*, paragraph 25).

26. In the present case, the provisions of national law, application of which the parties concerned have sought to avoid, are rules governing the formation of companies and not rules concerning the carrying on of certain trades, professions or businesses. The provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary.

27. That being so, the fact that a national of **a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment** guaranteed by the Treaty.

28. In this connection, the fact that company law is not completely harmonised in the Community is of little consequence. Moreover, it is always open to the Council, onthe basis of the powers conferred upon it by Article 54(3)(g) of the EC Treaty, to achieve complete harmonisation.

29. In addition, it is clear from paragraph 16 of *Segers* that the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment.

30. Accordingly, the refusal of a Member State to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office on the grounds that the branch is intended to enable the company to carry on all its economic activity in the host State, with the result that the secondary establishment escapes national rules on the provision for and the paying-up of a minimum capital, is incompatible with Articles 52 and 58 of the Treaty, in so far as it prevents any exercise of the right freely to set up a secondary establishment which Articles 52 and 58 are specifically intended to guarantee.

31. The final question to be considered is whether the national practice in question might not be justified for the reasons put forward by the Danish authorities.

32. Referring both to Article 56 of the Treaty and to the case-law of the Court **on imperative requirements in the general interest,** the Board argues that the requirement that private limited companies provide **for and pay up a minimum share capital pursues a dual objective: first, to reinforce the financial soundness of those companies in order to protect public creditors against the risk of seeing the public**

debts owing to them become irrecoverable since, unlike private creditors, they cannot secure those debts by means of guarantees and, second, and more generally, to protect all creditors, whether public or private, by anticipating the risk of fraudulent bankruptcy due to the insolvency of companies whose initial capitalisation was inadequate.

33. The Board adds that there is no less restrictive means of attaining this dual objective. The other way of protecting creditors, namely by introducing rules making it possible for shareholders to incur personal liability, under certain conditions, would be more restrictive than the requirement to provide for and pay up a minimum share capital.

34. It should be observed, first, that the reasons put forward do not fall within the ambit of Article 56 of the Treaty. Next, it should be borne in mind that, according to the Court's case-law, **national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must notgo beyond what is necessary in order to attain it** (see Case C-19/92 *Kraus* v *Land Baden-Württemberg* [1993] ECR I-1663, paragraph 32, and Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, paragraph 37).

35. Those conditions are not fulfilled in the case in the main proceedings. **First, the practice in question is not such as to attain the objective of protecting creditors which it purports to pursue since, if the company concerned had conducted business in the United Kingdom, its branch would have been registered in Denmark, even though Danish creditors might have been equally exposed to risk.**

36. Since the company concerned in the main proceedings holds itself out as a company governed by the law of England and Wales and not as a company governed by Danish law, its creditors are on notice that it is covered by laws different from those which govern the formation of private limited companies in Denmark and they can refer to certain rules of Community law which protect them, such as the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11), and the

Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ 1989 L 395, p. 36).

37. Second, contrary to the arguments of the Danish authorities, it is possible to adopt measures which are less restrictive, or which interfere less with fundamental freedoms, by, for example, making it possible in law for public creditors to obtain the necessary guarantees.

38. Lastly, the fact that a Member State may not refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office does not preclude that first State from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of the company, to evade their obligations towards private or public creditors established on the territory of a Member State concerned. In any event, combating fraud cannot justify a practice of refusing to register a branch of a company which has its registered office in another Member State.

39. The answer to the question referred must therefore be **that it is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in theState in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital.** That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.

(...)

Operative part

THE COURT, in answer to the question referred to it by the Højesteret by order of 3 June 1997, hereby rules:

It is contrary to Articles 52 and 58 of the EC Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.

15. FREEDOM OF ESTABLISHMENT – RECOGNITION OF LEGAL PERSONALITY

Case C-208/00 Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC), Judgment of the Court of 5 November 2002, Reports of Cases 2002 I-09919

(Überseering)

SUMMARY

The Überseering judgment referred to the issue of legal recognition and processing capabilities in the Member State of destination of a company established in the Netherlands that was active and had its actual seat in Germany. The question referred to the ECJ referred to the theory of the actual seat of whether it was in compliance with the freedom of establishment or not.

KEY WORDS

Articles 43 EC and 48 EC - Company formed in accordance with the law of a Member State and having its registered office there - Company exercising its freedom of establishment in another Member State - Company deemed to have transferred its actual centre of administration to the host Member State under the law of that State - Non-recognition by the host Member State of the company's legal capacity and its capacity to be a party to legal proceedings - Restriction on freedom of establishment – Justification

OVERVIEW

The Überseering judgment referred to the issue of legal recognition and processing capabilities in the Member State of destination of a company established in the Netherlands that was active and had its actual seat in Germany. The company Überseering duly incorporated in the Netherlands, where the founding theory was applied, transferred its actual centre of administration to Germany as two German nationals residing in Germany acquired all the shares of the company. Since the Überseering company was incorporated under the Dutch law, the German courts have applied the theory of the actual seat, refusing to recognize its legal capacity. The application of German law would require the re-establishment of the company in Germany, so that it becomes a German company and to acquire the processing capability. Unlike the logic in the Centros case, which required to keep the status of the company defined under the Dutch law and on the basis that it may invoke the provisions of the EC Treaty on freedom of establishment, the attitude of the German court was quite the opposite. Germany is using the theory of actual seat keen to ensure that companies do not avoid its restrictive regulations on the way to establish itself as a foreign company, and that actually operate in Germany.

The question referred to the ECJ to the theory of the actual seat is in compliance with the freedom of establishment. The ECJ, building its decision on the Centros judgment, rules that a company duly established in one Member State, in which it has its registered office, is deemed to transfer its actual centre of administration to another Member State on the basis of shares transfer to the nationals of that Member State. The rules applicable by the Member State of destination are included in the scope of the Treaty provisions relating to freedom of establishment, thus we can conclude that the recognition of the company of the Member State in which the company wants to be established is a precondition of freedom of establishment. The case may be illustrated by a situation in which it is considered that the company established in Member State B, where it has its registered office, moves its actual centre of administrationto the State A. The provisions of Articles 43 and 48 of EC Treaty do not allow a Member State to apply its own law in a way that it does not recognize the legal process and the ability of the company before its national courts. Given that the Überseering case decided on an existing company that has changed its registered office and thus kept its

"nationality" in the home Member State, the case is considered to be the continuation of the judgment in Centros case.

This case relates to the recognition by a Member State of companies established in another Member State, where the company denies legal capacity in the Member State of destination. As regarding the justification for any restrictions that apply to the overriding reasons such as the protection of creditors, minority shareholders, employees and even the taxation authorities, the ECJ points out that these restrictions cannot justify a denial of legal personality, and thus the procedural ability to participate in the proceedings before court in the country other than the country in which the company is legally established would constitute a negation of the freedom of establishment guaranteed by the Treaty .

In conclusion, by confirming its decision in the Centros case, the ECJ states that the application of the theory of actual seat leads to denial of the right of establishment in the case when there is no recognition of legal capacity of a company incorporated under the national law of a Member State of destination, and gives priority to the free movement of companies guaranteed by TEC (now TFEU) in relation to the preservation of and compliance with national rules. However, both the verdicts in Centros and Überseering case leave open the question of the scope of right of Member States to apply the national law on pseudo foreign companies.

TEXT OF THE JUDGMENT

1. By order of 30 March 2000, received at the Court Registry on 25 May 2000, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 43 EC and 48 EC.

2. Those questions were raised in proceedings between (i) **Überseering BV ('Überseering'), a company incorporated under Netherlands law and registered on 22 August 1990 in the register of companies of Amsterdam and Haarlem, and (ii) Nordic Construction Company Baumanagement GmbH ('NCC'), a company established in the Federal Republic of Germany**, concerning damages for defective work carried out in Germany by NCC on behalf of Überseering.

3. The Zivilprozessordnung (German Code of Civil Procedure) provides that an action brought by a party which does not have the capacity to bring legal proceedings must be dismissed as inadmissible. Under Paragraph 50(1) of the Zivilprozessordnung any person, including a company, having legal capacity has the capacity to be a party to legal proceedings: legal capacity is defined as the capacity to enjoy rights and to be the subject of obligations.

4. According to the settled case-law of the Bundesgerichtshof, which is approved by most German legal commentators, a company's legal capacity is determined by reference to the law applicable in the place where its actual centre of administration is established ('Sitztheorie' or company seat principle), as opposed to the 'Gründungstheorie' or incorporation principle, by virtue of which legal capacity is determined in accordance with the law of the State in which the company was incorporated. That rule also applies where a company has been validly incorporated in another State and has subsequently transferred its actual centre of administration to Germany.

5. Since a company's legal capacity is determined by reference to German law, it cannot enjoy rights or be the subject of obligations or be a party to legal proceedings unless it has been reincorporated in Germany in such a way as to acquire legal capacity under German law.

6. **In October 1990, Überseering acquired a piece of land in Düsseldorf (Germany), which it used for business purposes.** By a project-management contract dated 27 November 1992, Überseering engaged NCC to refurbish a garage and a motel on the site. The contractual obligations were performed but Überseering claimed that the paint work was defective.

7. In December 1994 two German nationals residing in Düsseldorf acquired all the shares in Überseering.

8. Überseering unsuccessfully sought compensation from NCC for the defective work and in 1996 it brought an action before the Landgericht (Regional Court), Düsseldorf, on the basis of its project-management contract with NCC. It claimed the sum of DEM 1 163 657.77, plus interest, in respect of the costs incurred in remedying the alleged defects and consequential damage.

9. The Landgericht dismissed the action. The Oberlandesgericht (Higher Regional Court), Düsseldorf, upheld the decision to dismiss the action. **It found that Überseering had transferred its actual centre of administration to Düsseldorf once its shares had been acquired by two German nationals. The Oberlandesgericht found that, as a company incorporated under Netherlands law, Überseering did not have legal capacity in Germany and, consequently, could not bring legal proceedings there.**

10. Therefore, the Oberlandesgericht held that Überseering's action was inadmissible.

11. Überseering appealed to the Bundesgerichtshof against the judgment of the Oberlandesgericht.

12. It also appears from Überseering's observations that, in parallel with the proceedings currently pending before the Bundesgerichtshof, an action was brought against Überseering before another German court based on certain unspecified provisions of German law. As a result, it was ordered by the Landgericht Düsseldorf to pay architects' fees, apparently because it was entered on 11 September 1991 in the Düsseldorf land registry as owner of the land on which the garage and the motel refurbished by NCC were built.

(...)

15. Second, where the connecting factor is taken to be the place of incorporation, the company's founding members are placed at an advantage, **since they are able, when choosing the place of incorporation, to choose the legal system which suits them best. Therein lies the fundamental weakness of the incorporation principle, which fails to take account of the fact that a company's incorporation and activities also affect the interests of third parties and of the State in which the company has its actual centre of administration, where that is located in a State other than the one in which the company was incorporated.**

16. Third, and by contrast, **where the connecting factor is taken to be the actual centre of administration, that prevents the provisions of company law in the State in which the actual centre of administration is situated, which are intended to protect certain vital interests, from being circumvented by incorporating the company abroad. In the present case, the interests which German law is seeking to safeguard are notably those of the company's creditors:** the legislation relating to

‘Gesellschaften mit beschränkter Haftung (GmbH)’ (limited liability companies under German law) provides such protection by detailed rules on the initial contribution and maintenance of share capital. In the case of related companies, dependent companies and their minority shareholders also need protection. In Germany such protection is provided by rules governing groups of companies or rules providing for financial compensation and indemnification of shareholders who have been put at a disadvantage by agreements whereby one company agrees to manage another or agrees to pay its profits to another company. Finally, the rules on joint management protect the company's employees. The Bundesgerichtshof points out that not all the Member States have comparable rules.

(...)

18. It points out, in that regard, that in Case 81/87 *The Queen* v *Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust* [1988] ECR 5483 the Court, having stated that companies could exercise their right of establishment by setting up agencies, branches and subsidiaries, or by transferring all their shares to a new company in another Member State, held that, unlike natural persons, companies exist only by virtue of the national legal system which governs their incorporation and operation. It is also apparent from that judgment that the EC Treaty has taken account of the differences in national rules on the conflict of laws and has reserved resolution of the problems associated therewith to future legislation.

19. In Case C-212/97 *Centros* [1999] ECR I-1459, the Court took exception to Danish authority's refusal to register a branch of a company validly incorporated in the United Kingdom. However, the Bundesgerichtshof points out that the company had not transferred its seat, since, from its incorporation, its registered office had been in the United Kingdom, whilst its actual centre of administration had been in Denmark.

20. The Bundesgerichtshof wonders whether, **in view of *Centros*, the Treaty provisions on freedom of establishment preclude, in a situation such as that in point in the main proceedings, application of the rules on conflict of laws in force in the Member State in which the actual centre of administration of a company validly incorporated in another Member State is situated when the consequence of those rules is the refusal to recognise the company's legal capacity and, therefore,**

its capacity to bring legal proceedings in the first Member State to enforce rights under a contract.

(...)

37. First, the Commission argues that **under Article 293 EC entry into negotiations with a view to reducing the discrepancies between national laws regarding the recognition of foreign companies is provided for by that article only 'so far as is necessary'.** If in 1968 there had been a relevant body of case-law, it would have not been necessary to have recourse to Article 293 EC. That explains the decisive importance of the Court's case-law today in establishing the substance and scope of the freedom of establishment conferred on companies by Articles 43 EC and 48 EC.

38. Second, Überseering, the United Kingdom Government, the Commission and the EFTA Surveillance Authority submit that ***Daily Mail and General Trust*** **is irrelevant in the present case.**

39. They argue that, as is apparent from the facts at issue in that judgment, the Court was considering the legal consequences, in the Member State in which a company was incorporated, of transferring the company's actual centre of administration to another Member State: accordingly**, the judgment cannot form a basis for examining the legal consequences, in the host Member State, of such a transfer.**

40. ***Daily Mail and General Trust*** **applies only to the relationship between the Member State of incorporation and the company which wishes to leave that State whilst retaining the legal personality conferred on it by the legislation thereof. Since companies are creatures of national law, they must continue to observe the requirements laid down by the legislation of their State of incorporation.** *Daily Mail and General Trust* therefore formally acknowledges the right of the Member State of incorporation to set rules on the incorporation and legal existence of companies in accordance with its rules of private international law. It does not, in contrast, decide the question whether a company formed under the law of one Member State must be recognised by another Member State.

41. Third, in the submission of Überseering, the United Kingdom Government, the Commission and the EFTA Surveillance Authority, to answer the question raised in this case, **it is appropriate to refer not to *Daily Mail and General Trust* but rather to *Centros,* since the dispute in *Centros* concerned, as in the Überseering case, the**

treatment in the host Member State of a company incorporated under the law of another Member State, which was exercising its right of establishment.

42. They observe that ***Centros*** **concerned a secondary establishment in Denmark, the host Member State, of a company, Centros Ltd, which was validly incorporated in the United Kingdom where it had its registered office but did not carry on business. Centros Ltd wished to set up a branch in Denmark in order to carry on its main business activities there. The Danish authorities did not question the company's existence under English law but denied it the right to exercise its freedom of establishment in Denmark by setting up a branch there, since it was not disputed that that form of secondary establishment was intended to avoid Danish rules on company formation, in particular the rules relating to the paying-up of a minimum share capital.**

43. In *Centros* the Court held that a Member State (the host State) must allow a company validly incorporated in another Member State where it has its registered office to register another establishment (in that case, a branch) in the host State, from which it may develop its entire business. On that basis, the host Member State cannot impose on a company which has been properly formed in another Member State its own substantive company law, in particular the rules on share capital. The Commission submits that the position must be the same where the host Member State invokes its private international law governing companies.

(...)

47. The EFTA Surveillance Authority adds **that freedom of establishment includes not only the right to set up a secondary establishment in another Member State, but also the right, where a company moves its actual centre of administration to another Member State, to retain its original establishment in the Member State of incorporation.** The effect of the provisions of German law being applied in the main proceedings is to turn freedom of establishment into an obligation of establishment if the company's legal capacity, and consequently its capacity to be a party to legal proceedings, are to be preserved. They thus constitute a restriction on the freedom of establishment enshrined in the Treaty. That conclusion does not imply that the Member States do not have the power to establish the connecting factors between a company and their territory but that they must exercise that power consistently with the Treaty.

48. Furthermore, the Netherlands and United Kingdom Governments and the EFTA Surveillance Authority stress the fact that **Überseering did not intend to transfer to Germany its actual centre of administration in the sense contemplated in German law. Überseering maintains that it did not intend to wind up its activities in the Netherlands in order to reincorporate itself in Germany and that it wishes to remain a Netherlands-law limited-liability company (BV).** Furthermore, it is paradoxical that German law should regard it as such for the purpose of legal proceedings brought against it for payment of architects' fees.

(...)

52. *In limine* and contrary to the submissions of both NCC and the German, Spanish and Italian Governments**, the Court must make clear that where a company which is validly incorporated in one Member State ('A') in which it has its registered office is deemed, under the law of a second Member State ('B'), to have moved its actual centre of administration to Member State B following the transfer of all its shares to nationals of that State residing there, the rules which Member State B applies to that company do not, as Community law now stands, fall outside the scope of the Community provisions on freedom of establishment.**

(...)

54. As the Advocate General maintained at point 42 of his Opinion, **Article 293 EC does not constitute a reserve of legislative competence vested in the Member States.** Although Article 293 EC gives Member States the opportunity to enter into negotiations with a view, *inter alia*, to facilitating the resolution of problems arising from the discrepancies between the various laws relating to the mutual recognition of companies and the retention of legal personality in the event of the transfer of their seat from one country to another, it does so solely 'so far as is necessary', that is to say if the provisions of the Treaty do not enable its objectives to be attained.

55. More specifically, it is important to point out that, although the conventions which may be entered into pursuant to Article 293 EC may, like the harmonising directives provided **for in Article 44 EC, facilitate the attainment of freedom of establishment, the exercise of that freedom can none the less not be dependent upon the adoption of such conventions.**

56. In that regard, it must be borne in mind that, as the Court has already had occasion to point out, **the freedom of establishment, conferred by Article 43 EC on Community nationals, includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as are laid down by the law of the Member State of establishment for its own nationals. Furthermore, according to the actual wording of Article 48 EC, 'companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of [the provisions of the Treaty concerning the right of establishment], be treated in the same way as natural persons who are nationals of Member States'.**

57. The immediate consequence of this is that those companies or firms are entitled to carry on their business in another Member State. The location of their registered office, central administration or principal place of business constitutes the connecting factor with the legal system of a particular Member State in the same way as does nationality in the case of a natural person.

58. The Court's reasoning in *Centros* was founded on those premisses (paragraphs 19 and 20).

59. A necessary precondition for the exercise of the freedom of establishment is the recognition of those companies by any Member State in which they wish to establish themselves.

60. Accordingly, **it is not necessary for the Member States to adopt a convention on the mutual recognition of companies in order for companies meeting the conditions set out in Article 48 EC to exercise the freedom of establishment conferred on them by Articles 43 EC and 48 EC, which have been directly applicable since the transitional period came to an end. It follows that no argument that might justify limiting the full effect of those articles can be derived from the fact that no convention on the mutual recognition of companies has as yet been adopted on the basis of Article 293 EC.**

61. Second, it is important to consider the argument based on the decision in *Daily Mail and General Trust*, which was central to the arguments put to the Court. It was cited in order, in some way, to assimilate **the situation in *Daily Mail and General***

***Trust* to the situation which under German law entails the loss of legal capacity and of the capacity to be a party to legal proceedings by a company incorporated under the law of another Member State.**

62. It must be stressed that, **unlike *Daily Mail and General Trust,* which concerned relations between a company and the Member State under whose laws it had been incorporated in a situation where the company wished to transfer its actual centre of administration to another Member State whilst retaining its legal personality in the State of incorporation, the present case concerns the recognition by one Member State of a company incorporated under the law of another Member State, such a company being denied all legal capacity in the host Member State where it takes the view that the company has moved its actual centre of administration to its territory, irrespective of whether in that regard the company actually intended to transfer its seat.**

63. As the Netherlands and United Kingdom Governments and the Commission and the EFTA Surveillance Authority have pointed out, **Überseering never gave any indication that it intended to transfer its seat to Germany.** Its legal existence was never called in question under the law of the State where it was incorporated as a result of all its shares being transferred to persons resident in Germany. In particular, the company was not subject to any winding-up measures under Netherlands law. Under Netherlands law, it did not cease to be validly incorporated.

64. Moreover, even if the dispute before the national court is seen as concerning a transfer of the actual centre of administration from one country to another, the interpretation of *Daily Mail and General Trust* put forward by NCC and the German, Spanish and Italian Governments is incorrect.

65. In that case, *Daily Mail and General Trust Plc*, a company formed in accordance with the law of the United Kingdom and having both its registered office and actual centre of administration there, wished to transfer its centre of administration to another Member State without losing its legal personality or ceasing to be a company incorporated under English law. This required the consent of the competent United Kingdom authorities, which they refused to give. The company initiated proceedings against the authorities before the High Court of Justice, Queen's Bench Division, seeking an order that Articles 52 and 58 of the EEC Treaty gave it the right to transfer

its actual centre of administration to another Member State without prior consent and without loss of its legal personality.

66. Thus, unlike the case before the national court in this instance, *Daily Mail and General Trust* did not concern the way in which one Member State treats a company which is validly incorporated in another Member State and which is exercising its freedom of establishment in the first Member State.

67. Asked by the High Court of Justice whether the Treaty provisions on freedom of establishment conferred on a company the right to transfer its centre of management to another Member State, the Court observed, at paragraph 19 of *Daily Mail and General Trust*, that a company, which is a creature of national law, exists only by virtue of the national legislation which determines its incorporation and functioning.

68. At paragraph 20 of that judgment, the Court pointed out that the legislation of the Member States varies widely in regard both to the factor providing a connection to the national territory required for the incorporation of a company and to the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor.

69. The Court concluded, at paragraph 23 of the judgment, that the Treaty regarded those differences as problems which were not resolved by the Treaty rules concerning freedom of establishment but would have to be dealt with by legislation or conventions, which the Court found had not yet been done.

70. In so doing, the Court confined itself to holding that the question **whether a company formed in accordance with the legislation of one Member State could transfer its registered office or its actual centre of administration to another Member State without losing its legal personality under the law of the Member State of incorporation and, in certain circumstances, the rules relating to that transfer were determined by the national law in accordance with which the company had been incorporated.** It concluded that a Member State was able, in the case of a company incorporated under its law, to make the company's right to retain its legal personality under the law of that State subject to restrictions on the transfer of the company's actual centre of administration to a foreign country.

71. By contrast, the Court did not rule on the question whether where, as here, a company incorporated under the law of a Member State (‘A’) is found, under the law

of another Member State ('B'), to have moved its actual centre of administration to Member State B, that State is entitled to refuse to recognise the legal personality which the company enjoys under the law of its State of incorporation ('A').

72. Thus, despite the general terms in which paragraph 23 of *Daily Mail and General Trust* is cast, **the Court did not intend to recognise a Member State as having the power, *vis-à-vis* companies validly incorporated in other Member States and found by it to have transferred their seat to its territory, to subject those companies' effective exercise in its territory of the freedom of establishment to compliance with its domestic company law.**

73. There are, therefore, **no grounds for concluding from *Daily Mail and General Trust* that, where a company formed in accordance with the law of one Member State and with legal personality in that State exercises its freedom of establishment in another Member State, the question of recognition of its legal capacity and its capacity to be a party to legal proceedings in the Member State of establishment falls outside the scope of the Treaty provisions on freedom of establishment, even when the company is found, under the law of the Member State of establishment, to have moved its actual centre of administration to that State.**

(...)

75. It is apparent from the wording of the General Programme that it requires a **real and continuous link solely in a case in which the company has nothing but its registered office within the Community.** That is unquestionably not the position in the case of Überseering whose registered office and actual centre of administration are within the Community. As regards the situation just described, the Court found, at paragraph 19 of *Centros*, that under Article 58 of the Treaty companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are to be treated in the same way as natural persons who are nationals of Member States.

76. It follows from the foregoing considerations that Überseering is entitled **to rely on the principle of freedom of establishment** in order to contest the refusal of German law to regard it as a legal person with the capacity to be a party to legal proceedings.

