European Company Law

Cases and Materials

Riga 2008

COURSE OUTLINE

NAME OF THE COURSE	European Company Law

CREDITS	2	AMOUNT OF WEEKS	1	LEVEL	Master's level

COURSE DURATION	Tuesday 9 to Thursday 11 December 2008

No. OF LECTURES	6
No. OF SEMINARS	6
OTHER CLASS ACTIVITIES (Moot court, etc.)	0

THE COURSE APPROVED BY:	Waleed Gumaa Law & Finance Programme Director	DATE OF APPROVAL	23/06/2008

RESPONSIBLELECTURES		
NAME, SURNAME	**COUNTRY**	**ACADEMIC TITLE**
Peter Gjortler	Denmark	LLM Law, BA Economics

OTHER LECTURERS			
NAME, SURNAME, TITLE	**COUNTRY**	**No. OF LECTURES/SEMINARS**	**TOPICS**

COURSE ABSTRACT (50 – 200 words)

The course deals with all aspects of company law as they are regulated or reflected in EU law, with a special attention the role and requirements of company law in relation to the basic right of free movement on the internal market. The course covers the establishment, transfer, and dissolution of companies, as well as the rights and obligations of its key players and stakeholders, including the board of directors, management, shareholders and employees. Relations with public authorities are dealt with in relation to tax issues as well as audit. The course links with competition law in dealing with mergers and divisions, and with transborder litigation in dealing with recognition of bankruptcy. Case studies and student participation form an essential part of the course, which alternates between presentational lectures and discussion based seminars.

COURSE OBJECTIVES

The overall goal of the course is to give an in-depth understanding of the common European company law, the motivations behind its historical and ongoing development, the particular issues of establishment, mobility and merger faced by corporations within the European Union, and the inherent conflicts with Member State national laws. It also aims to give a good understanding of the common and comparative international company law issues.

REQUIREMENTS FOR OBTAINING CREDITS

Students are required to be active participants in lectures. The final grade is based on performance in a final

written examination.

A ten grade system is used for grading, where 5 is the last successful mark

Grade	Meaning	Approx. ECTS equivalent	Diploma at RGSL
10	izcili (with distinction)	A+	With Distinction
9	teicami (excellent)	A	With Distinction
8	ļoti labi (very good)	B	With Merit
7	labi (good)	C	With Merit
6	gandrīz labi (almost good)	D	Pass
5	viduvēji (satisfactory)	E	Pass
4	gandrīz viduvēji (almost satisfactory)	E/FX	Pass
3	negatīvs vērtējums (unsatisfactory)	Fail	Fail

COURSE DESCRIPTION – PLAN (300 – 800 words)

Tuesday 9 December 2008

08.00 – 09.45

Lecture 1	Cross Border Mobility	
Duration	2 x 45 minutes	
Reading	Werlauff p. 1-104	
Cases	81/87 Daily Mail	page 7
	C-212/97 Centros	page 15
	C-355/98 Belgium	page 29

This lecture will introduce the subject of company law, and place the international and national company law provisions in an EU perspective. The implications of the EC treaty for company law will be presented together with the development of the EU legislation on company law.

10.00 – 11.45

Seminar 1	Company Types and Taxation	
Duration	2 x 45 minutes	
Reading	Werlauff p. 105-188	
Cases	C-402/96 EITO	page 39
	C-141/99 AMID	page 44
	C-71/91 & C-178/91 Ponente Carni	page 53

This seminar will focus on the different types of companies that exist in national law and their regulation at the

EU level, including the special forms established as an alternative to the national types at the EU level. The seminar will also focus on aspects of taxation and their relation to the rights of companies under EU law.

13.00 – 14.45

Lecture 2	Formation of Companies	
Duration	2 x 45 minutes	
Reading	Werlauff p. 189-224	
Cases	C-41/90 Macroton	page 63
	C-111/94 Job Centre Coop	page 73
	C-439/93 Lloyds	page 78

This lecture will focus on the establishment of companies and the procedures required under national law, with special emphasis on the EU limitations and demands on such procedures. The seminar will also deal with the concept of enterprises in relation to company law and the development of EU law in this perspective.