77. Furthermore, it must be borne in mind that **as a general rule the acquisition by one or more natural persons residing in a Member State of shares in a company incorporated and established in another Member State is covered by the Treaty provisions on the free movement of capital, provided that the shareholding does not confer on those natural persons definite influence over the company's decisions and does not allow them to determine its activities. By contrast, where the acquisition involves all the shares in a company having its registered office in another Member State and the shareholding confers a definite influence over the company's decisions and allows the shareholders to determine its activities, it is the Treaty provisions on freedom of establishment which apply** (see, to that effect, Case C-251/98 *Baars* [2000] ECR I-2787, paragraphs 21 and 22).

As to whether there is a restriction on freedom of establishment

78. The Court must next consider **whether the refusal by the German courts to recognise the legal capacity and capacity to be a party to legal proceedings of a company validly incorporated under the law of another Member State constitutes a restriction on freedom of establishment.**

79. In that regard, in a situation such as that in point in the main proceedings, a company validly incorporated under the law of, and having its registered office in, a Member State other than the Federal Republic of Germany has under German law no alternative to reincorporation in Germany if it wishes to enforce before a German court its rights under a contract entered into with a company incorporated under German law.

80. Überseering, which is validly incorporated in the Netherlands and has its registered office there, is entitled under Articles 43 EC and 48 EC to exercise its freedom of establishment in Germany as a company incorporated under Netherlands law. It is of little significance in that regard that, after the company was formed, all its shares were acquired by German nationals residing in Germany, since that has not caused Überseering to cease to be a legal person under Netherlands law.

81. Indeed, its very existence is inseparable from its status as a company incorporated under Netherlands law since, as the Court has observed, a company exists only by virtue of the national legislation which determines its incorporation and functioning

(see, to that effect, *Daily Mail and General Trust*, paragraph 19). **The requirement of reincorporation of the same company in Germany is therefore tantamount to outright negation of freedom of establishment.**

82. In those circumstances, the refusal by a host Member State ('B') to recognise the legal capacity of a company formed in accordance with the law of another Member State ('A') in which it has its registered office on the ground, in particular, that the company moved its actual centre of administration to Member State B following the acquisition of all its shares by nationals of that State residing there, with the result that the company cannot, in Member State B, bring legal proceedings to defend rights under a contract unless it is reincorporated under the law of Member State B, constitutes a restriction on freedom of establishment which is, in principle, incompatible with Articles 43 EC and 48 EC.

As to whether the restriction on freedom of establishment is justified

83. Finally, it is appropriate to determine **whether such a restriction on freedom of establishment can be justified on the grounds advanced by the national court and by the German Government.**

84. The German Government has argued in the alternative, should the Court find that application of the company seat principle entails a restriction on freedom of establishment that the restriction applies without discrimination, is justified by overriding requirements relating to the general interest and is proportionate to the objectives pursued.

85. In the German Government's submission, the lack of discrimination arises from the fact that the rules of law proceeding from the company seat principle apply not only to any foreign company which establishes itself in Germany by moving its actual centre of administration there but also to companies incorporated under German law which transfer their actual centre of administration out of Germany.

86. **As regards the overriding requirements relating to the general interest put forward in order to justify the alleged restriction,** the German Government maintains, first, that in other spheres, secondary Community law assumes that the

administrative head office and the registered office are identical. Community law has thus recognised the merits, in principle, of a single registered and administrative office.

87. In the German Government's submission, the German rules of private international **company law enhance legal certainty and creditor protection. There is no harmonisation at Community level of the rules for protecting the share capital of limited liability companies and such companies are subject in Member States other than the Federal Republic of Germany to requirements which are in some respects much less strict.** The company seat principle as applied by German law ensures that a company whose principal place of business is in Germany has a fixed minimum share capital, something which is instrumental in protecting parties with whom it enters into contracts and its creditors. That also prevents distortions of competition since all companies whose principal place of business is in Germany are subject to the same legal requirements.

88. The German Government submits that further justification is provided by the **protection of minority shareholders.** In the absence of a Community standard for the protection of minority-shareholders, a Member State must be able to apply to any company whose principal place of business is within its territory the same legal requirements for the protection of minority shareholders.

89. Application of the company seat principle is also **justified by employee protection through the joint management of undertakings** on conditions determined by law. The German Government argues that the transfer to Germany of the actual centre of administration of a company incorporated under the law of another Member State could, if the company continued to be a company incorporated under that law, involve a risk of circumvention of the German provisions on joint management, which allow the employees, in certain circumstances, to be represented on the company's supervisory board. Companies in other Member States do not always have such a body.

90. Finally, **any restriction resulting from the application of the company seat principle can be justified on fiscal grounds.** The incorporation principle, to a greater extent than the company seat principle, enables companies to be created which have two places of residence and which are, as a result, subject to taxation without limits in at least two Member States. There is a risk that such companies might claim and be granted tax advantages simultaneously in several Member States. By way of example,

the German Government mentions the cross-border offsetting of losses against profits between undertakings within the same group.

(...)

92. It is not inconceivable that overriding requirements relating to the general interest, such as the protection of the interests of creditors, minority shareholders, employees and even the taxation authorities, may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment.

93. Such objectives cannot, however, justify denying the legal capacity and, consequently, the capacity to be a party to legal proceedings of a company properly incorporated in another Member State in which it has its registered office. Such a measure is tantamount to an outright negation of the freedom of establishment conferred on companies by Articles 43 EC and 48 EC.

94. Accordingly, the answer to the first question must be that, where a company formed in accordance with the law of a Member State ('A') in which it has its registered office is deemed, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B.

95. It follows from the answer to the first question referred to the Court for a preliminary ruling that, where a company formed in accordance with the law of a Member State ('A') in which it has its registered office exercises its freedom of establishment in another Member State ('B'), Articles 43 EC and 48 EC require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation ('A').

(...)

Operative part

THE COURT, in answer to the questions referred to it by the Bundesgerichtshof by order of 30 March 2000, hereby rules:

1. **Where a company formed in accordance with the law of a Member State ('A') in which it has its registered office is deemed, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B.**
2. **Where a company formed in accordance with the law of a Member State ('A') in which it has its registered office exercises its freedom of establishment in another Member State ('B'), Articles 43 EC and 48 EC require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation ('A').**

16. FREEDOM OF ESTABLISHMENT – CROSS-BORDER TRANSFER OF THE COMPANY SEAT

Case C-210/06 Cartesio Oktató és Szolgáltató bt 16 December 2008

(Cartesio)

SUMMARY

In Cartesio case the ECJ ruled that Articles 43 and 48 EC Treaty were to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.

KEY WORDS

Transfer of a company seat to a Member State other than the Member State of incorporation, Freedom of establishment, Articles 43 EC and 48 EC

OVERVIEW

According to the ECJ, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.

In accordance with Article 48 EC, in the absence of a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, the question whether Article 43 EC applies to a company which seeks to rely on the

fundamental freedom enshrined in that article – like the question whether a natural person is a national of a Member State, and hence entitled to enjoy that freedom – is a preliminary matter which, as Community law now stands, can only be resolved by the applicable national law. In consequence, the question whether the company is faced with a restriction on the freedom of establishment, within the meaning of Article 43 EC, can arise only if it has been established, in the light of the conditions laid down in Article 48 EC, that the company actually has a right to that freedom.

Thus a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.

Moreover, the legislation and agreements in the field of company law envisaged in Articles 44(2)(g) EC and 293 EC have not yet addressed the differences between the legislation of various Member States concerning the place of connection of the companies and thus have not yet brought the end to them. Although certain regulations, such as Regulation No 2137/85 on the European Economic Interest Grouping, Regulation No 2157/2001 on the Statute for a European company and Regulation No 1435/2003 on the Statute for the European Cooperative Society, adopted on the basis of Article 308 EC, in fact lay down a set of rules under which it is possible for new legal entities which they establish to transfer their registered office (*siège statutaire*) and, accordingly, also their real seat (*siège réel*) – both of which must, in effect, be situated in the same Member State – to another Member State without it being compulsory to wind up the original legal person or to create a new legal person, such a transfer nevertheless necessarily entails a change as regards the national law applicable to the entity making such a transfer.

Where the company merely wishes to transfer its real seat from one Member State to another, while remaining a company governed by national law, hence without any change as to the national law applicable, the application mutatis mutandis of those regulations cannot in any event lead to the predicted result in such circumstances.

TEXT OF THE JUDGMENT

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

(…)

21. Cartesio was formed on 20 May 2004 as a 'betéti társaság' (limited partnership) under Hungarian law. Its seat was established in Baja (Hungary). Cartesio was registered in the commercial register on 11 June 2004.

22. **Cartesio has two partners both of whom are natural persons resident in Hungary and holding Hungarian nationality: a limited partner, whose only commitment is to invest capital, and an unlimited partner, with unlimited liability for the company's debts.** Cartesio is active, inter alia, in the field of human resources, secretarial activities, translation, teaching and training.

23. On 11 November 2005, Cartesio filed an application with the Bács-Kiskun Megyei Bíróság (Regional Court, Bács-Kiskun), sitting as a cégbíróság (commercial court), for registration of the transfer of its seat to Gallarate (Italy) and, in consequence, for amendment of the entry regarding Cartesio's company seat in the commercial register.

24. By decision of 24 January 2006, that application was rejected on the ground that the **Hungarian law in force did not allow a company incorporated in Hungary to transfer its seat abroad while continuing to be subject to Hungarian law as its personal law.**

25. Cartesio lodged an appeal against that decision with the Szegedi Ítélőtábla (Regional Court of Appeal, Szeged).

26. Relying on the judgment in Case C-411/03 *SEVIC Systems* [2005] ECR I-10805, Cartesio claimed before the Szegedi Ítélőtábla that, to the extent that Hungarian law draws a distinction between commercial companies according to the Member State in which they have their seat, that law is contrary to Articles 43 EC and 48 EC. It follows from those articles that Hungarian law cannot require Hungarian companies to choose to establish their seat in Hungary.

(…)

34. As regards the merits of the case before it, the Szegedi Ítélőtábla, referring to the judgment in Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, notes that the **freedom of establishment laid down in Articles 43 EC and 48 EC does not include the right, for a company incorporated under the legislation of a Member State and registered therein, to transfer its central administration, and thus its principal place of business, to another Member State whilst retaining its legal personality and nationality of origin**, should the competent authorities object to this.

35. However, according to the Szegedi Ítélőtábla, this principle may have been further refined in the later case-law of the Court.

36. In that regard, the Szegedi Ítélőtábla points out that, according to the case-law of the Court, **all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment constitute a restriction on that freedom**, and it refers in that regard, inter alia, to Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraphs 11 and 12).

37. The Szegedi Ítélőtábla moreover points out that, in *SEVIC Systems*, the Court ruled that **Articles 43 EC and 48 EC preclude registration in the national commercial register of the merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company from being refused in general in a Member State where one of the two companies is established in another Member State, whereas such registration is possible, on compliance with certain conditions, where the two companies participating in the merger are both established in the territory of the first Member State.**

38. Moreover, it is settled case-law of the Court that national laws cannot differentiate between companies according to the nationality of the person seeking their registration in the commercial register.

39. Lastly, the Szegedi Ítélőtábla states that Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) (OJ 1985 L 199, p. 1) and Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ 2001 L 294, p. 1) lay down, for the forms of Community undertaking which they introduce, more flexible and less costly provisions which enable those undertakings to transfer their seat or establishment from one Member State to another without first going into liquidation.

(…)

47. In that regard, it should be pointed out, first, that it is apparent from the order for reference as a whole that the fourth question relates not to the transfer of the registered office of the company concerned in the main **proceedings but to the transfer of its 'real seat'.**

48. As stated in the order for reference, it follows from the Hungarian legislation on company registration that, **for the purposes of applying that legislation, a company's seat is defined as the place where it has its central administration.**

49. Moreover, the referring court placed the case before it in the context of the situation at issue in *Daily Mail and General Trust*, which it describes as relating to a company, incorporated in accordance with the legislation of a Member State and registered therein, wishing to transfer its central administration, and thus its principal place of business, to another Member State whilst retaining its legal personality and nationality of origin, where the competent authorities object to this. More specifically, the referring court asks whether the principle laid down in that judgment – **that Articles 43 EC and 48 EC do not confer on companies the right to transfer their central administration in such a way, whilst retaining their legal personality as conferred on them in the State under whose laws they were incorporated – has been further refined in the later case-law of the Court.**

(…)

99. By its fourth question, the referring court essentially asks **whether Articles 43 EC and 48 EC are to be interpreted as precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.**

100. It is clear from the order for **reference that Cartesio – a company which was incorporated in accordance with Hungarian legislation and which, at the time of its incorporation, established its seat in Hungary – transferred its seat to Italy but wished to retain its status as a company governed by Hungarian law.**

101. Under the Hungarian Law on the commercial register, the seat of a company governed by Hungarian law is to be the place where its central administration is situated.

102. The referring court states that the application filed by Cartesio for amendment of the entry in the commercial register regarding its company seat was rejected by the court responsible for maintaining that register on the ground that, under Hungarian law, a company incorporated in Hungary may not transfer its seat, as defined by the Law on the commercial register, abroad while continuing to be subject to Hungarian law as the law governing its articles of association.

103. Such a transfer would require, first, that the company cease to exist and, then, that the company reincorporate itself in compliance with the law of the country where it wishes to establish its new seat.

104. In that regard, **the Court observed in paragraph 19 of *Daily Mail and General Trust* that companies are creatures of national law and exist only by virtue of the national legislation which determines its incorporation and functioning.**

105. In paragraph 20 of *Daily Mail and General Trust*, **the Court stated that the legislation of the Member States varies widely in regard to both the factor providing a connection to the national territory required for the incorporation of a company and the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor. Certain States require that not merely the registered office but also the real seat (*siège réel*) – that is to say, the central administration of the company – should be situated in their territory, and the removal of the central administration from that territory thus presupposes the winding-up of the company with all the consequences that winding-up entails under company law. The legislation of other States permits companies to transfer their central administration to a foreign country but certain of them make that right subject to certain restrictions, and the legal consequences of a transfer vary from one Member State to another.**

106. The Court added, in paragraph 21 of *Daily Mail and General Trust*, that the EEC Treaty had taken account of that variety in national legislation. In defining, in Article 58 of that Treaty (later Article 58 of the EC Treaty, now Article 48 EC), the companies which enjoy the right of establishment, the EEC Treaty placed on the same footing, as

connecting factors, the registered office, central administration and principal place of business of a company.

107. In Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 70, the Court, whilst confirming those dicta, inferred from them that the question **whether a company formed in accordance with the legislation of one Member State can transfer its registered office or its actual centre of administration to another Member State without losing its legal personality under the law of the Member State of incorporation, and, in certain circumstances, the rules relating to that transfer, are determined by the national law in accordance with which the company was incorporated. The Court concluded that a Member State is able, in the case of a company incorporated under its law, to make the company's right to retain its legal personality under the law of that Member State subject to restrictions on the transfer to a foreign country of the company's actual centre of administration.**

108. It should be pointed out, moreover, that the Court also reached that conclusion on the basis of the wording of Article 58 of the EEC Treaty. In defining, in that article, **the companies which enjoy the right of establishment, the EEC Treaty regarded the differences in the legislation of the various Member States both as regards the required connecting factor for companies subject to that legislation and as regards the question whether — and, if so, how — the registered office (*siège statutaire*) or real seat (*siège réel*) of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment, but which must be dealt with by future legislation or conventions** (see, to that effect, *Daily Mail and General Trust*, paragraphs 21 to 23, and *Überseering*, paragraph 69).

109. Consequently, in accordance with Article 48 EC, in **the absence of a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company,** the question whether Article 43 EC applies to a company which seeks to rely on the fundamental freedom enshrined in that article – like the question whether a natural person is a national of a Member State, hence entitled to enjoy that freedom – is a preliminary matter which, as Community law now stands, can only be resolved by the applicable national law. In consequence, **the**

question whether the company is faced with a restriction on the freedom of establishment, within the meaning of Article 43 EC, can arise only if it has been established, in the light of the conditions laid down in Article 48 EC, that the company actually has a right to that freedom.

110. Thus a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. **That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.**

111. Nevertheless, **the situation where the seat of a company incorporated under the law of one Member State is transferred to another Member State with no change as regards the law which governs that company falls to be distinguished from the situation where a company governed by the law of one Member State moves to another Member State with an attendant change as regards the national law applicable, since in the latter situation the company is converted into a form of company which is governed by the law of the Member State to which it has moved.**

112. In fact, in that latter case, the power referred to in paragraph 110 above, far from implying that national legislation on the incorporation and winding-up of companies enjoys any form of immunity from the rules of the EC Treaty on freedom of establishment, cannot, in particular, justify the Member State of incorporation, by requiring the winding-up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member State, to the extent that it is permitted under that law to do so.

113. **Such a barrier to the actual conversion of such a company, without prior winding-up or liquidation, into a company governed by the law of the Member State to which it wishes to relocate constitutes a restriction on the freedom of establishment of the company concerned which, unless it serves overriding**

requirements in the public interest, is prohibited under Article 43 EC (see to that effect, inter alia, *CaixaBank France*, paragraphs 11 and 17).

114. It should also be noted that, following the judgments in *Daily Mail and General Trust* and *Überseering*, the developments in the field of company law envisaged in Articles 44(2)(g) EC and 293 EC, respectively, as pursued by means of legislation and agreements, have not as yet addressed the differences, referred to in those judgments, between the legislation of the various Member States and, accordingly, have not yet eradicated those differences.

115. The Commission maintains, however, **that the absence of Community legislation in this field** – noted by the Court in paragraph 23 of *Daily Mail and General Trust* – **was remedied by the Community rules, governing the transfer of the company seat to another Member State, laid down in regulations such as Regulation No 2137/85 on the EEIG and Regulation No 2157/2001 on the SE or, moreover, Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European cooperative society (SCE)** (OJ 2003 L 207, p. 1), as well as by the Hungarian legislation adopted subsequent to those regulations.

116. The Commission argues that those rules may – and should – be applied mutatis mutandis to the cross-border transfer of the real seat of a company incorporated under the law of a Member State.

117. In that regard, it should be noted that although those regulations, adopted on the basis of Article 308 EC, in fact lay down a set of rules under **which it is possible for the new legal entities which they establish to transfer their registered office (*siège statutaire*) and, accordingly, also their real seat (*siège réel*) – both of which must, in effect, be situated in the same Member State – to another Member State without it being compulsory to wind up the original legal person or to create a new legal person, such a transfer nevertheless necessarily entails a change as regards the national law applicable to the entity making such a transfer.**

118. That is clear, for example, in the case of a European company, from Articles 7 to 9(1)(c)(ii) of Regulation No 2157/2001.

119. As it is, in the case before the referring court, Cartesio merely wishes to transfer its real seat from Hungary to Italy, while remaining a company governed by Hungarian law, hence without any change as to the national law applicable.

120. Accordingly, the application mutatis mutandis of the Community legislation to which the Commission refers – even if it were to govern the cross-border transfer of the seat of a company governed by the law of a Member State – cannot in any event lead to the predicted result in circumstances such as those of the case before the referring court.

121. Further, as regards the implications of *SEVIC Systems* **for the principle established in *Daily Mail and General Trust* and *Überseering*, it should be pointed out that those judgments do not relate to the same problem and that, consequently, *SEVIC Systems* cannot be said to have qualified the scope of *Daily Mail and General Trust* or *Überseering*.**

122. The case which gave rise to the judgment in *SEVIC Systems* concerned the recognition, in the Member State of incorporation of a company, of an establishment operation carried out by that company in another Member State by means of a cross-border merger, which is a situation fundamentally different from the circumstances at issue in the case which gave rise to the judgment in *Daily Mail and General Trust*, but similar to the situations considered in other judgments of the Court (see Case C-212/97 *Centros* [1999] ECR I-1459; *Überseering*; and Case C-167/01 *InspireArt* [2003] ECR I-10155).

123. In such situations, the issue which must first be decided is not the question, referred to in paragraph 109 above, **whether the company concerned may be regarded as a company which possesses the nationality of the Member State under whose legislation it was incorporated but, rather, the question whether or not that company – which, it is common ground, is a company governed by the law of a Member State – is faced with a restriction in the exercise of its right of establishment in another Member State.**

124. In the light of all the foregoing, the answer to the fourth question must be that, as Community law now stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.

(…)

Operative part

THE COURT, hereby rules:

1. **A court such as the referring court, hearing an appeal against a decision of a lower court, responsible for maintaining the commercial register, rejecting an application for amendment of information entered in that register, must be classified as a court or tribunal which is entitled to make a reference for a preliminary ruling under Article 234 EC, regardless of the fact that neither the decision of the lower court nor the consideration of the appeal by the referring court takes place in the context of *inter partes* proceedings.**
2. **A court such as the referring court, whose decisions in disputes such as that in the main proceedings may be appealed on points of law, cannot be classified as a court or tribunal against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC.**
3. **Where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred on any national court or tribunal by that provision of the Treaty to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.**
4. **As Community law now stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.**

17. FREEDOM OF ESTABLISHMENT – CROSS-BORDER CONVERSION OF THE COMPANY

Case C-378/10 VALE Építési kft Judgment of the Court (Third Chamber) 12 July 2012

(VALE)

SUMMARY

As regarding the seat transfer, the ECJ ruled that Articles 49 TFEU and 54 TFEU must have been interpreted as precluding the national legislation which enables companies established under the national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company.

KEYWORDS

Articles 49 TFEU and 54 TFEU, Freedom of establishment, Principles of equivalence and effectiveness, Cross-border conversion, Refusal to add to register.

OVERVIEW

The case concerned the Italian company VALE Constructioni incorporated in the commercial register in Rome, Italy in 2000. On 3 February 2006, the VALE Constructioni applied to be deleted from that register and as a reason for deletion was its wish to transfer the company seat and business to Hungary and to discontinue further business in Italy. On 13 February 2006, the company was removed from the Italian commercial register, in which it was noted that "the company had moved to Hungary". Once the company had been removed from the register, the director of

VALE Constructioni and another natural person incorporated the VALE Építési. The representative of VALE Építési requested from the Hungarian commercial court to register the company in the Hungarian commercial register, together with the entry stating that VALE Constructioni was the predecessor in law of VALE Építési. However, that application was rejected by the commercial court on the ground that the company incorporated and registered in Italy could not transfer its seat to Hungary and could not be registered in the Hungarian commercial register as the predecessor in law of a Hungarian company. Under the Italian law, it is possible for a company to convert into a company established under the foreign law. Under the Hungarian law, only companies incorporated under the law of Hungary are allowed to convert. When analyzing the VALE case, we cannot avoid not to compare it with the Cartesio case. As some authors emphasize, it is in fact the "mirror image" of the Cartesio case (in Cartesio, the ECJ discussed the seat transfer and applicable law – from Italian into Hungarian). A difference from the Cartesio case is that the Hungarian law does not recognize a seat transfer from Hungary to Italy and at the same time a retention of the applicable Hungarian law. The Hungarian Supreme Court, which had to adjudicate on the application to register the VALE Építési, asked the Court of Justice whether the Hungarian legislation, which enables Hungarian companies to convert but prohibits companies established in another Member State from converting to Hungarian companies, was compatible with the principle of the freedom of establishment. In that regard, the Hungarian court seeked to determine whether, when registering a company in the commercial register, a Member State could refuse to register the predecessor of that company originated in another Member State. In its judgement, the Court notes that, first of all, in the absence of a uniform definition of companies in EU law, companies exist only by virtue of the national legislation which determines their incorporation and functioning. Thus, in the context of cross-border company conversions, the host Member State may determine the national law applicable to such operations and apply the provisions of its national law to the conversion of national companies that govern the incorporation and functioning of companies. A Member State may restrict a company governed by its law to retain the status of the company established under the law of that Member State if the company intends to move its seat to another Member State, thereby breaking the connecting factor required under the national law of the Member State of incorporation. However, a Member State of company origin cannot prevent a company from converting itself into a company

governed by the law of the other Member State, to the extent that it is permitted under that law to do so.

However, the ECJ points out that national legislation in this area cannot escape the principle of the freedom of establishment from the outset and, as a result, national provisions which prohibit companies from another Member State from converting, while authorising national companies to do so, must be examined in light of that principle. The power of Member States to define the connecting factor required for a company to be regarded as a company under its national law is not infringed by the obligation under Article 49 and 54 TFEU to permit a cross-border conversion. However, a situation where national law enables national companies to convert, but it does not allow companies incorporated under the law of another Member State to do so, falls within the scope of the provisions of the TFEU regarding the freedom of establishment.

TEXT OF THE JUDGMENT

9. VALE Costruzioni Srl (a limited liability company governed by Italian law) ('VALE Costruzioni'), established on 27 September 2000, was registered in the Rome (Italy) commercial register on 16 November 2000. On 3 February 2006, VALE Costruzioni asked to be removed from that register on the ground that it intended to transfer its seat and its business to Hungary, and to discontinue business in Italy. In accordance with that request, the authority responsible for the commercial register in Rome deleted the entry relating to VALE Costruzioni from the register on 13 February 2006. As is apparent from the file, an entry was made in the register under the heading 'Removal and transfer of seat', stating that 'the company ha[d] moved to Hungary'.

10**. Given that the company established originally in Italy under Italian law had decided to transfer its seat to Hungary and to operate there in accordance with Hungarian law,** on 14 November 2006, **the director of VALE Costruzioni and another natural person adopted, in Rome, the articles of association of VALE Építési kft (a limited liability company governed by Hungarian law) ('VALE Építési'), with a view to registration in the Hungarian commercial register. Moreover, the share capital was paid up to the extent required under Hungarian law for registration.**

11. On 19 January 2007, the representative of VALE Építési applied to the Fővárosi Bíróság (Budapest Metropolitan Court), acting as the Cégbíróság (Commercial Court), to register the company in accordance with Hungarian law. In the application, the representative stated that **VALE Costruzioni was the predecessor in law to VALE Építési.**

12. The Fővárosi Bíróság, acting as a commercial court at first instance, **rejected the application for registration. VALE Építési lodged an appeal before the Fővárosi Ítélőtábla (Regional Court of Appeal of Budapest), which upheld the order rejecting the registration. According to that court, a company which was incorporated and registered in Italy cannot, by virtue of Hungarian company law, transfer its seat to Hungary and cannot obtain registration there in the form requested.** According to that court, under the Hungarian law in force, the only particulars which can be shown in the commercial register are those listed in Paragraphs 24 to 29 of Law V of 2006 and, consequently, a company which is not Hungarian cannot be listed as a predecessor in law.

13. VALE Építési brought an appeal on a point of law before the Legfelsőbb Bíróság (Supreme Court), seeking the annulment of the order rejecting registration and an order that the company be entered in the commercial register. It submits that the contested order infringes Articles 49 TFEU and 54 TFEU, which are directly applicable.

14. In that regard, it states that the order fails to recognise the fundamental difference between the international transfer of the seat of a company without changing the national law which governs that company, on the one hand, and the international conversion of a company, on the other. The Court clearly recognised that difference in Case C-210/06 *Cartesio* [2008] ECR I-9641.

15. The referring court upheld the assessment by the Fővárosi Ítélőtábla and states **that the transfer of the seat of a company governed by the law of another Member State,** in this instance the Italian Republic, entailing the reincorporation of the company in accordance with Hungarian law and a reference to the original Italian company, as requested by VALE Építési, cannot be regarded as a conversion under Hungarian law, since national law on conversions applies only to domestic situations. **However, it harbours doubts as to the compatibility of such legislation with the freedom of establishment, while stressing that the present case differs from the case which gave rise to the judgment in *Cartesio*, since what is at issue here is a**

transfer of the seat of a company with a change of the applicable national law, while maintaining the legal personality of the company, that is to say, a cross-border conversion.

16. In those circumstances, the Legfelsőbb Bíróság decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1) Must the host Member State pay due regard to Articles [49 TFEU and 54 TFEU] when a company established in another Member State (the Member State of origin) transfers its seat to that host Member State and, at the same time and for this purpose, deletes the entry regarding it in the commercial register in the Member State of origin, and the company's owners adopt a new instrument of constitution under the laws of the host Member State, and the company applies for registration in the commercial register of the host Member State under the laws of the host Member State?
2) If the answer to the first question is yes, must Articles [49 TFEU and 54 TFEU] be interpreted in such a case as meaning that they preclude legislation or practices of such a (host) Member State which prohibit a company established lawfully in any other Member State (the Member State of origin) from transferring its seat to the host Member State and continuing to operate under the laws of that State?
3) With regard to the response to the second question, is the basis on which the host Member State prohibits the company from registration of any relevance, specifically:
   - if, in its instrument of constitution adopted in the host Member State, the company designates as its predecessor the company established and deleted from the commercial register in the Member State of origin, and applies for the predecessor to be registered as its own predecessor in the commercial register of the host Member State?
   - in the event of international conversion within the Community, when deciding on the company's application for registration, must the host Member State take into consideration the instrument recording the fact of the transfer of company seat in the commercial register of the Member State of origin, and, if so, to what extent?
4) Is the host Member State entitled to decide on the application for company registration lodged in the host Member State by the company carrying out international conversion within the Community in accordance with the rules of

company law of the host Member State as they relate to the conversion of domestic companies, and to require the company to fulfil all the conditions (e.g. drawing up lists of assets and liabilities and property inventories) laid down by the company law of the host Member State in respect of domestic conversion, or is the host Member State obliged under Articles [49 TFEU and 54 TFEU] to distinguish international conversion within the Community from domestic conversion and, if so, to what extent?

(…)

23. By the first two questions referred, which it is appropriate to examine together, the referring court asks, in essence, **whether Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which, although enabling a company established under national law to convert, does not allow a company established in accordance with the law of another Member State to convert to a company governed by national law by incorporating such a company.**

24. As regards the question whether such legislation falls within the scope of Articles 49 TFEU and 54 TFEU, it should be noted that the Court held, in paragraph 19 of its judgment in Case C-411/03 *SEVIC Systems* [2005] ECR I-10805, **that company transformation operations are, in principle, amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment.**

(…)

27. Indeed, **according to settled case-law, companies are creatures of national law and exist only by virtue of the national legislation which determines their incorporation and functioning** (see Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, paragraph 19, and *Cartesio*, paragraph 104).

28. Similarly, it is not disputed that, **in accordance with Article 54 TFEU, in the absence of a uniform definition in European Union law of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, the question whether Article 49 TFEU applies to a company which seeks to rely on the fundamental freedom enshrined in that article is a preliminary matter which, as European Union law now stands, can be resolved only by the applicable national law** (Case

C-371/10 *National Grid Indus* [2011] ECR I-12273, paragraph 26 and the case-law cited).

29. Finally, **a Member State thus unquestionably has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under its national law and as such capable of enjoying the right of establishment, and the connecting factor required if the company is to be able subsequently to maintain that status** (*Cartesio*, paragraph 110, and *National Grid Indus*, paragraph 27).

30. In the light of the settled case-law set out above, the Court notes that **any obligation, under Articles 49 TFEU and 54 TFEU, to permit a cross-border conversion neither infringes the power, referred to in the preceding paragraph, of the host Member State nor that State's determination of the rules governing the incorporation and functioning of the company resulting from a cross-border conversion.**

31. As is apparent from the case-law set out in paragraph 27 above, **such a company is necessarily governed solely by the national law of the host Member State, which determines the connecting factor required and the rules governing its incorporation and functioning.**

32. It is thus apparent that the expression 'to the extent that it is permitted under that law to do so', in paragraph 112 of *Cartesio*, cannot be understood as seeking to remove, from the outset, the legislation of the host Member State on company conversions from the scope of the provisions of the Treaty on the Functioning of the European Union governing the freedom of establishment, but as reflecting the mere consideration that a company established in accordance with national law exists only on the basis of the national legislation which 'permits' the incorporation of the company, provided the conditions laid down to that effect are satisfied.

33. In the light of the foregoing, the Court concludes that **national legislation which enables national companies to convert, but does not allow companies governed by the law of another Member State to do so, falls within the scope of Articles 49 TFEU and 54 TFEU.**

34. As regards the existence of a restriction on the freedom of establishment, the Court notes **that the concept of establishment within the meaning of the Treaty**

provisions on the freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in the host Member State for an indefinite period. Consequently, it presupposes actual establishment of the company concerned in that State and the pursuit of genuine economic activity there (Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 54 and the case-law cited).

35. In the present case, there has been nothing to suggest in the procedure before the Court that the activities of VALE Építési will be restricted to Italy and that the company will not actually seek to establish itself in Hungary, although that is a matter to be determined by the referring court.

36. The Court considers that, in so far as **the national legislation at issue in the case in the main proceedings provides only for conversion of companies which already have their seat in the Member State concerned, that legislation treats companies differently according to whether the conversion is domestic or of a cross-border nature, which is likely to deter companies which have their seat in another Member State from exercising the freedom of establishment laid down by the Treaty and, therefore, amounts to a restriction within the meaning of Articles 49 TFEU and 54 TFEU** (see, to that effect, *SEVIC Systems*, paragraphs 22 and 23).

37. In so far as concerns **possible justification for the restriction at issue**, it is true that the Court recognised, in paragraph 27 of *SEVIC Systems*, that cross-border mergers pose specific problems, which is also true of cross-border conversions. Indeed, such conversions presuppose the consecutive application of two national laws.

38. The Court notes, at the outset, **that differences in treatment depending on whether a domestic or cross-border conversion is at issue cannot be justified by the absence of rules laid down in secondary European Union law.** Even though such rules are indeed useful for facilitating cross-border conversions, their existence cannot be made a precondition for the implementation of the freedom of establishment laid down in Articles 49 TFEU and 54 TFEU (see, in relation to cross-border mergers, *SEVIC Systems*, paragraph 26).

39. In so far as **concerns justification on the basis of overriding reasons in the public interest, such as protection of the interests of creditors, minority shareholders and employees, the preservation of the effectiveness of fiscal**

supervision and the fairness of commercial transactions, it is established that such reasons may justify a measure restricting the freedom of establishment on the condition that such a **restrictive measure is appropriate for ensuring the attainment of the objectives pursued and does not go beyond what is necessary to attain them** (see *SEVIC Systems*, paragraphs 28 and 29).

40. However, such justification is lacking in the present case. Hungarian law precludes, in a general manner, cross-border conversions, with the result that it prevents such operations from being carried out even if the interests, mentioned in the preceding paragraph, are not threatened. In any event, such a rule goes beyond what is necessary to protect those interests (see, as regards cross-border mergers, *SEVIC Systems*, paragraph 30).

41. In those circumstances, the answer to the first two questions is that **Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company.**

42. By its third and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, **whether Articles 49 TFEU and 54 TFEU must be interpreted, in the context of a cross-border conversion, as meaning that the host Member State is entitled to determine the national law applicable to such an operation and thus to apply the national law provisions on domestic conversions governing the incorporation and functioning of a company, such as the requirements of drawing up lists of assets and liabilities and property inventories.** More specifically, it seeks to determine whether the host Member State may refuse, for cross-border conversions, the designation 'predecessor in law', such a designation in the commercial register being laid down for domestic conversions, and whether and to what extent it is required to take account of documents issued by the authorities of the Member State of origin when registering the company.

43. In that regard, the Court notes, first, that, **since secondary law of the European Union, as it currently stands, does not provide specific rules governing cross-border conversions, the provisions which enable such an operation to be carried out can be found only in national law, namely the law of the Member State of origin of the company seeking to convert and the law of the host Member**

State in accordance with which the company resulting from that conversion will be governed.

44. The implementation of a cross-border conversion requires, as is apparent from paragraph 37 above, the consecutive application of two national laws to that legal operation.

45. Second, although specific rules capable of substituting national provisions cannot be inferred from Articles 49 TFEU and 54 TFEU, the application of such national provisions cannot escape all review in the light of those Treaty provisions.

46. As is apparent from the answer given to the first two questions referred, **Articles 49 TFEU and 54 TFEU require Member States which make provision for the conversion of companies governed by national law to grant that same possibility to companies governed by the law of another Member State which are seeking to convert to companies governed by the law of the first Member State.**

47. Consequently, provisions of national law must be applied consistently with that requirement, in accordance with Articles 49 TFEU and 54 TFEU.

48. In that regard, the Court notes that, in many areas, it is settled case-law that, in the absence of relevant European Union rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under European Union law are a matter for the domestic legal order of each Member State, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness) (see, to that effect, in relation to recovery of undue payments, Joined Cases C-10/97 to C-22/97 *IN. CO. GE.'90 and Others* [1998] ECR I-6307, paragraph 25; in relation to administrative law, Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 28; in relation to the non-contractual liability of a Member State, Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraph 31; and, in relation to the requirement of a certificate for a tax advantage, Case C-262/09 *Meilicke and Others* [2011] ECR I-5669, paragraph 55 and the case-law cited).

49. The Court notes that the logic underlying that case-law is also valid in the legal context of the case in the main proceedings. As in that case-law, the company

concerned enjoys a right granted by the European Union legal order, in this instance, the right to carry out a cross-border conversion, the implementation of which depends, in the absence of European Union rules, on the application of national law.

50. In that regard, the Court notes that the determination, by the host Member State, of the applicable national law enabling the implementation of a cross-border conversion is not, in itself, capable of calling into question its compliance with the obligations resulting from Articles 49 TFEU and 54 TFEU.

51. It is not disputed that, **in the host Member State, a cross-border conversion leads to the incorporation of a company governed by the law of that Member State. Indeed, companies are creatures of national law and exist only by virtue of the national legislation which determines their incorporation and functioning** (see *Daily Mail and General Trust*, paragraph 19, and *Cartesio*, paragraph 104).

52. Thus, in the present case, the application by Hungary of the provisions of its national law on domestic conversions governing the incorporation and functioning of companies, such as the requirements to draw up lists of assets and liabilities and property inventories, cannot be called into question.

(…)

55. Thus, in the context of a domestic conversion, **if the legislation of a Member State requires strict legal and economic continuity between the predecessor company which applied to be converted and the converted successor company, such a requirement may also be imposed in the context of a cross-border conversion.**

56. However, the refusal by the authorities of a Member State, in relation to a cross-border conversion, to record in the commercial register the company of the Member State of origin as the 'predecessor in law' to the converted company is not compatible with the principle of equivalence if, in relation to the registration of domestic conversions, such a record is made of the predecessor company. The Court notes, in that regard, that the recording of the 'predecessor in law' in the commercial register, irrespective of the domestic or cross-border nature of the conversion, may be useful, in particular, to inform the creditors of the company which has converted. Moreover, the Hungarian Government does not raise any argument to justify its recording of the names of only companies which convert domestically.

57. Consequently, **the refusal to record VALE Costruzioni in the Hungarian commercial register as the 'predecessor in law' is incompatible with the principle of equivalence.**

58. Next, so far as concerns the principle of effectiveness, the question arises in this instance as to the account which the host Member State must take, in the context of an application for registration, of documents obtained from the authorities of the Member State of origin. In the context of the dispute in the main proceedings, that question relates to the examination, to be made by the Hungarian authorities, of the issue whether VALE Costruzioni dissociated itself from Italian law, in accordance with the conditions laid down thereunder, while retaining its legal personality, thereby enabling it to convert into a company governed by Hungarian law.

59. Since that examination constitutes the indispensable link between the registration procedure in the Member State of origin and that in the host Member State, the fact remains that, **in the absence of rules under European Union law, the registration procedure in the host Member State is governed by the law of that State, which thus also determines, in principle, the evidence which must be furnished by the company seeking to be converted, certifying that conditions compatible with European Union law and required by the Member State of origin have been satisfied in that regard.**

60. However, a practice on the part of the authorities of the host Member State to refuse, in a general manner, to take account of documents obtained from the authorities of the Member State of origin during the registration procedure is liable to make it impossible for the company requesting to be converted to show that it actually complied with the requirements of the Member State of origin, thereby jeopardising the implementation of the cross-border conversion to which it has committed itself.

61. Consequently, the authorities of the host Member State are required, pursuant to the principle of effectiveness, to take due account, when examining a company's application for registration, of documents obtained from the authorities of the Member State of origin certifying that that company has indeed complied with the conditions laid down in that Member State, provided that those conditions are compatible with European Union law.

62. In the light of the foregoing, the answer to the third and fourth questions referred is that **Articles 49 TFEU and 54 TFEU must be interpreted, in the context of cross-border company conversions, as meaning that the host Member State is entitled to determine the national law applicable to such operations and thus to apply the provisions of its national law on the conversion of national companies governing the incorporation and functioning of companies, such as the requirements relating to the drawing-up of lists of assets and liabilities and property inventories.** However, the principles of equivalence and effectiveness, respectively, preclude the host Member State from

- refusing, in relation to cross-border conversions, to record the company which has applied to convert as the 'predecessor in law', if such a record is made of the predecessor company in the commercial register for domestic conversions, and
- refusing to take due account, when examining a company's application for registration, of documents obtained from the authorities of the Member State of origin.

(…)

Operative part

THE COURT, hereby rules:

1. **Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company.**
2. **Articles 49 TFEU and 54 TFEU must be interpreted, in the context of cross-border company conversions, as meaning that the host Member State is entitled to determine the national law applicable to such operations and thus to apply the provisions of its national law on the conversion of national companies governing the incorporation and functioning of companies, such as the requirements relating to the drawing-up of lists of assets and liabilities and property inventories.**

However, the principles of equivalence and effectiveness, respectively, preclude the host Member State from

- **refusing, in relation to cross-border conversions, to record the company which has applied to convert as the 'predecessor in law', if such a record is made of the predecessor company in the commercial register for domestic conversions, and**
- **refusing to take due account, when examining a company's application for registration, of documents obtained from the authorities of the Member State of origin.**

IV. Free Movement of Workers

18. CONCEPT OF WORKER

Case 53/81, *D.M. Levin v Staatssecretaris van Justitie* [1982] ECR 1035

(Levin)

SUMMARY

In the *Levin* judgment, the Court of Justice interpreted a concept of worker as autonomous concept of EU Law. Consequently, the meaning and scope of this concept should be formed within the legal order of EU Law, not national law. The national law of Member States cannot limit the scope of the Treaty provisions on free movement of workers *ratione personae* by setting different national criteria in order to define what a worker or activity of employed person constitutes of.

KEYWORDS

Free movement of persons, concept of worker in EU law, minimum wage requirement, public interest, activity of employed person.

OVERVIEW

Mrs D. M. Levin, a British subject and wife of a national of a non-member country, worked in Netherlands on part time cleaning jobs. She applied for a residence permit in 1978 but was rejected on the ground *inter alia* that the grant of a residence permit was not in the public interest. Mrs Levin income was lower than the national minimum legal wage in the Netherlands. Therefore, she was not considered as worker within the meaning of national law. The national administrative authorities (*Staatssecretaris van Justitie*) interpreted that the Treaty provisions on free movement of workers did not

apply to her. Mrs Levin argued in front of the national Dutch authorities that she had to be regarded as EEC citizen and therefore the Treaty provision on free movement of workers should have applied to her situation. Furthermore, she argued that she was able to support herself. The State Council of Netherlands (*Raad van State*) referred the subject matter to the European Court of Justice for a preliminary ruling.

The fundamental substantive legal problem in the case was a question of definition: is the Member state free to define concepts contained in the Treaty within the meaning of national law? A confirmative answer to that question would give the Member States a considerable leverage and allow for narrowing or even widening of the scope of primary law. However, it would also inevitably lead to inharmonious application of EU law. In particular, national interpretation of a concept of worker in the case limited the scope of fundamental Treaty provision on free movement of workers (Article 45 TFEU[36]) ratione *personae*. The expected outcome would be that the Court of Justice would not allow for such disparity in application of Treaty provisions. This is fully aligned with previous case-law on the matter, in particular with the judgement in the *Hoekstra (née Unger)*[37] case.

The Court of Justice delivering its judgment on 23 March 1982 interpreted that the meaning and the scope of the terms "worker" and "activity as an employed person" should be defined in the light of principles of the legal order of the Community. A concept of worker defines the field of application for one of the fundamental freedoms

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[36] Article 45 TFEU:
1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
(a) to accept offers of employment actually made;
(b) to move freely within the territory of Member States for this purpose;
(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

[37] Case 75/63, *Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses)* [1964] ECR English special edition 177

guaranteed by the Treaty and, as such, may not be interpreted restrictively. In words of former Judge and Advocate General Giuseppe Federico Mancini the European Court of Justice established and maintained *hermeneutic monopoly*[38] in application of EU Law.

TEXT OF JUDGEMENT

1. By interlocutory judgment of 28 November 1980, received at the Court on 11 March 1981, the Raad van State [State Council] of the Netherlands referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions relating to the interpretation of Article 48 of the Treaty and of certain provisions of Community regulations and directives on the free movement of persons within the Community.

2. The appellant in the main proceedings, Mrs Levin, of British nationality and the wife of a national of a non-member country, applied for a permit to reside in the Netherlands. The permit was refused, on the basis of Netherlands legislation, on the ground, amongst others, that Mrs Levin was not engaged in a gainful occupation in the Netherlands and therefore could not be described as a "favoured EEC citizen" within the meaning of that legislation.

3. Mrs Levin applied to the Staatssecretaris van Justitie [Secretary of State for Justice] for the decision to be reconsidered. Her application was rejected and she appealed to the Raad van State claiming that in the meantime she had taken up an activity as an employed person in the Netherlands and that, in any event, she and her husband had property and income more than sufficient to support themselves, even without pursuing such an activity.

4. Since the Raad van State considered that the judgment to be given depended on the interpretation of Community law it referred the following three questions to the Court for a preliminary ruling:

1) Should the concept of 'favoured EEC citizen', which in the Netherlands legislation is taken to mean a national of a Member State as described in Article 1 of Directive 64/221/EEC of the Council of the European

[38] Mancini, G. Frederico; *The Free Movement of Workers in the Case Law of the European Court of Justice*; in book Democracy and Constitutionalism in the European Union: Collected Essays; Hart Publishing, 2000.

Communities of 25 February 1964 and is used in that legislation to determine the category of persons to whom Anicie 48 of the Treaty establishing the European Economic Community, Regulation (EEC) No 1612/68 of 15 October 1968 and Directives 64/221/EEC of 25 February 1964 and 68/360/EEC of 15 October 1968 adopted by the Council of the European Communities in application of Article 48 apply, also be taken to mean a national of a Member State who in the territory of another Member State pursues an activity, whether paid or not as an employed person, or provides services to such a limited extent that in so doing he earns income which is less than that which in the last mentioned Member State is considered as the minimum necessary to enable him to support himself?

2) In the answer to Question 1, should a distinction be drawn between, on the one hand, persons who a pan from or in addition to their income derived from limited employment have other income (for example from property or from the employment of their spouses living with them who are not nationals of a Member State) as a result of which they have sufficient means of support as referred to in Question 1 and, on theother hand, persons who do not have such additional income at their disposal and yet for reasons of their own wish to make do with an income less than what is generally considered to be the minimum - required?
3) Assuming that Question 1 is answered in the affirmative, can the right of such a worker to free admission into and establishment in the Member State in which he pursues or wishes to pursue an activity or provides or wishes to provide services to a limited extent still be relied upon if it is demonstrated or seems likely that his chief motive for residing in that Member State is for a purpose other than the pursuit of an activity or provision of services to a limited extent?

5. Although these questions, as worded, are concerned not only with freedom of movement for workers but also with freedom of establishment and freedom to provide services, it is apparent from the particulars of the dispute in the main proceedings that the national court really has in mind only the issue of freedom of movement for workers. The answers to be given should therefore be confined to those aspects which have a bearing on that freedom.

First and second questions

6. In its first and second questions, which should be considered together, the national court is essentially asking whether the provisions of Community law relating to freedom of movement for workers also cover a national of a Member State whose activity as an employed person in the territory of another Member State provides him with an income less than the minimum required for subsistence within the meaning of the legislation of the second Member State. In particular the court asks whether those provisions cover such a person where he either supplements his income from his activity as an employed person with other income so as to arrive at that minimum or is content with means of support which fall below it.

7. Under Article 48 of the Treaty freedom of movement for workers is to be secured within the Community. That freedom is to entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and is to include the right, subject to limitations justified on grounds of public policy, public security or public health, to accept offers of employment actually made, to move freely within the territory of Member States for this purpose, to stay in a Member State for the purpose of employment and to remain there after the termination of that employment.

8. That provision was implemented inter alia by Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475) and Council Directive 68/360/EEC of the same date on the abolition of restrictions on movement and residence within the Community for workers of the Member States and their families (Official Journal, English Special Edition 1968 (II), p. 485). Under Article 1 of Regulation (EEC) No 1612/68 any national of a Member State is, irrespective of his place of residence, to have the right to take up 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.

9. Although the rights deriving from the principle of freedom of movement for workers and more particularly the right to enter and stay in the territory of a Member State are thus linked to the status of a worker or of a person pursuing an activity as an employed person or desirous of so doing, the terms "worker" and "activity as an employed

person" are not expressly defined in any of the provisions on the subject. It is appropriate, therefore, in order to determine their meaning, to have recourse to the generally recognized principles of interpretation, beginning with the ordinary meaning to be attributed to those terms in their context and in the light of the objectives of the Treaty.

10. The Netherlands and Danish Governments have maintained that the provisions of Article 48 may only be relied upon by persons who receive a wage at least commensurate with the means of subsistence considered as necessary by the legislation of the Member State in which they work, or who work at least for the number of hours considered as usual in respect of fulltime employment in the sector in question. In the absence of any provisions to that effect in Community legislation, it is suggested that it is necessary to have recourse to national criteria for the purpose of defining both the minimum wage and the minimum number of hours.

11. That argument cannot, however, be accepted. **As the Court has already stated** in its judgment of 19 March 1964 in Case 75/63 Hoekstra (née Unger) [1964] ECR 1977 **the terms "worker" and "activity as an employed person" may not be defined by reference to the national laws of the Member States but have a Community meaning. If that were not the case, the Community rules on freedom of movement for workers would be frustrated, as the meaning of those terms could be fixed and modified unilaterally, without any control by the Community institutions, by national laws which would thus be able to exclude at will certain categories of persons from the benefit of the Treaty.**

12. Such would, in particular, be the case if the enjoyment of the rights conferred by the principle of freedom of movement for workers could be made subject to the criterion of what the legislation of the host State declares to be a minimum wage, so that the field of application ratione personae of the Community rules on this subject might vary from one Member State to another. The meaning and the scope of the terms "worker" and "activity as an employed person" should thus be clarified in the light of the principles of the legal order of the Community.

13. In this respect it must be stressed that these concepts define the field of application of one of the fundamental freedoms guaranteed by the Treaty and, as such, may not be interpreted restrictively.

14. In conformity with this view the recitals in the preamble to Regulation (EEC) No 1612/68 contain a general affirmation of the right of all workers in the Member States to pursue the activity of their choice within the Community, irrespective of whether they are permanent, seasonal or frontier workers or workers who pursue their activities for the purpose of providing services. Furthermore, although Article 4 of Directive 68/36/EEC grants the right of residence to workers upon the mere production of the document on the basis of which they entered the territory and of a confirmation of engagement from the employer or a certificate of employment, it does not subject this right to any condition relating to the kind of employment or to the amount of income derived from it.

15. An interpretation which reflects the full scope of these concepts is also in conformity with the objectives of the Treaty which include, according to Articles 2 and 3, the abolition, as between Member States, of obstacles to freedom of movement for persons, with the purpose inter alia of promoting throughout the Community a harmonious development of economic activities and a raising of the standard of living. Since pan-time employment, although it may provide an income lower than what is considered to be the minimum required for subsistence, constitutes for a large number of persons an effective means of improving their living conditions, the effectiveness of Community law would be impaired and the achievement of the objectives of the Treaty would be jeopardized if the enjoyment of rights conferred by the principle of freedom of movement for workers were reserved solely to persons engaged in full-time employment and earning, as a result, a wage at least equivalent to the guaranteed minimum wage in the sector under consideration.

16. It follows that the concepts of "worker" and "activity as an employed person" must be interpreted as meaning that the rules relating to freedom of movement for workers also concern persons who pursue or wish to pursue an activity as an employed person on a pan-time basis only and who, by virtue of that fact obtain or would obtain only remuneration lower than the minimum guaranteed remuneration in the sector under consideration. In this regard no distinction may be made between those who wish to make do with their income from such an activity and those who supplement that income with other income, whether the latter is derived from property or from the employment of a member of their family who accompanies them.

17. It should however be stated that whilst pan-time employment is not excluded from the field of application of the rules on freedom of movement for workers, those rules cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary. It follows both from the statement of the principle of freedom of movement for workers and from the place occupied by the rules relating to that principle in the system of the Treaty as a whole that those rules guarantee only the free movement of persons who pursue or are desirous of pursuing an economic activity.

18. The answer to be given to the first and second questions must therefore be that the provisions of Community law relating to freedom of movement for workers also cover a national of a Member State who pursues, within the territory of another Member State, an activity as an employed person which yields an income lower than that which, in the latter State, is considered as the minimum required for subsistence, whether that person supplements the income from his activity as an employed person with other income so as to arrive at that minimum or is satisfied with means of support lower than the said minimum, provided that he pursues an activity as an employed person which is effective and genuine.

Third question

19. The third question essentially seeks to ascertain whether the right to enter and reside in the territory of a Member State may be denied to a worker whose main objectives, pursued by means of his entry and residence, are different from that of the pursuit of an activity as an employed person as defined in the answer to the first and second questions.

20. Under Article 48 (3) of the Treaty the right to move freely within the territory of the Member States is conferred upon workers for the "purpose" of accepting offers of employment actually made. By virtue of the same provision workers enjoy the right to stay in one of the Member States "for the purpose" of employment there. Moreover, it is stated in the preamble to Regulation (EEC) No 1612/68 that freedom of movement for workers entails the right of workers to move freely within the Community "in order to" pursue activities as employed persons, whilst Article 2 of Directive 68/360/EEC requires the Member States to grant workers the right to leave their territory "in order

to" take up activities as employed persons or to pursue them in the territory of another Member State.

21. However, these formulations merely give expression to the requirement, which is inherent in the very principle of freedom of movement for workers, that the advantages which Community law confers in the name of that freedom may be relied upon only by persons who actually pursue or seriously wish to pursue activities as employed persons. They do not, however, mean that the enjoyment of this freedom may be made to depend upon the aims pursued by a national of a Member State in applying for entry upon and residence in the territory of another Member State, provided that he there pursues or wishes to pursue an activity which meets the criteria specified above, that is to say, an effective and genuine activity as an employed person.

22. Once this condition is satisfied, the motives which may have prompted the worker to seek employment in the Member State concerned are of no account and must not be taken into consideration.

23. The answer to be given to the third question put to the Court by the Raad van State must therefore be that the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account as regards his right to enter and reside in the territory of the latter State provided that he there pursues or wishes to pursue an effective and genuine activity.

(...)

Operative part

THE COURT, in answer to the questions referred to it by the Judicial Division of the Raad van State of the Netherlands by interlocutory judgment of 28 November 1980, hereby rules:

1. **The provisions of Community law relating to freedom of movement for workers also cover a national of a Member State who pursues, within the territory of another Member State, an activity as an employed person which yields an income lower than that which, in the latter State, is considered as the minimum required for subsistence, whether that person supplements the income from his activity as an employed person with**

other income so as to arrive at that minimum or is satisfied with means of support lower than the said minimum, provided that he pursues an activity as an employed person which is effective and genuine.

2. **The motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account as regards his right to enter and reside in the territory of the latter State provided that he pursues or wishes to pursue an effective and genuine activity.**

19. DIRECT HORIZONTAL EFFECT OF TREATY PROVISIONS ON FREE MOVEMENT OF WORKERS AND DISCRIMINATION ON GROUNDS OF NATIONALITY

Case 281/98, *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139

(Angonese)

SUMMARY

The *Angonese* judgment represents an example of direct horizontal application of fundamental Treaty provision on free movement of workers. The capacity of that Treaty provision to be evoked in legal disputes between the private parties has been confirmed in the situations of indirect discrimination on grounds of nationality. The *Angonese* case is the evidence of fact that obstacles to free movement of workers, like a particular language certificate required for employment in a private bank, can in the field of horizontal application of free movement of workers potentially lurk around every corner, so to speak.

KEYWORDS

Free movement of workers, direct horizontal effect, discrimination on grounds of nationality, access to employment, language certificate.

OVERVIEW

Mr Angonese, an Italian national whose mother tongue is German and who is resident in the province of Bolzano (Italy), went to study in Austria between 1993 and 1997. In August 1997, in response to a notice published in the local Italian daily Dolomiten on 9

July 1997, he applied to take part in a competition for a post with a private bank in Bolzano, the Cassa di Risparmio. One of the conditions for entry to the competition was possession of a certificate of bilingualism (in Italian and German), which used to be required in the province of Bolzano for access in the public service. This certificate is issued by the public authorities of the province of Bolzano after an examination which is held only in that province. It is usual for residents of the province of Bolzano to obtain the certificate as a matter of course for employment purposes. Mr Angonese was not in possession of the certificate but he was perfectly bilingual. With a view to gaining the admission to the competition, he had submitted a certificate showing the completion of his studies and certificates attesting to his studies of languages (English, Slovene and Polish) at the Faculty of Philosophy at Vienna University and had stated that his professional experience included practising as a draughtsman and translating from Polish into Italian. In 1997, the Cassa de Risparmio informed Mr Angonese that he could not be admitted to the competition because he had not produced the required Bolzano certificate. Mr. Angonese instigated legal proceeding against the Casa de Risparmio before national court. Although he has acknowledged the Cassa di Risparmio's right to select its future staff from persons who are perfectly bilingual, Mr Angonese complained that the requirement to have and produce the particular certificate was unlawful and contrary to the principle of freedom of movement for workers contained in the Treaty. The national court referred the case to the European Court of Justice for a preliminary ruling.

The fundamental substantive problem in the case was the analysis of the limit of horizontal application of fundamental Treaty provision on free movement of workers (Article 45 TFEU). Since Mr. Angonese is a resident in the province of Bolzano, this matter could at first seem purely internal. However, a potential effect to free movement for workers not residing in Bolzano cannot be disregarded. Persons not residing in that province have a little chance of acquiring the particular certificate and it would be difficult for them to gain access to the employment in question. Therefore, such employment requirement potentially represents an obstacle to free movement of workers. In accordance with the established case-law, a general language requirement is allowed to be a restriction to the access to employment. Thus, the question was basically could a particular language certificate, obtainable only in one province, be considered as obstacle to free movement of workers incompatible with the Treaty.

The Court of Justice delivering its judgment on 6 June 2000 decided that the Treaty provision on free movement of workers precluded an employer from requiring the persons applying to take part in a recruitment competition to provide the evidence of their linguistic knowledge exclusively by means of one particular diploma issued only in one particular province of a Member State. The prohibition of discrimination on grounds of nationality laid down in Article 45 TFEU (in the time of the case Article 48 EC), which is drafted in general terms and is not specifically addressed to the Member States, also applies to conditions of employment fixed by private persons.

TEXT OF JUDGEMENT

1. By order of 8 July 1998, received at the Court on 23 July 1998, the Pretura Circondariale di Bolzano referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and of Articles 3(1) and 7(1) and (4) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475) (the Regulation)).

2. The question has been raised in the proceedings between Mr Angonese and the Cassa di Risparmio di Bolzano SpA (the Cassa di Risparmio) concerning a requirement imposed by the Cassa di Risparmio for admission to a recruitment competition.

Community law

3. Article 3(1) of the Regulation provides:

Under this Regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:

- where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals; or
- where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered.

This provision shall not apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled.

4. Article 7(1) and (4) of the Regulation provide:

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.

(...)

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.

The main proceedings

5. Mr Angonese, an Italian national whose mother tongue is German and who is resident in the province of Bolzano, went to study in Austria between 1993 and 1997. In August 1997, in response to a notice published in the local Italian daily Dolomiten on 9 July 1997, he applied to take part in a competition for a post with a private banking undertaking in Bolzano, the Cassa di Risparmio.

6. One of the conditions for entry to the competition was possession of a type-B certificate of bilingualism (in Italian and German) (the Certificate), which used to be required in the province of Bolzano for access to the former carriera di concetto (managerial career) in the public service.

7. According to the file, the Certificate is issued by the public authorities of the province of Bolzano after an examination which is held only in that province. It is usual for residents of the province of Bolzano to obtain the Certificate as a matter of course for employment purposes. Obtaining the Certificate is viewed as an almost compulsory step as part of normal training.

8. The national court has found as a fact that, although Mr Angonese was not in possession of the Certificate, he was perfectly bilingual. With a view to gaining admission to the competition, he had submitted a certificate showing completion of his studies as a draughtsman and certificates attesting to his studies of languages (English, Slovene and Polish) at the Faculty of Philosophy at Vienna University and had stated that his professional experience included practising as a draughtsman and translating from Polish into Italian.

9. On 4 September 1997, the Cassa de Risparmio informed Mr Angonese that he could not be admitted to the competition because he had not produced the Certificate.

10. The Pretore di Bolzano draws attention to the fact that non-residents of Bolzano may have difficulty obtaining the Certificate in good time. He explains that, in the present case, applications to take part in the competition had to be submitted by 1 September 1997, just less than two months after publication of the competition notice. However, there is a minimum period of 30 days between the written tests and the oral tests organised for the purpose of awarding the Certificate and there are a limited number of examination sittings in any given year.

11. The requirement for the Certificate imposed by the Cassa de Risparmio was founded on Article 19 of the National Collective Agreement for Savings Banks of 19 December 1994 (the Collective Agreement), which provides:

"The institution has the right to decide whether the recruitment of staff referred to in paragraphs 1 and 2, subject in any event to Article 21 below, is to be by way of an internal competition on the basis of either qualifications and/or tests or in accordance with selection criteria specified by the institution.

The institution must lay down as and when necessary the conditions and rules for internal competitions, must appoint selection panels and must lay down the selection criteria mentioned in the first paragraph ..."

12. Although he has acknowledged the Cassa di Risparmio's right to select its future staff from persons who are perfectly bilingual, Mr Angonese has complained that the requirement to have and produce the Certificate is unlawful and contrary to the principle of freedom of movement for workers laid down in Article 48 of the Treaty.

13. Mr Angonese claims that the requirement should be declared void and that the Cassa di Risparmio should be ordered to compensate him for his loss of opportunity and to reimburse him the costs he has incurred in the proceedings.

14. According to the national court, the requirement to hold the Certificate in order to provide evidence of linguistic knowledge, may, contrary to Community law, penalise job candidates not resident in Bolzano and, in the present case, could have been prejudicial to Mr Angonese who had taken up residence in another Member State for the purpose of studying there. The national court takes the view, moreover, that, if the requirement in issue were held to be inherently contrary to Community law, it would be void under Italian law.

The question submitted for a preliminary ruling

15. In those circumstances, the Pretore di Bolzano decided to stay proceedings and to refer the following question to the Court:

"Is it compatible with Article 48(1), (2) and (3) of the EC Treaty and Articles 3(1) and 7(1) and (4) of Regulation (EEC) No 1612/68 to make the admission of candidates for a competition organised to fill posts in a company governed by private law conditional on possession of the official certificate attesting to knowledge of local languages issued exclusively by a public authority of a Member State at a single examination centre (namely, Bolzano), on completion of a procedure of considerable duration (to be precise, of not less than 30 days, on account of the minimum lapse of time envisaged between the written test and the oral test)?"

16. Before examining the question put by the Pretore di Bolzano, it should be noted that observations have been submitted as to its relevance for resolution of the main proceedings and the Court's jurisdiction to answer it.

17. The Italian Government and the Cassa di Risparmio contend that, since Mr Angonese is regarded as having been resident in the province of Bolzano since his birth, the question is artificial and has no connection with Community law.

18. In that respect, it should be noted that the Court has consistently held that it is for the national courts alone, which are seized of a case and which must assume responsibility for the judgment to be given, to determine, having regard to the

particular features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they refer to the Court. A reference for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action (see, in particular, Case C-230/96 Cabour and Nord Distribution Automobile v Arnor [1998] ECR I-2055, paragraph 21).

19. Whether or not the reasoning of the order for a reference mentioned in paragraph 14 above is well founded, it is far from clear that the interpretation of Community law it seeks has no relation to the actual facts of the case or to the subject-matter of the main action.

20. In those circumstances, the question submitted must be answered.

21. The national court is asking essentially whether Article 48 of the EC Treaty and Articles 3 and 7 of the Regulation preclude an employer from requiring persons applying to take part in a recruitment competition to provide evidence of their linguistic knowledge solely by means of one particular diploma, such as the Certificate, issued in a single province of a Member State.

22. As far as the effect of the Regulation is concerned, Article 3(1) is concerned only with provisions laid down by the laws, regulations or administrative action or administrative practices of Member States. Article 3(1) is not therefore relevant in determining the lawfulness of a requirement not based on such provisions or practices.

23. As regards Article 7 of the Regulation, the Cassa di Risparmio submits that the requirement to possess the Certificate does not arise under a collective agreement or an individual employment contract, and so the question whether it is lawful under that provision is not relevant.

24. Mr Angonese and the Commission contend, however, that Article 19 of the Collective Agreement allows banking undertakings to include discriminatory selection criteria, such as possession of the Certificate, and that it infringes Article 7(4) of the Regulation.

25. It should be noted that Article 19 of the Collective Agreement authorises the institutions concerned to lay down the conditions and rules for competitions, as well as the selection criteria.

26. Nevertheless, such a provision does not authorise the institutions concerned, either expressly or implicitly, to adopt discriminatory criteria in relation to workers who are nationals of other Member States, which would be incompatible with Article 7 of the Regulation.

27. It follows that such a provision does not in itself constitute an infringement of Article 7 of the Regulation and does not have any effect on the lawfulness, under the Regulation, of a requirement such as the one imposed by the Cassa di Risparmio.

28. In those circumstances, the question submitted falls to be examined solely in relation to Article 48 of the Treaty.

29. Under that provision, freedom of movement for workers within the 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.

30. It should be noted at the outset that the principle of non-discrimination set out in Article 48 is drafted in general terms and is not specifically addressed to the Member States.

31. 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 v Union Cycliste Internationale [1974] ECR 1405, paragraph 17).

32. 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, paragraph 18, and Case C-415/93 Union Royale Belge des Sociétés de Football Association and Others v Bosman and Others [1995] ECR I-4921, paragraph 83).

33. Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons, limiting application of the prohibition of discrimination based on nationality to acts of a public authority risks creating inequality in its application (see Walrave, paragraph 19, and Bosman, paragraph 84).

34. The Court has also ruled 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 (see Case 43/75 Defrenne v Sabena [1976] ECR 455, paragraph 31). The Court accordingly held, in relation to a provision of the Treaty which was mandatory in nature, that the prohibition of discrimination applied equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals (see Defrenne, paragraph 39).

35. Such considerations must, a fortiori, be applicable to Article 48 of the Treaty, which lays down a fundamental freedom and which constitutes a specific application of the general prohibition of discrimination contained in Article 6 of the EC Treaty (now, after amendment, Article 12 EC). In that respect, like Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), it is designed to ensure that there is no discrimination on the labour market.

36. Consequently, the prohibition of discrimination on grounds of nationality laid down in Article 48 of the Treaty must be regarded as applying to private persons as well.

37. The next matter to be considered is whether a requirement imposed by an employer, such as the Cassa di Risparmio, which makes admission to a recruitment competition conditional on possession of one particular diploma, such as the Certificate, constitutes discrimination contrary to Article 48 of the Treaty.

38. According to the order for reference, the Cassa di Risparmio accepts only the Certificate as evidence of the requisite linguistic knowledge and the Certificate can be obtained only in one province of the Member State concerned.

39. Persons not resident in that province therefore have little chance of acquiring the Certificate and it will be difficult, or even impossible, for them to gain access to the employment in question.

40. Since the **majority of residents of the province of Bolzano are Italian nationals, the obligation to obtain the requisite Certificate puts nationals of other Member States at a disadvantage by comparison with residents of the province**.

41. That is so notwithstanding that the requirement in question affects Italian nationals resident in other parts of Italy as well as nationals of other Member States. In order for a measure to be treated as being discriminatory on grounds of nationality under the rules relating to the free movement of workers, it is not necessary for the measure to have the effect of putting at an advantage all the workers of one nationality or of putting at a disadvantage only workers who are nationals of other Member States, but not workers of the nationality in question.

42. A requirement, such as the one at issue in the main proceedings, making the right to take part in a recruitment competition conditional upon possession of a language diploma that may be obtained in only one province of a Member State and not allowing any other equivalent evidence could be justified only if it were based on objective factors unrelated to the nationality of the persons concerned and if it were in proportion to the aim legitimately pursued.

43. **The Court has ruled that the principle of non-discrimination precludes any requirement that the linguistic knowledge in question must have been acquired within the national territory** (see Case C-379/87 Groener v Minister for Education and the City of Dublin Vocational Educational Committee [1989] ECR 3967, paragraph 23).

44. So, even though **requiring an applicant for a post to have a certain level of linguistic knowledge may be legitimate** and possession of a diploma such as the Certificate may constitute a criterion for assessing that knowledge, **the fact that it is impossible to submit proof of the required linguistic knowledge by any other means, in particular by equivalent qualifications obtained in other Member States, must be considered disproportionate in relation to the aim in view**.

45. It follows that, where an employer makes a person's admission to a recruitment competition subject to a requirement to provide evidence of his linguistic knowledge exclusively by means of one particular diploma, such as the Certificate, issued only in one particular province of a Member State, that requirement constitutes discrimination on grounds of nationality contrary to Article 48 of the EC Treaty.

46. The reply to be given to the question submitted must therefore be that Article 48 of the Treaty precludes an employer from requiring persons applying to take part in a recruitment competition to provide evidence of their linguistic knowledge exclusively by means of one particular diploma issued only in one particular province of a Member State.

(...)

Operative part

THE COURT, in answer to the question referred to it by the Pretura Circondariale di Bolzano by order of 8 July 1998, hereby rules:

> **Article 48 of the EC Treaty (now, after amendment, Article 39 EC) precludes an employer from requiring persons applying to take part in a recruitment competition to provide evidence of their linguistic knowledge exclusively by means of one particular diploma issued only in one particular province of a Member State.**

V. Free Movement of Capital

20. VALIDITY OF REGISTRATION OF MORTGAGES IN FOREIGN CURRENCIES

Case C-464/98 Westdeutsche Landesbank Girozentrale *v* Friedrich Stefan and Republic of Austria European Court reports 2001 Page I-00173

(Stefan)

SUMMARY

The *Friedrich Stefan* deals with issues which already arose in the *Trummer and Mayer*[39] but it also opened a question of applicability of EU law before full membership in the EU and the possibility of EU law to be applied retroactively *i.e.* the possibility for EU law to remedy *ex post facto* the void agreements on mortgage registration made under national provisions before the country entered into the EU. The judgment is also an example of so called „horizontal direct effect" of provisions on free movement of capital where private defendant invoked provision on free movement of capital against an individual - private plaintiff. The judgement in question is particularly important for new Member States facing difficulties when adjusting the previous legal transactions to a new EU legal context.

KEY WORDS

Free movement of capital, Restrictions, Prohibition by a Member State of registration of a mortgage in the currency of another Member State, Not permissible, Treaty provisions Article 73b (now Article 56 EC), Application in Austria as at the date of its

[39] See Case C-222/97 Proceedings brought by Trummer and Mayer European Court reports 1999 Page I-1671.

accession to the European Union, Effect of entry into force of the Treaty, Remedying of a mortgage registration which is null and void under national law, Not possible

OVERVIEW

The *Friedrich Stefan* opened questions on retroactive applicability of EU law to legal transactions which were undertaken under national provisions before the country, in this case, the Republic of Austria, entered into the EU. The subject of dispute was the issue related to registration of mortgage on real estate by defendant, Mr. Stefan, the Austrian public notary, in a form of enforceable notarial act in foreign currency, namely, German marks. At the relevant time, strict provisions of Austrian law allowed that only in limited number of situations, which is not the case herein. On 7 June 1995, the insolvency proceedings were commenced in relation to the debtor. The plaintiff, Westdeutsche Landesbank Girozentrale, sought to enforce its charge and, to that end, brought proceedings for the realisation of its security. The administrator of the insolvent estate, representing the debtor, contested the validity of the charge before the Supreme Court of Austria, pleading the illegality of the entry in the land register of a foreign-currency mortgage. The plaintiff brought proceedings before the Landesgericht für Zivilrechtssachen Wien, seeking an order requiring the defendant, Mr. Stefan, to pay compensation on the ground that the latter had failed, in breach of the obligations in drawing up a contract, to inform it on the invalidity of the charge. The defendant denied that the mortgage denominated in German marks was unlawful and relied in that regard on, *inter alia*, provisions of free movement of capital. In course of proceedings, question arose whether provision on free movement of capital could be applied retroactively to mortgages which were registered in foreign currency prior to the accession of Austria to the European Community, which were incurably void at the time of registration, *i. e.* to remedy them *ex post facto*. In addition to the aforementioned, the question is how the free movement of capital provisions, by virtue of the Austrian preaccession documents, effect the validity of registration of foreign currency mortgage. The Court followed the well-known case law in *Trummer and Mayer* and stated that provisions of free movement of capital precluded the application of national rules such as those at issue in the main proceedings, requiring a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency. But, regarding the retroactive applicability of EU law, the Court

clearly stated that no provisions on free movement of capital applied retroactively. The entry into force of Community law in a Member State can have the effect of remedying such a mortgage registration only in so far as, under the applicable national law, it is recognised as having some legal value until such time as it is found by a court to be null and void. The judgement in *Friedrich Stefan,* in the context of free movement of capital, gives the Court's view on possibility of *ex post* convalidation of transactions invalid under the national law. The Court in fact clearly stands on the opinion that EU law has effect after the full membership and no prior. The judgement is also an example of situation including the horizontal direct effect of the EU law which is one of the features of this freedom.[40]

TEXT OF THE JUDGEMENT

1. By order of 28 October 1998, received at the Court on 18 December 1998, the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) **two questions on the interpretation of Article 73b of the EC Treaty (now Article 56 EC).**

2. Those questions have been raised in proceedings brought by Westdeutsche Landesbank Girozentrale, a German bank, against Mr Stefan, a notary, **in which it complains that he registered a mortgage denominated in German marks at a time when Austrian law required mortgages to be registered in the national currency.**

3. **Articles 67 to 73 of the EEC Treaty**, which provided for the progressive liberalisation of movements of capital, **were replaced as from 1 January 1994,** (...) **by Articles 73b to 73g of the EC Treaty** (...). Article 73b of the Treaty is worded as follows:

1) Within the framework of the provisions set out in this Chapter, **all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.**

[40] The same in Craig, P.; De Burca, G.; EU Law: Text, Cases and Materials, Fifth Edition, Oxford, pp. 694 and Bodiroga Vukobrat, N.; Horak, H.; Martinović, A.; Temeljne gospodarske slobode u Europskoj uniji (Fundamental Market Freedoms in the European Union), Inženjerski biro, Zagreb, 2011., p. 272.

2) Within the framework of the provisions set out in this Chapter, **all restrictions on payments between Member States and between Member States and third countries shall be prohibited.**

4. Article 73d of the Treaty provides:

1) The provisions of Article 73b shall be without prejudice to the right of Member States:

(a) (...)

(b) **to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements, for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.**

2) (...)

3) The measures and procedures referred to in paragraphs 1 and 2 **shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 73b.**

5. **The notion of capital movements is not defined by the EC Treaty.** However, inasmuch as Article 73b of the Treaty substantially reproduces the contents of Article 1 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5), **the nomenclature in respect of movements of capital used in Annex I to that directive still has the same indicative value, for the purposes of defining the notion of capital movements,** as it did before the entry into force of Article 73b et seq. of the Treaty, subject to the qualification, contained in the introduction to the nomenclature, that **the list set out therein is not exhaustive** (Case C-222/97 Trummer and Mayer [1999] ECR I-1661, paragraph 21).

6. In view of the circumstances of the main proceedings, it is appropriate to recite the terms of points VII and IX of that annex:

(...)

B Credits granted by residents to non-residents

(...)

IX Sureties, other guarantees and **rights of pledge**

A Granted by non-residents to residents

B Granted by residents to non-residents.

7. Paragraph 3(1) of the Verordnung über wertbeständige Rechte (Decree on fixed-value rights, dRGBl I, p. 1521) of 16 November 1940, as amended by Paragraph 4 of the Schillinggesetz (Law concerning the schilling, StGBl 1945, No 231), provides:

Within the scope of the Grundbuchgesetz (Land Register Law, hereinafter "the GBG"), **charges on real property may,** following the entry into force of this Decree, **be created in currencies other than schillings** only **if the amount of money to be paid in respect of the property is determined by reference to the price of fine gold.**

(...)

9. **On 16 December 1991 the plaintiff granted a loan in the sum of DEM 20 million to the Grundstücks- und Bauprojektentwicklungs GmbH.** By way of security for the loan, **a mortgage was registered in DEM pursuant to an enforceable notarial act drawn up by the defendant. That mortgage related to two parcels of real property situated in Vienna which were owned by the debtor.**

10. **On 7 June 1995 insolvency proceedings were commenced in relation to the debtor. The plaintiff sought to enforce its charge and, to that end, brought proceedings for the realisation of its security. The administrator of the insolvent estate, representing the debtor, contested the validity of the charge before the Oberster Gerichtshof (Supreme Court), Austria, pleading the illegality of the entry in the land register of a foreign-currency mortgage.** The Oberster Gerichtshof decided to stay proceedings and to refer to the Court of Justice for a preliminary ruling a question concerning the scope of Article 73b of the Treaty (Case C-167/98 Westdeutsche Landesbank Girozentrale). However, it withdrew its question by decision of 21 October 1998.

11. The plaintiff ultimately concurred with the view taken by the administrator and consented to the charge being struck out in order, inter alia, to minimise its loss.

12. It then brought proceedings before the Landesgericht für Zivilrechtssachen Wien, seeking an order requiring the defendant to pay compensation on the ground that the latter had failed, in breach of the obligations incumbent upon him in drawing up a contract, to inform it of the invalidity of the charge.

13. **The defendant denies that the mortgage denominated in DEM is unlawful and relies in that regard on,** inter alia, **Article 73b of the Treaty.**

14. The Landesgericht für Zivilrechtssachen Wien states that **the Oberster Gerichtshof has ruled on several occasions prior to the accession of the Republic of Austria to the European Union that Paragraph 3 of the Verordnung über wertbeständige Rechte precludes the registration of foreign-currency mortgages. Registrations effected in breach of that rule are incurably invalid and have no effect in law. Under Paragraph 130 of the GBG, they are automatically to be struck out.**

15. According to the national court**, the Austrian legal order does not allow, in the absence of an express legislative provision, for the retroactive remedying of void legal acts.** Consequently, the Verordnung über wertbeständige Rechte could be rendered inapplicable in this particular case only on the basis of the prohibition, laid down in Article 73b of the Treaty, of all restrictions on the movement of capital and payments. **The national court considers in that regard that, if Article 73b of the Treaty prohibits obstacles to the registration of foreign-currency mortgages, and if that provision applies to mortgages which, upon the accession of the Republic of Austria to the European Union, were void under national law despite being registered in the land register, an effective charge will have been acquired by the plaintiff prior to the commencement of the insolvency proceedings.**

16. The questions referred for a preliminary ruling by the Landesgericht für Zivilrechtssachen Wien are as follows:

1) **Does a refusal to allow a mortgage to be created to cover a debt denominated in a foreign currency (in this case, German marks) constitute a restriction on the movement of capital and payments compatible with Article 73b of the EC Treaty?**
2) **(a) Does Article 73b of the EC Treaty apply retroactively to mortgages which were registered in German marks prior to the accession of Austria to the European Community, and thus incurably void at the time of**

registration, in such a way as to remedy them ex post facto? Alternatively,

(b) Have the Community rules concerning the free movement of capital, in particular Article 73b of the EC Treaty, had the effect, by virtue of the accession application made by Austria on 17 July 1989 and the Opinion of 31 July 1991, of rendering the registration of a foreign-currency mortgage in Austria on 16 December 1991 permissible?

(...)

17. By its first question, the national court is essentially asking **whether Article 73b of the Treaty precludes the application of rules of a Member State requiring a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency.**

18. In paragraph 34 of the judgement in Trummer and Mayer, cited above, the Court held that Article 73b of the Treaty precludes the application of national rules requiring a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency.

19. Since the plaintiff has not put forward any argument warranting reconsideration of that decision, **the answer to the first question must be that Article 73b of the Treaty is to be construed as precluding the application of national rules such as those at issue in the main proceedings, requiring a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency.**

(...)

20. By its second question, **the national court is essentially asking whether Article 73b of the Treaty was applicable in Austria even before that State acceded to the European Union. If the answer to that question is in the negative, the national court wishes to know whether Article 73b of the Treaty is capable of remedying the incurable nullity, under the national law applicable at the time, of a mortgage registered prior to the accession of the Republic of Austria to the European Union.**

(...)

21. In accordance with Article 73a of the Treaty, **Article 73b entered into force on 1 January 1994 in the States which then formed the Union. Since the Republic of Austria did not accede to the Union until 1 January 1995**, and in the absence of any contrary provision in the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1), **it was only from that date that Article 73b started to take effect in that Member State.**

22. (...) the answer to this part of the second question must be that **Article 73b of the Treaty is to be construed as meaning that it did not apply in Austria prior to the date of accession of the Republic of Austria to the European Union.**

(...)

23. It is apparent from the account of the national legal system provided by the referring court that **the nullity of a mortgage registration such as that at issue in the main proceedings is absolute and incurable from the outset and operates to render such registration non-existent.**

24. The entry into force of Community law in a Member State can have the effect of remedying such a mortgage registration only in so far as, under the applicable national law, it is recognised as having some legal value until such time as it is found by a court to be null and void.

25. (...) the answer to this part of the second question must be that **Article 73b of the Treaty is to be construed as incapable of remedying, with effect from the entry into force of the EC Treaty in Austria, a mortgage registration which, under the relevant national law, is vitiated from the outset by absolute and incurable nullity such as to render that registration non-existent.**

(...)

Operative part

THE COURT, in answer to the questions referred to it by the Landesgericht für Zivilrechtssachen Wien by order of 28 October 1998, hereby rules:

1. **Article 73b of the EC Treaty (now Article 56 EC) is to be construed as precluding the application of national rules such as those at issue in the main proceedings, requiring a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency.**
2. **Article 73b of the Treaty is to be construed as meaning that it did not apply in Austria prior to the date of accession of the Republic of Austria to the European Union.**
3. **Article 73b of the Treaty is to be construed as incapable of remedying, with effect from the entry into force of the EC Treaty in Austria, a mortgage registration which, under the relevant national law, is vitiated from the outset by absolute and incurable nullity such as to render that registration non-existent.**

21. FREEDOM TO PROVIDE SERVICES AND FREE MOVEMENT OF CAPITAL

Case C-287/10 Tankreederei I SA *v* Directeur de l'administration des contributions directes European Court reports Page 2010 I-14233

(Tankreederei I)

SUMMARY

It is not easy to draw a line between the freedom to provide services and free movement of capital due to a fact that it has the same structure[41] as other freedoms under TFEU.[42] The most prominent situation occurs when provision of services includes the use of capital goods. In the established case law[43], the criterion of monetary nature of the particular freedom was introduced. The qualification of freedom will depend on answer whether the restraint influences the free movement of capital directly or indirectly. In latter case, if it primary affects the non-monetary provision of services and only indirectly affects the free movement of capital, than provisions on free provision of services are applied. In this case, the Court dealt with similar situation in the context of different tax treatment of investments including the use of capital goods on national territory and abroad. So, the Court dealt with justification of such treatment in light of provisions of EU law.

[41] See more in Flynn, L., Comming of Age: The free movement of capital case law 1993-2002, Common Market Law Review, vol. 39, 2002., pp. 773-805.
[42] Treaty on the Functioning of the European Union (TFEU), Consolidated version, OJ C 83, 30 March 2010.
[43] See judgement of the Court in Case C-118/96, Safir v. Skattemyndigheten and Dalarnas Län, European Court reports Page I-1897.

KEY WORDS

Freedom to provide services, Free movement of capital, Tax credit for investments, Grant linked to the physical use of the investments on national territory, Use of inland navigation vessels used in other Member States.

OVERVIEW

A dispute arose between Tankreederei, the Luxembourg company, and Luxembourg tax authorities as a result of the refusal on the part of those authorities to grant tax credits to Tankreederei. The criterion for granting those credits was, *inter alia*, the physical use of navigation vessels on the Luxembourg territory. The Tankreederei used its vessels as type of capital goods to provide refuelling service in the Belgian and Netherlands ports. After its claim for tax credits was refused on grounds that it used its vessels abroad and not on the Luxembourg territory, and after refusal was followed up by the further administrative procedure before tax authorities, the Tankreederei brought an action stating that it had no permanent establishment other than in Luxembourg and, secondly, that its vessels were entered as assets on its balance sheet in that Member State and were used in connection with activities that were taxable exclusively in the Luxembourg territory. The Tankreederei states that the less favourable tax treatment which is applied to it constitutes an unjustified restriction on the freedom to provide services. The Court clearly stated that this sort of refuelling business was covered by provisions of freedom to provide services and that the Member State, although direct taxation falls within their competence, must have none the less exercised that competence consistently with EU law. The Court concluded that tax provisions, as those in question, were likely, if not to discourage national undertakings from providing, in other Member States, services that require the use of capital goods situated in those other Member States, at least to make that provision of cross-border services less attractive or more difficult than the provision of services in national territory by means of capital goods situated in that territory. It can be seen that different tax treatment of use of capital in cross-border economic activities can lead to a negative impact on attractiveness of cross-border provision of service. Since this discrimination in the first place affects the provision of services by means of different tax policy towards the use of capital abroad, one can see that in fact restriction of one fundamental freedom can jeopardise free provision of other. Those freedoms should be

interpreted together, as part of coherent system of provisions governing internal market and drawing distinction among them is more of theoretical nature. It can be stated that the Court, by using rather diplomatic manner of expressing itself, (stating that there is "no need to examine whether the provisions of the FEU Treaty relating to the free movement of capital might also preclude such a national provision") in fact refrains from giving its opinion which freedom prevails.[44] One can say that the free movement of capital applies to all kinds of cross-border activities that are subject to the freedom of establishment or freedom to provide services[45], at least as supporting interpretation instrument when deciding on possible restrictions on free provision of services.

TEXT OF THE JUDGEMENT

1. This reference for a preliminary ruling concerns the interpretation of Articles 56 TFEU and 63 TFEU.

2. The reference has been made in proceedings between **Tankreederei I SA ('Tankreederei'), a company governed by Luxembourg law, and the Directeur de l'administration luxembourgeoise des contributions directes (the Director of the Luxembourg direct taxation authorities), following the refusal on the part of those authorities to grant that company tax credits for investments.**

3. The first paragraph of Article 152 bis of **the Law of 4 December 1967 on income tax** (*Mémorial* A 1967, p. 1228), as amended by the law of 19 December 1986 (*Mémorial* A 1986, p. 2330) ('the LIT'), provides:

'On application, **taxpayers shall obtain the income tax credits referred to below on investments referred to in paragraphs 2 and 7 which they make in their undertakings as defined in Article 14. The investments must be made in an**

[44] The same Bernhard Heusser, Which Treaty Freedom Prevails?, Freedom of Establishment and EC Tax Law: The case for ECJ consistency, Conference Working Papers, Institute for Advanced Legal Studies, University of London, p. 12., available at: http://ials.sas.ac.uk/postgrad/courses/docs/MA_Tax_Working_papers/Bernhard%20PUBLICATION%20Final.pdf (last visited on 3 June 2014)
[45] *Ibid.*

establishment situated in the Grand-Duchy and be intended to remain there permanently; they must also be physically used on Luxembourg territory'.

4. Tankreederei, which has its principal office in Luxembourg, operates two inland navigation vessels from Luxembourg for the purpose of its business of providing sea vessels with hydrocarbons for their holds ('bunkering') in the ports of Antwerp (Belgium) and Amsterdam (Netherlands).

5. For the tax years 2000 to 2003, **it claimed tax credits for investments** under Article 152 bis of the LIT, **which were refused,** on 11 May 2005, **by the administration des contributions directes du Grand-Duché de Luxembourg (Direct taxation authorities of the Grand-Duchy of Luxembourg) on the ground that the vessels concerned were used abroad.**

6. On 28 June 2005, **Tankreederei lodged a complaint with the Director of those authorities, which the Director rejected by decision of 29 January 2009** ('the decision of 29 January 2009').

7. On 23 April 2009, **Tankreederei brought an action against the decision of 29 January 2009 before the national court.** In support of that action, **it argues that Article 152 bis of the LIT is incompatible with Article 56 TFEU. Stating, first, that it has no permanent establishment other than in Luxembourg and must therefore be regarded as an undertaking as defined in Article 14 of the LIT and, secondly, that its vessels are entered as assets on its balance sheet in that Member State and are used in connection with activities that are taxable exclusively in Luxembourg territory, Tankreederei submits that the decision of 29 January 2009 is tantamount to according it tax treatment less favourable than that of companies engaged in the same activities in the territory of that Member State. It submits that the treatment which is applied to it consequently constitutes an unjustified restriction on the freedom to provide services.** It adds that, although its vessels are appropriate for the purpose of navigation on the Luxembourg Moselle, the maritime inland navigation department of the Ministry of Transport rejected its application for registration of those vessels in the Luxembourg port of Mertert, which compelled it to have them registered in the port of Antwerp.

8. On the basis of the finding that Tankreederei is established and liable to tax in Luxembourg and that the decision of 29 January 2009 was based on failure to comply

with the condition, set out in Article 152 bis of the LIT, that the investment be physically used on Luxembourg territory, the tribunal administratif **(Administrative Court) states that**, contrary to the view taken before it by the Luxembourg Government, **European Union law precludes not only national legislation which constitutes discrimination on grounds of nationality, but is also capable of precluding national legislation that has the effect of deterring a national of one Member State from providing services or from investing in another Member State.**

9. Faced with doubts on the compatibility of Article 152 bis of the LIT with European Union law, the tribunal administratif decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

"**Do Articles [56 TFEU] and [63 TFEU] preclude the provisions** of the first paragraph of Article 152 bis of the [LIT], insofar as, **under those provisions, Luxembourg taxpayers are granted a tax credit for investments only if the investments are made in an establishment situated in the Grand-Duchy [of Luxembourg] and are intended to remain there on a permanent basis, and only if they are physically used on Luxembourg territory?"**

10. By its question the national court asks, in essence, whether Articles 56 TFEU and 63 TFEU are to be interpreted as precluding a provision of a Member State which makes the grant of a tax credit for investments subject to the condition that the investments in question be made in an establishment situated in national territory, be intended to remain there on a permanent basis and that they be physically used in that territory.

11. It is apparent from the reference for a preliminary ruling and from the case-file sent to the Court that the national court's question relates, more specifically, to the compliance with Articles 56 TFEU and 63 TFEU of the condition, as laid down in Article 152 bis of the LIT, which makes the grant of the tax advantage at issue in the main proceedings dependent on the physical use of the investments concerned in national territory.

12. **In that regard, it must be pointed out,** as did Tankreederei and the European Commission, **that the services provided, in return for remuneration, by that company, which is exclusively established in Luxembourg, in connection with its**

refuelling business carried out in the ports of Antwerp and Amsterdam by the two vessels for which it sought a tax credit for investments, constitute services within the meaning of Article 57 TFEU.

13. It follows that the provisions of the FEU Treaty relating to freedom to provide services apply to a situation such as that in the main proceedings.

14. **In that regard, whilst it is true that direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with EU law** (see, inter alia, Case C-72/09 *Établissements Rimbaud* [2010] ECR I-0000, paragraph 23).

15. **The Court has repeatedly held that Article 56 TFEU precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State** (see, inter alia, Joined Cases C-155/08 and C-157/08 *X and Passenheim-van Schoot* [2009] ECR I-5093, paragraph 32). **Restrictions on the freedom to provide services are national measures which prohibit, impede or render less attractive the exercise of that freedom** (see, inter alia, Case C-330/07 *Jobra* [2008] ECR I-9099, paragraph 19).

16. Furthermore, **the freedom to provide services may be relied on by an undertaking against the Member State in which it is established where the services are provided to recipients established in another Member State and, more generally, whenever a provider of services offers services in a Member State other than the one in which he is established** (see, inter alia, Case C-208/05 *ITC* [2007] ECR I-181, paragraph 56).

17. In the present case, **it must be held that a national provision such as that at issue** in the main proceedings – which applies a less favourable tax regime to investments used in the territory of other Member States, in which the undertaking concerned is not established, than to investments that are used in national territory – **is likely, if not to discourage national undertakings from providing, in other Member States, services that require the use of capital goods situated in those other Member States, at least to make that provision of cross-border services less attractive or more difficult than the provision of services in national territory by**

means of capital goods situated in that territory (see, to that effect, *Jobra*, paragraph 24).

18. It follows that such a national provision constitutes a restriction on freedom to provide services within the meaning of Article 56 TFEU.

19. That restriction may be accepted only if it is justified by overriding reasons in the public interest. Even if that were so, application of that restriction would still have to be such as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose (see, to that effect, Case C-150/04 *Commission* v *Denmark* [2007] ECR I-1163, paragraph 46, and Case C-96/08 *CIBA* [2010] ECR I-0000, paragraph 45).

20. No possible justification has been put forward by the Luxembourg Government in the present case nor has any been mentioned by the national court.

21. In any event, in circumstances such as those of the main proceedings, **the restriction referred to cannot be justified by the need, which the Court has held to be lawful, for the balanced allocation of the power to impose taxes between Member States** (see, inter alia, Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraphs 45, 46 and 51).

22. It is sufficient, in that regard, to point out, as did Tankreederei and the Commission, that, according to the information provided by the national court, Tankreederei's business activities relating to the refuelling services provided in the ports of Antwerp and Amsterdam by means of the vessels in respect of which the tax credit for investments is sought are exclusively taxable in Luxembourg. Consequently, the right of the Grand-Duchy of Luxembourg to exercise its taxing powers in relation to those activities would in no way be jeopardised if the condition referred to in paragraph 11 of this judgment did not exist (see, to that effect, *Jobra*, paragraphs 32 and 33).

23. **The restriction in question cannot moreover be justified by the need to ensure the coherence of the national tax system, which was established by the Court as an overriding requirement relating to the public interest** (See Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 28, and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305, paragraph 21).

24. **For such a justification to succeed, a direct link must be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy** (see, inter alia, Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I-2647, paragraph 62 and the case-law cited).

25. As the Commission states, **it is not apparent from the case-file submitted to the Court that there is a direct link, as regards the Luxembourg tax system, between, on the one hand, the grant to an undertaking providing services such as those at issue in the main proceedings of a tax credit for investments used for those purposes and, on the other hand, the financing of that tax advantage by means of the tax levied on the income made by the recipients of the services provided by means of those assets** (see, to that effect, *Jobra*, paragraph 34 and the case-law cited).

26. It is therefore irrelevant, for the purposes of the grant of the tax credit at issue in the main proceedings, that the recipients of those services who are established in Luxembourg are subject to tax in that Member State and that those who are established in another Member State are not (see, to that effect, Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 40).

27. **The need to prevent the reduction of national tax revenues** – a reduction which, in the main proceedings, the grant of the tax credit at issue to Tankreederei would result in – **is not an overriding reason in the public interest capable of justifying a restriction on a freedom instituted by the FEU Treaty** (see, to that effect, Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 56, and Case C-318/07 *Persche* [2009] ECR I-359, paragraph 46).

28. As regards the need to prevent abuse, it is true that it is apparent from settled case-law that **a restriction on the freedom to provide services can be justified where it specifically targets wholly artificial arrangements which do not reflect economic reality and whose only purpose is to obtain a tax advantage** (see, inter alia, *Jobra*, paragraph 35 and the case-law cited).

29. However, the national provision at issue in the main proceedings affects every undertaking which uses capital goods in the territory of a Member State other than the Grand-Duchy of Luxembourg, and does so even where nothing, as in the main proceedings, points towards the existence of such an artificial arrangement (see, to that effect, *Jobra*, paragraphs 36 to 38).

30. Lastly, as regards the considerations voiced by the French Government on the discretion which Member States have to make the grant of a tax advantage which seeks to meet the specific needs of its entire or of part of its population subject to the requirement of a certain degree of connection between the recipient of the advantage and the society of the Member State concerned, **it must be acknowledged that it is true that the choice of interests of the general public which a Member State wishes to promote by granting tax advantages is a matter for its own discretion** (see, to that effect, Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 39).

31. Furthermore, **as regards the need for a connection between the recipient of a benefit and the society of the Member State concerned, the Court has already held that, with regard to benefits that are not covered by European Union law, Member States enjoy a wide margin of appreciation in deciding which criteria are to be used when assessing the degree of connection to society** (see, to that effect, Case C-103/08 *Gottwald* [2009] ECR I-9117, paragraphs 32 and 34).

32. However, in circumstances such as those of the case in the main proceedings, **where a national provision consistently refuses the benefit of a tax advantage when the investment is not used in national territory, notwithstanding the fact that the investment in question is unconnected with any social objective, such a refusal cannot be justified by such considerations.**

33. It is apparent from the foregoing analysis that a national provision such as that at issue in the main proceedings cannot be justified by overriding reasons of public interest.

34. Consequently, the answer to the question referred is that Article 56 TFEU is to be interpreted as precluding a provision of a Member State pursuant to which the benefit of a tax credit for investments is denied to an undertaking which is established solely in that Member State on the sole ground that the capital goods, in respect of which that credit is claimed, are physically used in the territory of another Member State.

35. **In those circumstances, there is no need to examine whether the provisions of the FEU Treaty relating to the free movement of capital might also preclude such a national provision** (see, to that effect, *Jobra*, paragraph 42).

Operative part

THE COURT, hereby rules:

Article 56 TFEU is to be interpreted as precluding a provision of a Member State pursuant to which the benefit of a tax credit for investments is denied to an undertaking which is established solely in that Member State on the sole ground that the capital goods, in respect of which that credit is claimed, are physically used in the territory of another Member State.

22. DIFFERENCES IN TAX TREATMENT OF RESIDENTS AND NON-RESIDENTS IN REGARDS OF OBLIGATIONS *IN PERSONAM*

Case C-364/01 The heirs of H. Barbier v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen European Court reports 2003 Page I-15013

(Barbier)

SUMMARY

Among other types of capital movements, the transfers of inheritance and gifts are covered by provisions on free movement of capital.[46] A discrimination in tax treatment can occur in relation to so called „personal capital movements". The situation is even more complicated when there are differences in legal systems of Member States concerning the types of ownership regimes. In case below, the Court dealt with national legislation concerning the assessment of inheritance tax on properties excluding from the assessment of their value the fact that non-resident owners were, before their death, under an obligation to transfer legal title to the financial owner. The possibility of justification of such differences in relation to non-residents, *inter alia*, in the context of international accepted standards for taxation of immovable property and EU provisions on prohibition of restrictions of capital movement, is been discussed below.

[46] See Bodiroga Vukobrat N.; Horak, H.; Martinović, A., Temeljne gospodarske slobode u Europskoj uniji (Fundamental Market Freedoms in the European Union), Inženjerski biro, Zagreb, 2011., p. 267.

KEY WORDS

Free movement of capital, Directives 88/361/EEC and 90/364/EEC, Inheritance tax, Requirement of cross-border economic activity, Prohibition of discrimination on the basis of Member State of residence, National legislation concerning the assessment of inheritance tax on properties excluding from the assessment of their value the fact that non-resident owners were, before their death, under an obligation to transfer legal title to the financial owner, Not permissible.

OVERVIEW

A different approach in terms of taxation to residents and non-residents when investing the capital in some other Member State can be justified in restrictive number of cases.[47] The subject of dispute concerns the heirs of Mr. Barbier, born in the Netherlands , but having place of residence in Belgium, and the Inspector of Taxes responsible for non-resident taxpayers (private individuals and companies), Heerlen, as regards the Inspector's refusal, when assessing the immovable property held by Mr. Barbier in the Netherlands, to deduct the value of the obligation to transfer the legal title to that property on the ground that Mr. Barbier was not a resident in that Member State at the time of his death. The national court asked whether EU law, in particular the provisions relating to the free movement of capital and persons, precluded the national legislation concerning the assessment of tax due to the inheritance of immovable property situated in the Member State concerned according to which, in order to assess the property value, the fact that the deceased was under an unconditional obligation to transfer legal title to another person who has financial ownership of that property may be taken into account if, at the time of death, the deceased resided in that Member State but may not be taken into account if he resided in another Member State. According to the international tax principles, which were invoked by the Netherlands Government, only obligations *in rem* are to be taken into account by the Netherlands, as the State where the property is situated, while personal obligations, as the obligation to transfer legal ownership, fall under the fiscal competence of the State of residence. That essentially means that obligations *in*

[47] For list of cases involving mentioned issue see Craig, P; De Burca, G., EU Law: Text, Cases and Materials, Fifth Edition, Oxford, p. 696.

personam are not to be taken into account by the Netherlands authorities due to their fiscal incompetence. The situation in which the deceased resided in the Netherlands is different from the one in which the deceased resided in another Member State. The heirs stated that the difference in treatment at issue in the main proceedings was incompatible with free movement of capital, on the ground that a non-resident will hesitate to purchase immovable property in the Netherlands since, in that case, his heirs would be liable to a greater tax burden than if he had not invested in that Member State or had invested there in another way. The Netherlands Government stated that retaining the legal ownership of a property constitutes neither an economic activity nor an investment. Thus, it is not a genuine capital transaction. The Court clearly stated that national provisions, such as those at issue in the main proceedings, which determine the value of immovable property for the purposes of assessing the amount of tax due when it is acquired through inheritance, were such as to discourage the purchase of immovable property situated in the Member State concerned and the transfer of financial ownership of such property to another person by a resident of another Member State. They also have the effect of reducing the value of the estate of a resident of a Member State other than that in which the property is situated who is in the same position as Mr. Barbier. If concrete facts of the dispute are put aside, one can deduce from the Court conclusion that it considers the nature of the obligation *per se, i. e.*the fact that there is an unconditional obligation on part of resident of one Member State and claim for fullfillment on the part of other, resident private entity (company) in other member State, which forms a cross-border capital transaction. Since different treatment of the comparable situation is not justifiable in terms of general principle of equality and non-discrimination[48], the same was applied in judgement below.

TEXT OF THE JUDGEMENT

1. By order of 5 September 2001, received at the Court on 24 September 2001, the Gerechtshof te 's-Hertogenbosch referred to the Court for a preliminary ruling under Article 234 EC **five questions on the interpretation of Articles 48 and 52 of the EEC Treaty (subsequently Articles 48 and 52 of the EC Treaty, now, after**

[48] See Livioara Goga, G.; The General Principle of non Discrimination and Equal Treatment in the Legislation and Jurisprudence of the Court of Justice of the European Union, Acta Universitatis Danubius, Vol. 5, 1/2013, p.143.

amendment, Articles 39 EC and 43 EC), Article 67 of the EEC Treaty (subsequently Article 67 of the EC Treaty, repealed by the Treaty of Amsterdam), Articles 6 and 8a of the EC Treaty (now, after amendment, Articles 12 EC and 18 EC) and the provisions of Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26) and Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5).

2. Those questions were raised in proceedings between the heirs of Mr Barbier and the Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen (Inspector of Taxes responsible for non-resident taxpayers (private individuals and companies), Heerlen, hereinafter the Inspector) as regards the Inspector's refusal, when assessing the immovable property held by Mr Barbier in the Netherlands, to deduct the value of the obligation to transfer the legal title to that property on the ground that Mr Barbier was not resident in that Member State at the time of his death.

(...)

3. Article 67(1) of the Treaty, which was in force at the time of Mr Barbier's death, provides that: During the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested.

4. **That provision has been implemented** by several directives, **in particular Directive 88/361,** applicable at the material time. Pursuant to Article 1(1) of that directive: **Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this directive, capital movement shall be classified in accordance with the nomenclature in Annex I.**

5. (...) **capital movements are classified according to the economic nature of the assets and liabilities they concern,** denominated either in national currency or in foreign exchange.

(...)

6. That nomenclature comprises 13 different categories of capital movements. The second category concerns Investments in real estate, which are defined as follows:

A ─ **Investments in real estate on national territory by non-residents**

B ─ Investments in real estate abroad by residents

7. The 11th category of that nomenclature, entitled Personal capital movements, includes inheritances and legacies.

8. Article 4 of Directive 88/361 provides: **This directive shall be without prejudice to the right of Member States to take all requisite measures to prevent infringements of their laws and regulations, inter alia in the field of taxation and prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information.Application of those measures and procedures may not have the effect of impeding capital movements carried out in accordance with Community law.**

(...)

10. Under Netherlands law, every estate is subject to tax. Article 1(1) of **the Successiewet 1956 (1956 Law on Succession)** of 28 June 1956 (Stbl. 1956, p. 362, hereinafter the SW 1956) **draws a distinction on the basis of whether the person whose estate is subject to probate (hereinafter the deceased) resided in the Netherlands or abroad. That article states:** In accordance with this law, **the following taxes shall be levied:**

1) **Inheritance duty on the value of all the assets** transferred by virtue of the right to inherit **following the death of a person who resided in the Netherlands at the time of death.** (...)
2) **Transfer duty on the value of the assets set out in Article 5(2) obtained as a gift or inheritance following the death of a person who did not reside in the Netherlands at the time of that gift or that death;**

(...)

11. Article 5(2) of the SW 1956 states:

2) **Transfer duty is levied on the value:**
1. of the domestic possessions referred to in Article 13 of the Wet op de vermogensbelasting 1964 (Stbl. 529), after deducting any debts referred to in that article;

(...)

12. The first indent of Article 13(1) of the Wet op de vermogensbelasting 1964 **(1964 Law on inheritance tax)** of 16 December 1964 (Stbl. 1964, p. 513, hereinafter WB 1964) defines **domestic possessions as including immovable property situated in the Netherlands or rights relating thereto (in so far as they do not belong to a Netherlands undertaking).**

13. Article 13(2)(b) of the WB 1964 allows the deduction of debts secured by a mortgage on immovable property situated in the Netherlands only to the extent that the interest and charges relating to those debts are taken into account for the purpose of determining gross domestic income under Article 49 of the Wet op de Inkomstenbelasting 1964 (1964 Law on income tax) of 16 December 1964 (Stbl. 1964, p. 519, hereinafter the IB 1964).

14. Pursuant to Article 49 of the IB 1964, gross domestic income under that provision includes the total net income received by a person not residing in the Netherlands from immovable property situated in that Member State.

15. **Article 13 of the WB 1964,** as construed by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) (judgment of 5 December 1962, BNB 1962/23), **implies that a non-resident deceased, if he was still the owner of immovable property situated in the Netherlands at the time of his death but had previously transferred financial ownership of the property to a separate legal person under an agreement of sale/purchase, should have declared the full value of that property as a domestic possession for the purposes of both inheritance tax and transfer duty, regardless of the fact that a third person has financial ownership thereof.**

16. Moreover, the Hoge Raad held that when the notarised mortgage deed has not been recorded in the public registers, contrary to the requirements of the Netherlands Civil Code, such a right under a mortgage does not amount to a debt secured by a mortgage

for the purpose of Article 13(2)(b) of the WB 1964 (judgment of 23 December 1992, BNB 1993/78).

17. Accordingly, in the case of the estate of a person who was not resident in the Netherlands at the time of death, an obligation to transfer title to immovable property situated in that Member State is not one of the domestic debts referred to in Article 13 of the WB 1964 and therefore cannot be deducted from the basis of assessment laid down in Article 5(2) of the SW 1956. By contrast, in the case of the estate of a person resident in the Netherlands, that obligation may be deducted, since inheritance duty relates to all the assets and liabilities falling within the estate.

18. Mr Barbier, a Netherlands national born in 1941, died on 24 August 1993. His heirs are his wife and his only son (hereinafter the heirs).

19. In 1970, Mr Barbier moved from the Netherlands to Belgium, from where he continued to exercise his activities as director of a private company established in the Netherlands operating clothing boutiques.

20. In the period from 1970 to 1988, while he was resident in Belgium, Mr Barbier acquired a number of properties situated in the Netherlands, from which he received rent. Under Article 49(1)(b)(2) of the IB 1964 such rent contributes to the gross domestic income of the taxpayer. Those properties were mortgaged.

21. Netherlands law recognises that the **legal title to immovable property may be separated from its so-called financial ownership.** In 1988, **Mr Barbier carried out a series of transactions, including the transfer of financial ownership of his properties, to private Netherlands companies which he controlled. Those companies took over the mortgage debts from the finance company, although Mr Barbier formally remained the mortgagor. With regard to those companies, he undertook, apparently unconditionally, to transfer the title to those properties and waived any rights relating to them in the meantime.**

22. Those transactions gave rise to certain tax advantages for Mr Barbier, such as avoiding the payment of a 6% registration duty.

23. After Mr Barbier's death, for the purpose of paying transfer duty, his notary declared the value of certain other properties held absolutely by Mr Barbier, less the mortgage debts incurred in acquiring them.

24. The value of the properties whose financial ownership Mr Barbier had transferred was not included in that notarial declaration, but the Inspector added the value of all those properties to the declared estate and did not allow any deduction in respect of the obligation to transfer legal title.

25. The heirs appealed against the tax assessment made by the Inspector on the ground that, as a result of the obligation to transfer legal title, the value of those properties should have been reduced to zero. The Inspector nevertheless rejected the appeal and confirmed the tax assessment. **The heirs appealed against that rejection to the Gerechtshof te 's-Hertogenbosch, on the sole ground that the national legislation was in breach of Community law.**

(...)

26. In those circumstances, the Gerechtshof te 's-Hertogenbosch decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1) **Is cross-border economic activity still a precondition for being able to rely on Community law?**
2) **Does Community law preclude a Member State (the State in which the property is situated) from levying on the inheritance of immovable property situated in that Member State a tax on the value of that property which allows the value of the obligation to transfer title to that property to be deducted if, at the time of death, the deceased resided in the State where the property is situated but not if he resided in another Member State (the State of residence)?**
3) **Does it affect the reply to Question 2 if, at the time he acquired that property, the deceased no longer resided in the State in which the property is situated?**
4) **Is the distribution of the deceased's capital as between the State in which the property is situated, the State of residence and any other States relevant to the reply to Question 2?**

5) **If so, in which State must the capital be considered to be invested in the case of a current account claim against a private company of the type referred to in paragraph 2.4 [of the order for reference]?**

(...)

27. **By those questions**, which must be considered together, **the national court essentially asks whether Community law, in particular the provisions of the Treaty relating to the free movement of capital** and of persons and Directive 88/361, **precludes national legislation concerning the assessment of tax due on the inheritance of immovable property situated in the Member State concerned according to which, in order to assess the property's value, the fact that the deceased was under an unconditional obligation to transfer legal title to another person who has financial ownership of that property may be taken into account if, at the time of death, the deceased resided in that Member State but may not be taken into account if he resided in another Member State.**

28. In that context, **the national court asks whether the existence of cross-border economic activity is a precondition for relying on those freedoms.** It refers in this respect to Article 8a of the Treaty on citizenship of the Union and to Directive 90/364. **It also asks the Court whether it is relevant that the deceased, who was a national of the Member State in which the property is situated, had transferred his residence but not his economic activity to another Member State before he acquired the property in question, and whether it might be of relevance that his capital was distributed over several Member States.**

(...)

29. **The heirs point out that**, by creating a situation where elements of an estate situated in the Netherlands and burdened by an obligation to transfer title are subject to different tax treatment according to whether the deceased resided in the Netherlands or abroad at the time of his death, **Netherlands law is operating a covert form of discrimination on grounds of nationality** (Case C-330/91 Commerzbank [1993] ECR I-4017, Case C-1/93 Halliburton Services [1994] ECR I-1137, and Case C-307/97 Saint-Gobain ZN [1999] ECR I-6161).

30. The Netherlands Government does not deny that there is a difference in treatment based solely on the criterion of residence and admits that, in the case of a person

residing in the Netherlands at the time of his death, an obligation to transfer title may be deducted, while it may not be deducted where a person resides in another Member State at the time of his death.

31. Nevertheless, **the Government** contends that the present case does not involve different treatment of identical situations. **It points out that it is important to distinguish clearly between the case where the deceased had absolute ownership of immovable property and that where, as in the case in the main proceedings, he retained only legal ownership of that property.** In the latter case, according to the Netherlands Government, **the obligation on the owner to transfer legal ownership at a given time is a personal obligation and not an obligation in rem** in respect of immovable property.

32. While it relies on that distinction, **the Netherlands Government maintains that the general principle of international tax law as to the allocation of the power to tax between States should be applied.** According to that principle, **obligations in rem in respect of property are a matter for the State in which the property is situated,** while **personal obligations, such as the obligation at issue in the main proceedings to transfer title, are for the State of residence to take into account.**

33. Accordingly, in the light of that principle, **the situation where the deceased resided in the Netherlands is different from one where the deceased resided in another Member State. In the first case, the whole of the estate, including personal obligations, attaches to the Netherlands, as the State where the property is situated and where the person concerned resided.**

34. By contrast, **in the second case only obligations in rem are to be taken into account by the Netherlands, as the State where the property is situated, while personal obligations fall under the fiscal competence of the State of residence.** While it concedes that in certain cases other obligations in rem which are economically related to immovable property are taken into account in application of that principle, including debts connected to the acquisition, transformation, renovation or maintenance of such an item in the estate, the Netherlands Government maintains that **personal obligations such as the obligation to transfer title at issue in the main proceedings are not real property obligations and are** therefore, in accordance with international tax law, **a matter for the State of residence.**

(...)

36. The Commission points out that, **although direct taxation falls within the competence of the Member States, they must none the less exercise that competence consistently with Community law** (Verkooijen, cited above, paragraph 32).

37. It maintains that the unequal treatment at issue in the main proceedings does not lie in the exercise of tax powers but in the failure to take into account an obligation encumbering the estate. That failure to take into account the economic value of a debt artificially increases the basis of assessment.

38. In contrast to the case which led to the Schumacker judgment cited above, there is no objective difference in the case in the main proceedings which could justify such a difference in treatment between residents and non-residents.

39. Moreover, contrary to the Netherlands Government's contention, **it is not legitimate to take into account for assessment purposes the transfer of legal ownership but not obligations affecting such ownership. The Commission states that the Netherlands Government takes account of such obligations only if the deceased was a Netherlands resident. The situation of a non-resident is no different as regards supervision.**

(...)

40. The heirs submit that there is no condition as regards cross-border economic activity or that there is such activity simply because cross-border investments in immovable property made through a company are involved. It relies on Verkooijen in that regard.

41. The heirs maintain that the difference in treatment at issue in the main proceedings is incompatible with free movement of capital, on the ground that a non-resident will hesitate to purchase immovable property in the Netherlands since, in that case, his heirs would be liable to a greater tax burden than if he had not invested in that Member State or had invested there in another way.

42. By contrast, **the Netherlands Government takes the view that there is no cross-border economic activity that is impeded by Netherlands tax law.** The purchase by Mr Barbier of immovable property in the Netherlands while he resided in Belgium was

not hindered in any way, and the same is true of the transfer of the financial ownership of that property, for the purpose of which he was treated in the same way as a Netherlands resident.

43. However, the acquisition of property by inheritance is not in itself an economic activity. Nor is investment in property of an exclusively legal nature, without financial ownership, such an activity. The Netherlands Government emphasises that Mr Barbier made such an investment solely for tax purposes.

44. At the hearing, **the Netherlands Government pointed out that retaining the legal ownership of a property constitutes neither an economic activity nor an investment. Legal ownership does not account for value in the economic circuit. Contrary to what the heirs suggest, it is not a genuine capital transaction.**

45. The Netherlands Government also points out that in the case in the main proceedings Mr Barbier had acquired property in the Netherlands when he was already living in Belgium and that that purchase was in no way hindered. Moreover, Mr Barbier did not meet any obstacles either in retaining legal ownership or in effecting the transfer of the financial ownership of his properties.

46. In addition, **observing that the sale of the financial ownership of those properties was almost exclusively motivated by the desire to avoid paying registration duties or to delay doing so, the Netherlands Government maintains that there was no real economic activity and that, as a result, no protection under the Treaty is necessary.** In the alternative, even if such a transaction had to be considered a genuine economic activity, the link between the decision to set up such a complicated arrangement for the purpose, in particular, of avoiding transfer tax and the fact that it was not subsequently possible to deduct the personal obligation to transfer title is so tenuous that it cannot be said that the free movement of capital might thereby have been hindered.

47. **The Commission,** for its part, **states** at the outset **that Article 1(1) of Directive 88/361, the direct effect of which is not disputed, requires Member States to abolish all restrictions on movements of capital.**

48. Moreover, Mr Barbier's estate is affected by the fact that at the time of his death he owned immovable property in the Netherlands without being resident there. In this respect, **it should be noted that Mr Barbier had acquired that property after**

leaving the Netherlands and therefore found himself in the same objective situation as any person who, as a resident of another Member State, wishes to acquire immovable property situated in the Netherlands. For that reason **the dispute also concerns the free movement of capital laid down in Article 1 of Directive 88/361. Any cross-border investment in itself constitutes cross-border economic activity.**

The Court's answer

56. It must be borne in mind, first, that although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law (see Schumacker , cited above, paragraph 21; Case C-80/94 Wielockx [1995] ECR I-2493, paragraph 16; and Gschwind , paragraph 20, and Verkooijen , paragraph 32, cited above).

57. Second, **Directive 88/361 brought about complete liberalisation of capital movements and to that end Article 1(1) thereof required the Member States to abolish all restrictions on such movements** (Verkooijen , paragraph 33). **The direct effect of that provision was recognised by the Court in Joined Cases C-358/93 and C-416/93 Bordessa and Others [1995] ECR I-361, paragraph 33.**

58. **Investments in property** such as those made within Netherlands territory by Mr Barbier, acting from Belgium, **clearly constitute movements of capital within the meaning of Article 1(1) of Directive 88/361, as does the transfer of immovable property by its sole owner to a private company in which he holds all the shares, as well as the inheritance of that property.**

59. The rights conferred by that directive are not subject to the existence of other cross-border elements. The mere fact that the result of a national provision is to restrict movements of capital by an investor who is a national of a Member State on the basis of his place of residence is sufficient for Article 1(1) of Directive 88/361 to apply.

60. Accordingly, **neither the fact that Mr Barbier had changed residence to another Member State before acquiring the property in question nor the fact that**

his capital may have been distributed over two Member States is relevant as regards the application of that provision.

61. Similarly, it is not relevant that the tax measure at issue in the main proceedings was adopted by the Member State of origin of the person concerned (see, to that effect, Case 115/78 Knoors [1979] ECR 399, paragraph 24; Case C-61/89 Bouchoucha [1990] ECR I-3551, paragraph 13; Case C-19/92 Kraus [1993] ECR I-1663, paragraph 15; Case C-419/92 Scholz [1994] ECR I-505, paragraphs 8 and 9; and Case C-107/94 Asscher [1996] ECR I-3089, paragraph 32).

62. As for the existence of a restriction within the meaning of Article 1(1) of Directive 88/361, **national provisions such as those at issue in the main proceedings,** which determine the value of immovable property for the purposes of assessing the amount of tax due when it is acquired through inheritance, **are such as to discourage the purchase of immovable property situated in the Member State concerned and the transfer of financial ownership of such property to another person by a resident of another Member State. They also have the effect of reducing the value of the estate of a resident of a Member State other than that in which the property is situated who is in the same position as Mr Barbier.**

63. Accordingly, **the national provisions at issue in the main proceedings have the effect of restricting the movement of capital.**

64. None the less, **the Netherlands Government,** without, however, taking Directive 88/361 into account, puts forward a series of considerations in support of the difference in treatment of resident and non-resident taxpayers.

65. First, it **maintains that this case does not involve the different treatment of comparable situations, in the light of the principle of international tax law pursuant to which obligations in rem in respect of property are a matter for the State in which the property is situated while personal obligations, such as the obligation to transfer title at issue in the main proceedings, are for the State of residence to take into account.**

66. In that regard, the national court sets out a similar argument put forward by the Inspector, to the effect that it follows from the generally recognised allocation of the power to tax between States that the distinction made on the basis of residence is compensated for by the fact that that power is limited on the death of a non-resident

whose estate is subject to probate. The national court, however, takes the view that there is no such principle of allocation. **The divergences between Member States' legal systems and concepts in the field of taxation of real property are too wide, and only a bilateral agreement could settle the effects of those differences.** There is no agreement between the Netherlands and the Kingdom of Belgium intended to prevent double taxation in matters of inheritance.

67. **The legal difficulties to which the national court refers are illustrated by the possibility** provided by Netherlands law, **of which Mr Barbier made use, of separating the legal title to immovable property from its so-called financial ownership, a distinction which does not exist in certain other legal systems.** In a case where the inheritance law of the State of residence of the deceased does not recognise that possibility, only a bilateral agreement can ensure that the deceased's obligation to transfer legal title will be taken into account by that State as the basis for a deduction from the personal estate and that, in that case, the legal title will be assigned the same value as in the Netherlands.

68. In any event, **according to the information supplied to the Court** at the hearing, **the value of the estate of a person residing in the Netherlands at the time of death is not assessed,** in circumstances such as those in the case in the main proceedings, **on the basis of a strict distinction between rights in rem and rights in personam, since the obligation to transfer title is simply taken into account as a deduction, so that the right in rem attaching to the estate of that person at the time of death is assessed at zero.**

69. Second, in support of the difference in treatment in question, the Netherlands Government maintains that no duty will be levied if the value of the obligation to transfer title is deducted, either for the 1988 transfer of financial ownership (registration duty) or for the 1993 inheritance (transfer duty).

70. In that regard, as the Commission has stated, **there is no link between transfer duty and inheritance duty.** As the Advocate General pointed out in paragraph 66 of his Opinion, **no such duties would be paid if a deceased person had resided in the Netherlands and carried out the same transfers of financial ownership of property as Mr Barbier, without registering a mortgage. Moreover, the heirs were able to state, without being contradicted on that point, that duty is in any event payable when legal ownership is finally transferred.**

71. **As regards the Netherlands Government's argument that the fact that the objective of selling the financial ownership of that immovable property was to avoid or delay the payment of a transfer tax should deprive the heirs of protection under Community law,** suffice it to recall that **a Community national cannot be deprived of the right to rely on the provisions of the Treaty on the ground that he is profiting from tax advantages which are legally provided by the rules in force in a Member State other than his State of residence.**

72. The Netherlands Government also relies on Article 73d(1)(a) of the Treaty to support its argument that it may be justifiable to distinguish between resident taxpayers and non-resident taxpayers in this case.

73. **In that regard it must be pointed out that**, apart from the fact that Article 73d of the Treaty came into force after Mr Barbier's death, **Article 73d(3) provides that the national measures referred to inter alia in paragraph 1 of that article must not constitute a disguised restriction on the free movement of capital.**

74. The Netherlands Government did not put forward any other factor capable of bringing the legislation at issue in the main proceedings within the scope of the derogation in Directive 88/361. **It follows that Article 1(1) thereof precludes national legislation such as that at issue in the main proceedings.**

75. It follows from the foregoing that it is not necessary to examine the questions referred for a preliminary ruling in so far as they concern freedom of movement for persons. Suffice it to point out in that regard that **the tax consequences in respect of inheritance rights are among the considerations which a national of a Member State could reasonably take into account when deciding whether or not to make use of the freedom of movement provided for in the Treaty.**

76. The answer to the questions referred to the Court must therefore be that **Community law precludes national legislation concerning the assessment of tax due on the inheritance of immovable property situated in the Member State concerned according to which, in order to assess the property's value, the fact that the person holding legal title was under an unconditional obligation to transfer it to another person who has financial ownership of that property may be taken into account if, at the time of his death, the former resided in that Member State, but may not be taken into account if he resided in another Member State.** (...)

Operative part

THE COURT, in answer to the questions referred to it by the Gerechtshof te ’s-Hertogenbosch by order of 5 September 2001, hereby rules:

Community law precludes national legislation concerning the assessment of tax due on the inheritance of immovable property situated in the Member State concerned according to which, in order to assess the property's value, the fact that the person holding legal title was under an unconditional obligation to transfer it to another person who has financial ownership of that property may be taken into account if, at the time of his death, the former resided in that Member State, but may not be taken into account if he resided in another Member State.

23. JUSTIFICATION OF PRIOR AUTHORISATION - RESTRICTION TO FREE MOVEMENT OF CAPITAL

Case C-54/99 Association Église de Scientologie de Paris and Scientology International Reserves Trust *v* The Prime Minister European Court reports 2000 Page I-01335

(Église de Scientologie)

SUMMARY

The judgement in the *Église de Scientologie* deals with issues of justification of Member States' restraints to free movement of capital. The Court stated that system of prior authorization could be justified in relation to the foreign direct investments, but only if the restraints were related to specific circumstances. In other words, a system of prior authorisation of direct foreign investments which confines itself to defining in general terms the affected investments as investments that represent a threat to the public policy and public security, is not precise enough and is not in line with requirements of keystone principle of legal certainty.

KEY WORDS

Free movement of capital, Restrictions, System of prior authorisation for direct foreign investments, Measure justified on grounds of public policy or public security, Lack of precision, Infringement of the principle of legal certainty.

OVERVIEW

The judgement in the *Église de Scientologie* deals with questions of justification of Member States's measures which restrict direct cross-border foreign investments on

grounds of protection of public policy and public security. The Association Église de Scientologie de Paris, constituted under the French law, and Scientology International Reserves Trust, established in the United Kingdom, requested for repeal of the French provisions on system of prior authorisation for certain categories of direct foreign investments. The French Minister implicite rejected their appeal by maintaining the provision in force and from their point of view failed to comply with provisions of the Community Law on free movement of capital. Since cross-border direct investments are considered to be a form of capital movement,[49] the question of justification of such state measures arose. The main issues are: How precise do the state measures have to be in order to be justified under exemptions of free movement of capital? The same question in fact comprises the question of legal certainty as one of the fundamental principles that are to be found in the national legal systems of Member States.[50] The Court concluded that a provision of national law, which made a direct foreign investment a subject to prior authorisation, constituted a restriction on the movement of capital. The Court elaborates that Member States are, in principle, free to determine the requirements of public policy and public security in the light of their national needs, but those grounds must, in the Community context and, in particular, as derogations from the fundamental principle of free movement of capital, be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions. A mere invocation of public security and public policy as grounds for restrictions is not enough. Public policy and public security may be relied, as it was stated by the Court, as a ground for restraints, only if there is a genuine and sufficiently serious threat to a fundamental interest of society and only if they are necessary for the protection of the interests which they are intended to guarantee in so far as those objectives cannot be attained by less restrictive measures (the principle of proportionality).[51] Those derogations must not serve purely economic ends. In the case of direct foreign investments which constitute a genuine and sufficiently serious threat to public policy and public security, as stated by the Court, a system of prior declaration may prove to be inadequate to counter such a threat. In the

[49] The same in Bodiroga Vukobrat, N.; Horak, H.; Martinović, A.; Temeljne gospodarske slobode u Europskoj uniji (Fundamental Market Freedoms in the European Union), Inzenjerski biro, Zagreb, 2011.
[50] For more on principle of legal certainty see Craig, P; De Burca, G., EU Law: Text, Cases and Materials, Fifth Edition, Oxford, pp. 533-535.
[51] See more on the principle of proportionality *ibid*., pp. 168-169.

present case, however, the system in question required the prior authorisation for every direct foreign investment which represents a threat to public policy and public security, in very wide and general manner. Thus, the investors concerned are given no indication whatever as to the specific circumstances in which prior authorisation is required. Such lack of precision does not disable individuals to be apprised of the extent of their rights and obligations deriving from the Treaty. In that case, the system established is contrary to the principle of legal certainty.

TEXT OF THE JUDGEMENT

1. By decision of 6 January 1999, received at the Court on 16 February 1999, **the French Conseil d'État (Council of State) referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question concerning the interpretation of Article 73d(1)(b) of the EC Treaty (now Article 58(1)(b) EC).**

2. This question has arisen in proceedings between, on the one hand, **Association Église de Scientologie de Paris, an association constituted under French law, and Scientology International Reserves Trust, a trust established in the United Kingdom, and, on the other, the Prime Minister of France, concerning the latter's implied decision rejecting the applicants' request for repeal of the provisions governing the system of prior authorisation laid down by French law for certain categories of direct foreign investments.**

(...)

3. Article 73b(1) of the EC Treaty (now Article 56(1) EC) provides:

Within the framework of the provisions set out in this Chapter, **all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.**

4. Article 73d of the Treaty provides as follows:

1) **The provisions of Article 73b shall be without prejudice to the right of Member States:**
   (a) (...)
   (b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision

of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or **to take measures which are justified on grounds of public policy or public security.**

2) (...)

3) The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 73b.

(...)

5. Article 1 of **Law No 66-1008 of 28 December 1966 on financial relations with foreign countries** (Law No 66-1008) provides:

Financial relations between France and other countries shall be free. This freedom shall be exercised in accordance with the arrangements set out in this Law and in compliance with international commitments entered into by France.

6. Article 3(1)(c) of Law No 66-1008 provides:

The Government may, with a view **to ensuring the defence of national interests** and by decree adopted following a report by the Minister for Economic and Financial Affairs:

1) **make the following subject to** declaration, **prior authorisation** or control:

(...)

(c) the making and realisation of foreign investments in France;

(...)

7. Article 5-1(I)(1) of Law No 66-1008, introduced by Law No 96-109 of 14 February 1996 on financial relations with foreign countries in regard to foreign investments in France, provides:

"If he should establish that a foreign investment is being or has been made in activities which are connected, even on an occasional basis, **with the exercise of public authority in France, or that a foreign investment is such as to represent a threat to public policy, public health or public security,** or if that investment has been made in activities involving research into, production of or trade in arms,

munitions, explosive powders or substances intended for military purposes, or materials designed for warfare, **the Minister responsible for the economy may,** in the absence of a request for prior authorisation required under Article 3(1)(c) of the present Law or despite a refusal of authorisation, or where the conditions attached to authorisation have not been satisfied, **order the investor to discontinue the transaction, or modify or restore, at his own expense, the situation previously obtaining.** Such an order may be issued only after the investor has been given formal notice to submit his comments within 15 days."

8. **Article 11 of Decree No 89-938 of 29 December 1989**, adopted for the purpose of applying Article 3 of Law No 66-1008, as amended by Decree No 96-117 of 14 February 1996 (Decree No 89-938), provides:

Direct foreign investments made in France shall be free. When they are being made, these investments shall be the subject of an administrative declaration.

9. Under Article 11a of Decree No 89-938:

The system defined in Article 11 shall not apply to the investments covered by Article 5-1(I)(1) of Law No 66-1008 of 28 December 1966 governing financial relations with foreign countries, as amended by, inter alia, Law No 96-109 of 14 February 1996.

10. Article 12 of Decree No 89-938 adds:

Direct foreign investments made in France which are covered by Article 11a shall be subject to prior authorisation by the Minister responsible for the economy. That authorisation shall be deemed to have been obtained one month after receipt of the investment declaration submitted to the Minister responsible for the economy, unless the latter has, within that same period, declared that the transaction in question is to be deferred. The Minister responsible for the economy may waive the right of deferment before the period laid down in the present article has expired.

11. Article 13 of Decree No 89-938 states that certain direct investments are exempt from the administrative declaration and prior authorisation provided for under Articles 11 and 12; these include the establishment of companies, subsidiaries or new undertakings, direct investments between companies all belonging to the same group, direct investments made, up to a maximum limit of FRF 10 million, in craft-based

undertakings, undertakings engaged in retail and hotel trades, and purchases of agricultural land.

(...)

12. On 1 February 1996 the applicants in the main proceedings requested the Prime Minister of France to repeal certain legislative provisions laying down a system of prior authorisation for direct foreign investments. Having subsequently found that legislative amendments made on 14 February 1996 maintained in force a prior authorisation system, they concluded that this constituted a decision by the Prime Minister equivalent to a refusal of their request and challenged that decision before the Conseil d'État as being ultra vires. In support of their action, they submitted that there had been a failure to comply with the rules of Community law governing the free movement of capital.

13. Taking the view that it was unclear how Article 73d of the Treaty was to be construed, the Conseil d'État decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

„Do the provisions of Article 73d of the Treaty of 25 March 1957 establishing the European Community, as amended, **according to which the prohibition of all restrictions on movements of capital between Member States is without prejudice to the right of Member States "to take measures which are justified on grounds of public policy or public security", allow a Member State, in derogation from the system of full freedom or the declaration system applicable to foreign investments within its territory, to maintain a system of prior authorisation for investments which are such as to represent a threat to public policy, public health or public security, such authorisation being deemed to have been obtained one month after receipt of the investment declaration submitted to the Minister unless the latter, within the same period, declares that the transaction in question is to be deferred?“**

14. A provision of national law which makes a direct foreign investment subject to prior authorisation constitutes a restriction on the movement of capital within the meaning of Article 73b(1) of the Treaty (see, to this effect, Joined Cases C-163/94, C-165/94 and C-250/94 Sanz de Lera and Others [1995] ECR I-4821, paragraphs 24 and 25).

15. Such a provision remains a restriction even if, as in the present case, authorisation is deemed to have been obtained one month after receipt of the request where the competent authority does not declare a deferment of the transaction in question within the same period. Similarly, it is irrelevant that, as the French Government asserts in this case, failure to comply with the obligation to request prior authorisation attracts no penalty.

16. The question which arises is therefore whether Article 73d(1)(b) of the Treaty, which provides that Article 73b thereof is without prejudice to the right of Member States to take any measures which are justified on grounds of public policy or public security, permits national legislation, such as that at issue in the main proceedings, which merely requires prior authorisation for direct foreign investments which are such as to represent a threat to public policy or public security.

17. It should be observed, first, that **while Member States are still, in principle, free to determine the requirements of public policy and public security in the light of their national needs, those grounds must, in the Community context and, in particular, as derogations from the fundamental principle of free movement of capital, be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions** (see, to this effect, Case 36/75 Rutili v Minister for the Interior [1975] ECR 1219, paragraphs 26 and 27). **Thus, public policy and public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society** (see, to this effect, Rutili, cited above, paragraph 28, and Case C-348/96 Calfa [1999] ECR I-11, paragraph 21). **Moreover, those derogations must not be misapplied so as, in fact, to serve purely economic ends (to this effect, see Rutili, paragraph 30). Further, any person affected by a restrictive measure based on such a derogation must have access to legal redress** (see, to this effect, Case 222/86 Unectef v Heylens and Others [1987] ECR 4097, paragraphs 14 and 15).

18. Second, **measures which restrict the free movement of capital may be justified on public-policy and public-security 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, to this effect, Sanz de Lera and Others, cited above, paragraph 23).

19. However, **although the Court has held,** in Joined Cases C-358/93 and C-416/93 Bordessa and Others [1995] ECR I-361 and in Sanz de Lera and Others, which concerned the exportation of currency, **that systems of prior authorisation were not, in the circumstances particular to those cases, necessary in order to enable the national authorities to carry out checks designed to prevent infringements of their laws and regulations and that such systems consequently constituted restrictions contrary to Article 73b of the Treaty, it has not held that a system of prior authorisation can never be justified, particularly where such authorisation is in fact necessary for the protection of public policy or public security** (see judgment of 1 June 1999 in Case C-302/97 Konle v Austria [1999] ECR I-0000, paragraphs 45 and 46).

20. In the case of direct foreign investments, the difficulty in identifying and blocking capital once it has entered a Member State may make it necessary to prevent, at the outset, transactions which would adversely affect public policy or public security. It follows that, in the case of direct foreign investments which constitute a genuine and sufficiently serious threat to public policy and public security, a system of prior declaration may prove to be inadequate to counter such a threat.

21. In the present case, however, the essence of the system in question is that prior authorisation is required for every direct foreign investment which is such as to represent a threat to public policy [and] public security, without any more detailed definition. Thus, the investors concerned are given no indication whatever as to the specific circumstances in which prior authorisation is required.

22. Such lack of precision does not enable individuals to be apprised of the extent of their rights and obligations deriving from Article 73b of the Treaty. That being so, the system established is contrary to the principle of legal certainty.

23. The answer to the question submitted must therefore be that Article 73d(1)(b) of the Treaty must be interpreted as precluding a system of prior authorisation for direct foreign investments which confines itself to defining in general terms the affected investments as being investments that are such as to represent a threat to public policy and public security, with the result that the persons concerned are unable to ascertain the specific circumstances in which prior authorisation is required. (...)

Operative part

THE COURT, in answer to the question referred to it by the Conseil d'État by decision of 6 January 1999, hereby rules:

Article 73d(1)(b) of the EC Treaty (now Article 58(1)(b) EC) must be interpreted as precluding a system of prior authorisation for direct foreign investments which confines itself to defining in general terms the affected investments as being investments that are such as to represent a threat to public policy and public security, with the result that the persons concerned are unable to ascertain the specific circumstances in which prior authorisation is required.

24. GOLDEN SHARES IN LIGHT OF FREE MOVEMENT OF CAPITAL AND FREEDOM OF ESTABLISHMENT

Case C-212/09 European Commission v Portuguese Republic European Court reports 2011 Page I-10889

(Commission v Portugal)

SUMMARY

In the *European Commission v Portuguese Republic* the Court dealt with status of golden shares in EU law, in the context of both freedom of establishment and free movement of capital. By confirming the well-established Court practice, according to which the golden shares are not in principle an acceptable instrument of state control of privatised undertakings, it dealt with questions of justification of such instruments from perspective of public security regarding the energy supply.

KEY WORDS

Free movement of capital, Restrictions, Company law, National rules vesting in the State special rights in the management of a privatised undertaking.

OVERVIEW

Golden shares comprise special rights or powers vested by the state or public authorities which entitle those holders to execute certain level of supervision in the managment of privatised undertaking.[52] They stand for instrument of keeping under

[52] According to the definition given by Jurić, D.; Sloboda kretanja kapitala: Sudska praksa Europskog suda u pogledu primjene zlatnih dionica i njihove dopustivosti s obzirom na ostvarenje slobode kretanja kapitala /Free Movement of Capital: ECJ's Case Law in regards of Golden Shares and their Admissibility

control those companies which perform activities of the state special interest, e.g. public services, even after those companies have been privatised.[53] According to the special rights vested to the state, they can be categorised as rights to control decisions made by company's bodies and rights to influence the shareholder structure.[54] Golden shares can be implemented by general company law or by particular sources of law on privatisation of companies.[55] The main dispute in case below concerns the golden shares held by Portuguese state in GALP, a Portuguese privatised oil company. Those shares, irrespective of their number, confered rights under the special Law on Privatisation to Portuguese state to influence on the company key decisions by act of veto, e.g. appointment of a number of directors not exceeding one third of the total, resolutions amending the company's articles of association, resolutions authorising the conclusion of certain contracts concerning the structure and control of groups of companies and those that might in any way jeopardise the country's supply of oil or gas and also the right to appoint the Chairman of the Board of Directors, what, according to the European Commission, was not in line with provisions of EU law on free movement of capital. The main objective of such golden shares, on side of Portuguese state, was to protect the national interest of Portuguese state in regards of energy supply. One of the questions arising in course of proceedings is whether those special rights belong to the State or the shareholder - Caixa Geral de Depósitos SA (CGD), which is the State bank and, in fact, does it make any difference in treatment of state position within the company as regards the golden shares. The bank was one of the shareholders and under shareholders agreement it was entitled to appoint a director, who is required to be the Chairman of the Board of Directors. The Court clearly stated that the State acted through the Bank. The State is the sole shareholder, the State exercises its rights through the intermediary of CGD. Consequently, as regards the private nature of the shareholders' agreement, the Portuguese State acts, through the

in regards of Achievement of Free Movement of Capital in Bodiroga Vukobrat, N.; Đerđa, D.; Pošćić, A. (ur./eds.), Zbirka presuda Europskog suda (izbor recentne prakse)/Collection of ECJ's case law (Selection of Recent Cases), Inženjerski biro, Zagreb, 2011., p. 179.

[53] *Ibid.*

[54] *Ibid.*, p. 180.

[55] *Ibid.*

intermediary of CGD.[56] The approval on appointing the chairman of the Board of Directors is a right inherent in the shares specific to the State. This therefore constitutes a specific right, which derogates from general company law and is laid down by the national legislative measure for the sole benefit of the public authorities. It maintains that the State special rights in GALP cannot be justified on grounds of public security, in this case the security of Portugal's energy supply. As it is apparent from the Portuguese national law on energy, it is for the State, and not for GALP, to ensure the security of oil and natural gas supply. It is a common ground confirmed by the Court in this judgment that requirements of public security must, in particular as a derogation from the fundamental principle of the free movement of capital, be interpreted strictly, with the result that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union. Thus, the public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. But neither that law nor GALP's articles of association lay down any criteria for determining the specific circumstances in which special rights arising out of golden shares may be exercised. In addition to that, the State's appointment of a director is subject to the condition, also formulated in a rather general and imprecise manner, of safeguarding the public interest. Such uncertainty, as concluded by the Court, constitutes serious interference with the free movement of capital in that it confers on the national authorities, as regards the use of such rights, a latitude so discretionary in nature that it cannot be regarded as proportionate to the objectives pursued. Since the national measures at issue involve restrictions on freedom of establishment, such restrictions are a direct consequence of the obstacles to the free movement of capital. Since the breach of free movement of capital has been established, there is no need for a separate examination of the measures at issue in the light of the Treaty rules concerning the freedom of establishment. Such wording is in line with the Court practice when *implice* confirms the complementarity of fundamental freedoms and refraining from giving prevailance to one or another. But, nevertheless, the Court explicitly held that golden shares in question affected both

[56] On wide interpretation of term „State" in ECJ's case law see in [56] See Bodiroga Vukobrat N.; Horak, H.; Martinović, A., Temeljne gospodarske slobode u Europskoj uniji (Fundamental Market Freedoms in the European Union), Inženjerski biro, Zagreb, 2011., p. 36.

freedoms, discouraging potential investors from investing into company in which they cannot count on possibility to influence on decisions due to special state position. Such special rights restrict the possibility for shareholders to participate effectively in the management and control of the company concerned in proportion to the value of the shares which they hold and also deter investors from other Member States from buying shares in that company.

TEXT OF THE JUDGEMENT

1. By its application, the Commission of the European Communities seeks a declaration from the Court that, by maintaining special rights for the Portuguese State and for other public entities or public sector bodies in GALP Energia SGPS SA ('GALP'), allocated in connection with privileged ('golden') shares held by the Portuguese State, the Portuguese Republic has failed to fulfil its obligations under Articles 43 EC and 56 EC.

(...)

2. Article 15(1) of **Law No 11/90 of 5 April 1990 concerning the Framework Law on Privatisations** (Lei No 11/90, Lei Quadro das Privatizações) (*Diário da República* I, Series A, No 80 of 5 April 1990) (the 'LQP') provides:

"In exceptional circumstances, and where grounds of national interest so require, the legislative measure adopting the articles of association of the company to be privatised may provide, in order to protect the public interest, that resolutions relating to certain matters must be approved by a director appointed by the State."

3. **Article 15(3)** of the LQP provides, in the following terms, for the possibility of creating golden shares:

"The instrument [approving the articles of association of the undertaking to be privatised or converted into a public limited company] referred to in Article 4(1) may also, in exceptional cases, where grounds of national interest so require, provide for the existence **of golden shares, which are intended to remain the property of the State and which, irrespective of their number, confer on the State a right of veto over**

amendments to the articles of association and over other resolutions relating to certain matters duly specified in the articles of association."

4. In pursuance of Article 15 of the LQP, **Article 4(1) of Decree-Law No 261-A/99** approving the first phase of the privatisation of the share capital of GALP – Petróleos e Gás de Portugal, SGPS SA (Decreto-Lei n° 261-A/99 aprova a 1.ª fase do processo de privatização do capital social da GALP – Petróleos e Gás de Portugal, SGPS, SA), of 7 July 1999 (*Diário da República* I, Series A, No 156, of 7 July 1999) ('Decree-Law No 261-A/99') **provides for the possibility of 'creating golden shares through the conversion of ordinary shares**'.

5. Under Article 4(2) of that Decree-Law, golden shares may not represent a proportion of GALP's share capital which is greater than 10%, before the increase in capital, and the majority of those shares must be held by public bodies.

6. According to Article 4(3) of the same Decree-Law, the golden shares confer a right of veto with regard to the appointment of a number of directors not exceeding one third of the total. They confer the same right in respect of resolutions amending the company's articles of association, resolutions authorising the conclusion of certain contracts concerning the structure and control of groups of companies and those that might in any way jeopardise the country's supply of oil or gas, or of products derived therefrom.

7. Article 391(2) of the Portuguese Commercial Companies Code ('the CSC') provides:

"The articles of association of a company may state that the election of directors must be approved by a number of votes corresponding to a specified proportion of the share capital, or that the election of some of the directors, not exceeding one third of the total number, must also be approved by a majority of the votes attaching to certain shares, although the right to appoint directors cannot be attached to certain categories of shares."

(...)

9. Under Article 4(1) of GALP's articles of association, the company's share capital is made up of 40 million Class A shares and approximately 789 million Class B shares.

10. Article 4(3) of GALP's articles of association provides that certain special rights attach to Class A shares:

> (a) the election of the chairman of the Board of Directors shall require a majority of the votes attaching to Class A shares;
>
> (b) resolutions on the conclusion of contracts concerning the structure and control of groups of companies, and those that might in any way jeopardise the country's supply of oil, gas, electricity or products derived therefrom shall require a majority of the votes attaching to Class A shares.
>
> (...)

11. Furthermore, Article 18(1)(b) of GALP's articles of association provides that the adoption of resolutions of GALP's Board of Directors in certain areas is to require the approval of a qualified majority of two thirds of the directors, **which must include a vote in favour by the chairman of the Board of Directors**; those areas include: strategic disinvestment; share acquisitions in sectors not relating to the company's main activities; choice of strategic partners; adoption and amendment of strategic guidelines, of the strategic plan and of related areas of activity; definition of the basic management and organisational structure; definition of the degree of managerial autonomy of the companies controlled by GALP; operations for the division, merger or winding-up of companies controlled by GALP; and distribution of dividends by companies controlled by GALP.

(...)

12. On 4 October 2006, a shareholders' agreement was concluded (...).

13. Under that agreement, inter alia, CGD is to appoint a director, who is required to be the chairman of the Board of Directors.

14. Since 1999, the Portuguese energy sector, in particular that of oil and natural gas, has undergone extensive restructuring, which culminated, through the adoption of Decree-Law No 137-A/99 of 22 April 1999, in the formation of GALP, a publicly-owned holding company for the State's direct shareholdings in certain public companies.

(...)

16. It is apparent from the documents before the Court that GALP is currently the main integrated group for oil and natural gas products in Portugal.

17. **On 18 October 2006, the Commission sent a letter of formal notice to the Portuguese Republic** accusing it of failing to fulfil its obligations under Articles 43 EC and 56 EC, on the ground that, **as part of the privatisation of GALP, golden shares had been created for the Portuguese State, to which special rights attached, in particular the right to appoint the chairman of the company's Board of Directors and the right of veto with regard to certain important decisions of the company.**

(...)

33. The Commission claims, inter alia, **that the fact that the Portuguese State holds special rights in GALP,** namely **the right to appoint the chairman of the Board of Directors having the power to endorse management decisions of the organs of the company, confirmed by the clauses of the shareholders' agreement negotiated by the Portuguese State through the CGD, and the right of veto in respect of important decisions of that company, obstructs both direct and portfolio investments in the share capital of that company and, consequently, constitutes a restriction on the free movement of capital and freedom of establishment.**

34. In the view of the Commission, **such special rights restrict the possibility for shareholders to participate effectively in the management and control of the company concerned in proportion to the value of the shares which they hold and also deter investors from other Member States from buying shares in that company.**

35. The Commission states, in this regard, **that the creation of special rights attaching to golden shares is not the result of a normal application of company law, but constitutes a State measure which falls within the scope of Articles 43 EC and 56(1) EC.** GALP's articles of association, which provide for the special rights in question, were drawn up by legislation at a time when the Portuguese State held all the capital of that company, and they cannot be amended without the consent of that State.

36. First of all, **the Portuguese Republic contends,** by reference to the judgment in Case C-326/07 *Commission* v *Italy* [2009] ECR I-2291, paragraph 39, **that the national provisions challenged by the Commission must be examined solely in the**

light of Article 43 EC, since, as in that case, both the right of veto and the right to appoint the chairman of GALP's Board of Directors relate to decisions within the scope of the management of the company and therefore concern only those shareholders capable of exerting a definite influence on the company.

37. **The Portuguese Republic further contends that,** in any event, **the national provisions affording special rights to the State do not come within the scope of Articles 43 EC and 56 EC** inasmuch as **they do not constitute a restriction on the fundamental freedoms in question. The effects which the national measures concerned have on market access are, according to the case-law of the Court on freedom of establishment, purely hypothetical and, in any event, totally uncertain and indirect** (Joined Cases C-418/93 to C-421/93, C-460/93 to C-462/93, C-464/93, C-9/94 to C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94 *Semeraro Casa Uno and Others* [1996] ECR I-2975, paragraph 32). Those national **measures can constitute restrictive measures under Articles 43 EC and 56 EC only if they impose direct and substantial conditions on the access of investors to the market.** The Portuguese Republic calls on the Court in this regard to interpret the concept of a 'restriction' on the free movement of capital and on freedom of establishment in the light of, inter alia, the judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, which concerned selling arrangements in relation to the free movement of goods.

38. Moreover, **the Portuguese Republic submits,** in the light of GALP's shareholder structure and the way in which it has evolved since 1999, it is clear **that the existence of special rights for the State in that company has not had any negative effect on either direct investments or portfolio investments in that company's share capital.**

39. With regard to the issue of whether **the right to appoint the chairman of GALP's Board of Directors,** which is provided for in that company's articles of association and in the shareholders' agreement, is a State measure, the Portuguese Republic claims, lastly, that **that right does not constitute a State measure, but is rather an act governed by private law which is outside the scope of Articles 43 EC and 56 EC.**

40. In reply to those arguments **the Commission contends,** with regard to the Portuguese Republic's reference to Case C-326/07 *Commission* v *Italy*, **that both the right of veto and the right to appoint the chairman of the Board of Directors**

confer on the State special powers over particular decisions of the general meeting which affect all shareholders and potential investors and not just those exerting a definite influence over decisions of the company concerned. The Portuguese Republic cannot therefore contest the application of Article 56 EC in the present case.

(...)

41. As regards the question whether national legislation falls within the scope of one or other of the fundamental freedoms, it is clear from well-established case-law that the purpose of the legislation concerned must be taken into consideration (see, inter alia, Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 22; Case C-326/07 *Commission* v *Italy*, paragraph 33; and Case C-543/08 *Commission* v *Portugal*, paragraph 40).

42. **Provisions of national law which apply to the possession by nationals of one Member State of holdings in the capital of a company established in another Member State, allowing them to exert a definite influence on that company's decisions and to determine its activities, fall within the scope *ratione materiae* of Article 43 EC on freedom of establishment** (see, inter alia, Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 22; Case C-326/07 *Commission* v *Italy*, paragraph 34; and Case C-543/08 *Commission* v *Portugal*, paragraph 41).

43. **Direct investments,** that is to say, **investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the company to which that capital is made available in order to carry out an economic activity, fall within the scope of Article 56 EC on the free movement of capital.** That object presupposes that the **shares held by the shareholder enable the latter to participate effectively in the management or control of that company** (see, inter alia, Case C-112/05 *Commission* v *Germany* [2007] ECR I-8995, paragraph 18 and the case-law cited; Case C-326/07 *Commission* v *Italy*, paragraph 35; and Case C-543/08 *Commission* v *Portugal*, paragraph 42).

44. **National legislation not intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities but which applies irrespective of the size of the holding which the shareholder has in a company may fall within the scope of both Article**

43 EC and Article 56 EC (Case C-326/07 *Commission* v *Italy*, paragraph 36, and Case C-543/08 *Commission* v *Portugal*, paragraph 43).

45. It must be stated that, in the present action for failure to fulfil obligations, it is not inconceivable that **the national provisions at issue might affect all shareholders and potential investors and not solely those shareholders capable of exerting a definite influence on the management and control of GALP.** Consequently, **the contested provisions must be examined in the light of both Article 43 EC and Article 56 EC.**

(...) the Court has held that **movements of capital** within the meaning of Article 56(1) EC include, in particular, **'direct' investments**, that is to say, **investments in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control, and 'portfolio' investments, that is to say, investments in the form of the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking** (see Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands*, paragraph 19 and the case-law cited; Case C-112/05 *Commission* v *Germany*, paragraph 18; Case C-171/08 *Commission* v *Portugal*, paragraph 49; and Case C-543/08 *Commission* v *Portugal*, paragraph 46).

48. Concerning those two forms of investment, the Court has stated that **national measures must be regarded as 'restrictions' within the meaning of Article 56(1) EC if they are liable to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors from other Member States from investing in their capital** (see Case C-543/08 *Commission* v *Portugal*, paragraph 47 and the case-law cited).

49. The Portuguese Republic disputes the classification of Article 4(3) of GALP's articles of association and the relevant clauses of the shareholders' agreement as a national measure. It further maintains, inter alia, that under that agreement the right of the State to appoint the chairman of GALP's Board of Directors is exercised by CGD and not by the Portuguese State, and that the provision at issue therefore does not constitute a State measure and is consequently outside the scope of Articles 43 EC and 56 EC.

50. In that regard**, it should be noted,** first, **that,** as is clear from the documents before the Court, **GALP's articles of association were drawn up** before the end of the first phase of GALP's privatisation, in other words, **at a time when the Portuguese State held the majority of GALP's share capital.** At the same time, **a specific right of veto for that State,** which is exercised, inter alia, in respect of decisions to amend that company's articles of association, **was also provided for by statute.** Thus, **the clause relating to the right to appoint the chairman of GALP's Board of Directors can now no longer be removed by the shareholders without the consent of the State.**

51. Secondly, with regard to the Portuguese Republic's argument in that context concerning the appointment of the chairman of the Board of Directors by CGD, suffice it to state that, **since the latter is a bank in which the State is the sole shareholder, the State exercises its rights through the intermediary of CGD. Consequently, as regards the private nature of the shareholders' agreement, the Portuguese State acts, through the intermediary of CGD, together with the reference shareholders whom it has selected in order to maintain its influence over the composition and management of GALP.**

52. In those circumstances, it must be held that **it was the Portuguese Republic itself which, first, through the intermediary of the national legislature, authorised the creation of golden shares in the share capital of GALP** and, secondly**, in its capacity as a public authority, decided,** pursuant to Article 15(3) of the LQP, **to introduce golden shares into GALP's share capital, to allocate them to the State and to define the special rights which they confer.**

53. Moreover, it must also be stated **that the creation of the right of the State to appoint the chairman of GALP's Board of Directors is not the result of a normal application of company law.** While the CSC expressly precludes the right to appoint certain directors being attached to certain categories of shares, Decree-Law No 261-A/99 and GALP's articles of association provide, on the contrary, that **approval of the choice of chairman of the Board of Directors is a right inherent in the shares specific to the State. This therefore constitutes a specific right, which derogates from general company law and is laid down by a national legislative measure for the sole benefit of the public authorities** (see, to that effect, Case C-112/05 *Commission* v *Germany*, paragraphs 59 to 61).

54. Consequently, **the right of the State to appoint the chairman of GALP's Board of Directors must be regarded as being attributable to the Portuguese Republic and for that reason comes within the scope of Article 56(1) EC.**

55. As regards the restrictive nature of the Portuguese State's holding of golden shares in the share capital of GALP to which special rights attach, as provided for by the national legislation – in part, in conjunction with GALP's articles of association –, it must be held that **such shares are liable to deter traders from other Member States from investing in the capital of that company.**

56. In relation to the right of veto, it is clear from Article 4(3) of Decree-Law No 261-A/99 that the adoption of a large number of significant resolutions relating to GALP is subject to the approval of the Portuguese State. In that regard, it must be pointed out that the State's vote in favour is required for, inter alia, any resolution involving an amendment of GALP's articles of association, with the result that the influence of the Portuguese State over GALP cannot be reduced except with the consent of that State itself.

57. Consequently, that **right of veto, in so far as it confers on the Portuguese State an influence over the management and control of GALP which is not justified by the size of its shareholding in that company, is liable to discourage traders from other Member States from making direct investments in GALP's share capital since it would not be possible for them to be involved in the management and control of that company in proportion to the value of their shareholdings** (see, inter alia, Case C-112/05 *Commission* v *Germany*, paragraphs 50 to 52; Case C-171/08 *Commission* v *Portugal*, paragraph 60; and Case C-543/08 *Commission* v *Portugal*, paragraph 56).

58. Similarly, **the right of veto at issue may have a deterrent effect on portfolio investments in GALP's share capital in so far as a possible refusal by the Portuguese State to approve an important decision, proposed by the organs of that company as being in the company's interests, is in fact liable to depress the value of the shares of that company and thus reduce the attractiveness of an investment in such shares** (see, to that effect, Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands*, paragraph 27; Case C-171/08 *Commission* v *Portugal*, paragraph 61; and Case C-543/08 *Commission* v *Portugal*, paragraph 57).

59. As regards **the right to appoint the chairman of the Board of Directors, this amounts to a restriction on the free movement of capital since such a specific right constitutes a derogation from general company law and is laid down by a national legislative measure for the sole benefit of the public authorities** (see Case C-112/05 *Commission* v *Germany*, paragraph 61, and Case C-543/08 *Commission* v *Portugal*, paragraph 62). While it is true that that facility can be conferred by legislation as a right of a qualified minority, it is clear that it must, in such a case, be accessible to all shareholders and must not be reserved exclusively to the State.

60. **By restricting the opportunity for shareholders other than the Portuguese State to participate in GALP's share capital with a view to establishing or maintaining lasting and direct economic links with it such as to enable them to participate effectively in the management or control of that company, the right to appoint a director,** provided for in Article 15(1) of the LQP and Article 4(3) of Decree-Law No 261-A/99, **is liable to deter direct investors from other Member States from investing in the share capital of that company.**

61. It follows that the right of veto with regard to certain resolutions of GALP's general meeting and the right to appoint the chairman of the Board of Directors constitute restrictions on the free movement of capital within the terms of Article 56(1) EC.

(...)

67. It is clear, as has been stated in paragraphs 58 and 61 of the present judgment, that **the national provisions at issue, to the extent to which they create instruments liable to limit the ability of investors to participate in the share capital of GALP with a view to establishing or maintaining lasting and direct economic links with it which would make possible effective participation in the management or control of that company, reduce the interest in acquiring a stake in that capital** (see, to that effect, Case C-112/05 *Commission* v *Germany*, paragraph 54, and Case C-543/08 *Commission* v *Portugal*, paragraph 70).

(...)

69. In the light of the foregoing, it must be held that the Portuguese State's holding of golden shares, in conjunction with the special rights which such shares

confer on their holder, constitutes a restriction on the free movement of capital within he terms of Article 56(1) EC.

(...)

70. The Commission contends that the restrictions arising from the special rights held by the Portuguese State in GALP cannot be justified by any of the objectives relied on by the Portuguese Republic and, in any event, infringe the principle of proportionality.

71. **It maintains that the State's special rights in GALP cannot be justified on grounds of public security, in this case the security of Portugal's energy supply.** As is apparent from Decree-Law No 31/2006 establishing the general bases for the organisation and functioning of the national petroleum system (*Diário da República* I, Series A, No 33, of 15 February 2006), and from Decree-Law No 30/2006 laying down the general bases for the organisation and functioning of the natural gas system (*Diário da República* I, Series A, No 33, of 15 February 2006), **it is for the State, and not for GALP, to ensure security of oil and natural gas supplies.**

72. With regard to the principle of proportionality, the Commission contends that the **special rights held by the State in GALP are not adequate to ensure the proper functioning of the gas distribution network and GALP's retail selling of petroleum products. The rights in question are, in reality, instruments designed to pursue the private interest of the company and not the national interest.** Moreover, contrary to the requirements of the case-law of the Court in this area (see, inter alia, Case C-483/99 *Commission* v *France* [2002] ECR I-4781, paragraphs 50 to 53), since no precise and objective criteria have been laid down regulating the exercise of those rights, application of them is, in practice, entirely a matter of discretion.

73. Nor, in the view of the Commission, is there any basis for the State to have special rights in GALP under European Union secondary law.

(...)

77. The Portuguese Republic contends that, even if it is accepted that the national measures at issue do constitute restrictions on freedom of establishment and on the free movement of capital, they are none the less justified with regard to Articles 46 EC and 58 EC in that they are necessary in order to guarantee the country's security of supply for oil and natural gas and to enable this to be done

in an appropriate way, given, inter alia, the absence of suitable instruments at European Union level.

78. The Portuguese Republic also points out that the exercise of the special rights in question may be the subject of effective judicial review.

(...)

79. Moreover, in asserting that the contested provisions comply with the principle of proportionality, **the Portuguese Republic argues that, in any event, the Commission has not adduced evidence that there are less restrictive measures which would allow the State to react swiftly and effectively in the event of a genuine and serious threat to the security of supply.**

80. Lastly, **the Portuguese Republic contends that the national provisions at issue are none the less compatible with European Union law, under Article 86(2) EC, since they are required in order to enable GALP to carry out appropriately its tasks of managing services of general economic interest entrusted to it by the State.**

(...)

81. **According to well-established case-law, national measures which restrict the free movement of capital may be justified on the grounds set out in Article 58 EC or by overriding reasons in the public interest, provided that they are appropriate to secure the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it** (see Case C-112/05 *Commission* v *Germany*, paragraphs 72 and 73 and the case-law cited; Case C-171/08 *Commission* v *Portugal*, paragraph 69; and Case C-543/08 *Commission* v *Portugal*, paragraph 83).

82. As regards the derogations permitted under Article 58 EC, **it cannot be denied that the objective invoked by the Portuguese Republic of safeguarding a secure energy supply in that Member State in case of crisis, war or terrorism may constitute a ground of public security** (see judgment of 14 February 2008 in Case C-274/06 *Commission* v *Spain*, paragraph 38; Case C-171/08 *Commission* v *Portugal*, paragraph 72; and Case C-543/08 *Commission* v *Portugal*, paragraph 84) and may possibly justify an obstacle to the free movement of capital. (...)

83. **However, it is common ground that requirements of public security must, in particular as a derogation from the fundamental principle of the free movement of capital, be interpreted strictly, with the result that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union. Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society** (see, inter alia, Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 17; Case C-171/08 *Commission* v *Portugal*, paragraph 73; and Case C-543/08 *Commission* v *Portugal*, paragraph 85).

84. In this regard, **the Portuguese Republic points out,** inter alia, that at the present time concerns exist about certain investments made particularly by sovereign wealth funds, or investments that might be linked to terrorist organisations, in undertakings in strategic sectors, which constitute a threat of that nature in relation to energy supply. Given that a **Member State is under an obligation to guarantee the security of a regular and uninterrupted supply of oil and natural gas, that State can legitimately equip itself with the means required to guarantee the fundamental interest of security of supply in the event of a crisis and it is the duty of the State concerned to ensure that adequate mechanisms are put in place which will enable it to react rapidly and effectively to guarantee that the security of that supply is not interrupted.**

85. However, as the Portuguese Republic has done no more than put forward the ground relating to the security of the energy supply, without stating clearly the exact reasons why it considers that the special rights at issue, considered either individually or as a whole, would make it possible to prevent such interference with a fundamental interest such as energy supply, a justification based on public security cannot be upheld in the present case.

86. Furthermore, the Portuguese Republic's argument that European Union law, as it currently stands, does not adequately guarantee the security of energy supply in Member States, a circumstance which compels the Portuguese Republic to adopt national measures which are sufficient to guarantee the protection of that fundamental interest of society, cannot be upheld.

87. Even if it is accepted that, pursuant to provisions of European Union secondary legislation, a Member State has **an obligation to guarantee the supply of energy**

within its territory, as is claimed by the Portuguese Republic, compliance with such an obligation **cannot be relied on to justify any measure which is contrary in principle to a fundamental freedom** (see Case C-543/08 *Commission* v *Portugal*, paragraph 89).

88. For the sake of completeness, as regards the proportionality of the provisions of national law at issue, it should be noted that, as has correctly been pointed out by the Commission, **the exercise of the special rights which the holding of golden shares in GALP's share capital confers on the Portuguese State is not subject to any specific and objective condition or circumstance, contrary to what is claimed by the Portuguese Republic.**

89. **Although Article 15(3) of the LQP states that the creation in the share capital of GALP of golden shares which confer special rights on the Portuguese State is subject to the condition** – which, it may be added, is formulated in a rather general and imprecise manner – that grounds of national interest must so require, **the fact nevertheless remains that neither that law nor GALP's articles of association lay down any criteria for determining the specific circumstances in which those special rights may be exercised** (see Case C-326/07 *Commission* v *Italy*, paragraph 51, and Case C-543/08 *Commission* v *Portugal*, paragraph 91). The same finding applies to Article 15(1) of the LQP, in that, under that provision, **the State's appointment of a director is subject to the condition, also formulated in a rather general and imprecise manner, of safeguarding the public interest.**

90. Thus, such **uncertainty constitutes serious interference with the free movement of capital in that it confers on the national authorities, as regards the use of such rights, a latitude so discretionary in nature that it cannot be regarded as proportionate to the objectives pursued** (see, to that effect, Case C-326/07 *Commission* v *Italy*, paragraph 52, and Case C-543/08 *Commission* v *Portugal*, point 92).

91. Lastly, **as regards the justification based on Article 86(2) EC, it must be stated that that provision, in conjunction with Article 86(1) EC, may be relied on to justify the grant by a Member State to an undertaking entrusted with the operation of services of general economic interest of special or exclusive rights which are contrary to the provisions of the Treaty, to the extent to which performance of the particular task assigned to that undertaking can be assured**

only through the grant of such rights and provided that the development of trade is not affected to such an extent as would be contrary to the interests of the European Union (Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraph 52; Case C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* [2007] ECR I-12175, paragraph 78; and Case C-567/07 *Woningstichting Sint Servatius* [2009] ECR I-9021, paragraph 44).

92. In the present case, it is clear, however, that that is not the purpose of the provisions laid down in the national legislation which is at issue in the infringement proceedings brought against the Portuguese Republic.

93. As the Commission correctly states, **those provisions do not involve the granting of special or exclusive rights to GALP or the classification of GALP's activities as services of general economic interest, but are concerned with the lawfulness of attributing to the Portuguese State, as a shareholder of that company, special rights in connection with golden shares which it holds in the share capital of GALP.**

94. In any event, since **a Member State must set out in detail the reasons why, in the event of elimination of the contested measures, the performance, under economically acceptable conditions, of the tasks of general economic interest which it has entrusted to an undertaking would, in its view, be jeopardised** (Case C-463/00 *Commission* v *Spain*, paragraph 82), the Portuguese Republic has given no explanation whatsoever as to why that is the case here.

95. It follows that Article 86(2) EC is not applicable to a situation such as that in the present case and cannot, therefore, be relied on by the Portuguese Republic as justification for the national provisions at issue inasmuch as they constitute restrictions on the free movement of capital which is enshrined in the Treaty.

96. The argument based on Article 86(2) EC must therefore also be rejected.

97. It must consequently be declared that, **by maintaining in favour of the Portuguese State and other public bodies special rights in GALP, such as those provided for in the present case by the LQP, Decree-Law No 261-A/99 and the company's articles of association, granted in connection with the Portuguese State's golden shares in the share capital of GALP, the Portuguese Republic has failed to fulfil its obligations under Article 56 EC.**

(...)

98. With regard to the Commission's application for a declaration that the Portuguese Republic has failed to fulfil its obligations under Article 43 EC, suffice it to note that, in accordance with settled case-law, **since the national measures at issue involve restrictions on freedom of establishment, such restrictions are a direct consequence of the obstacles to the free movement of capital considered above, to which they are inextricably linked. Consequently, since a breach of Article 56(1) EC has been established, there is no need for a separate examination of the measures at issue in the light of the Treaty rules concerning freedom of establishment** (see, inter alia, Case C-463/00 *Commission* v *Spain*, paragraph 86; Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands*, paragraph 43; Case C-171/08 *Commission* v *Portugal*, paragraph 80; and Case C-543/08 *Commission* v *Portugal*, paragraph 99).

(...)

Operative part

THE COURT, hereby:

1. **Declares that, by maintaining in favour of the Portuguese State and other public bodies special rights in GALP Energia SGPS SA, such as those provided for in the present case by Law No 11/90 of 5 April 1990 concerning the Framework Law on Privatisations (Lei No 11/90, Lei Quadro das Privatizações), by Decree-Law No 261-A/99 of 7 July 1999 approving the first phase of the privatisation of the share capital of GALP – Petróleos e Gás de Portugal SGPS SA (Decreto-Lei n° 261-A/99 aprova a 1.ª fase do processo de privatização do capital social da GALP – Petróleos e Gás de Portugal, SGPS, SA), and by the articles of association of that company, granted in connection with the Portuguese State's golden shares in the share capital of that company, the Portuguese Republic has failed to fulfil its obligations under Article 56 EC;**
2. **Orders the Portuguese Republic to pay the costs.**

TABLE OF CASES

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Joined cases C-267/91 and C-268/91 Criminal proceedings against Bernard Keck and Daniel Mithouard [1993] ECR I-6097

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