15.00 – 16.45

Seminar 2	Capital Inflow and Outflow	
Duration	2 x 45 minutes	
Reading	Werlauff p. 225-298	
Cases	C-19/90 & C-20/90 Karella	page 90
	C-42/95 Siemens	page 99
	C-367/96 Kefalas	page 106

This seminar will focus on the capital movements in relation to company law, with separate consideration of the company inflow related to company formation, as well as augmenting of company capital, and the dispersing of dividends and other payments from company funds.

Wednesday 10 December 2008

08.00 – 09.45

Lecture 3	Securities and Internal Regulation	
Duration	2 x 45 minutes	
Reading	Werlauff p. 299-334	
Cases	C-101/94 Italy	page 114
	C-214/89 Duffryn	page 121
	C-281/98 Angonese	page 130

This lecture will focus on the different types of securities that may be issued by companies, as well as the procedural requirements for such issue. In this relation, the lecture will also deal with the internal regulation of relations between the companies and its stakeholders, including stock holders and employees.

10.00 – 11.45

Seminar 3	Company Bodies	
Duration	2 x 45 minutes	
Reading	Werlauff p. 335-386	
Cases	C-441/93 Pafitis	page 139
	C-58/99 Italy	page 152
	C-373/97 Diamantis	page 157

This seminar will the structure and powers of various company bodies, including the general meeting and the

company management. Special attention will be given to the procedures and powers of the general meeting, both in its ordinary and its extraordinary format.

13.00 – 14.45

Lecture 4	Board of Directors	
Duration	2 x 45 minutes	
Reading	Werlauff p. 387-436	
Cases	C-104/96 Rabobank	page 167
	C-28/99 Verdonck	page 174
	C-384/02 Grøngaard	page 183

This lecture will focus on the internal and external relations of the board of directors, with special attention given to the issue of board responsibility. Also dealt with are the rights and obligation of the board of directors in connections with its relation to the company management.

15.00 – 16.45

Seminar 4	Shareholders and Employees	
Duration	2 x 45 minutes	
Reading	Werlauff p. 437-492	
Cases	C-367/98 Portugal	page 193
	C-392/92 Schmidt	page 206
	C-117/96 Handelsrejsende	page 213

This seminar will focus on the company right holders in the form of shareholders and employees, with special attention given to the minority protection in relation to shareholders. For employees, focus is placed on the issues related to representation and rights related to transfer and bankruptcy.

Thursday 11 December 2008

08.00 – 09.45

Lecture 5	Authorities and Audit	
Reading	Werlauff p. 493-564	
Cases	C-188/95 Fantask	page 219
	C-234/94 Wettern	page 234
	C-106/91 Ramrath	page 242

This lecture will focus on the obligations of companies towards public authorities, with special attention given to the issues related to auditing. The lecture will address issues related to annual accounts and the special requirements for such accounts in relation to company groups.

10.00 – 11.45

Seminar 5	Mergers and Division	
Reading	Werlauff p. 565-614	
Cases	142/84 & 156/84 Reynolds	page 251
	T-2/93 & T-3/93 Air France	page 270
	T-83/92 Zunis	page 288

This seminar will focus on relations between different companies resulting from mergers and divisions, as well as other related issues within EU competition law. The seminar will evaluate the procedural and substantial requirements for mergers as set out in EU legislation and judicial practice.

13.00 – 14.45

Lecture 6	Liquidation and Bankruptcy	
Reading	Werlauff p. 615-641	
Cases	C-341/04 Eurofood	page 299
	C-294/02 AMI	page 315
	C-32/03 Fini H	page 333

This lecture will focus on the termination of companies through dissolution, including both liquidation and bankruptcy. In this connection, the procedural issues of cross border recognition will also be dealt with, as well as the issues related to the reconstruction of companies.

15.00 – 16.45

Seminar 6	Practical application and exam preparation
Reading	Review of previous readings
Cases	Review of previous cases

This seminar will sum up the discussions held under the previous sessions, and give room for a general discussion as well as a session of questions and answers as part of the final preparation for the course exam, which will be in the written essay form, based on a case scenario.

LITERATURE	
COURSE BOOKS	Erik Werlauff, EU-Company Law, 2nd edition, Copenhagen 2003
COMPENDIA	RGSL Compendium including reading material and seminar tasks
REFERENCE READING	
SUGGESTED PERIODICALS	

Judgment of the Court of 27 September 1988

The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc. Reference for a preliminary ruling: High Court of Justice, Queen's Bench Division - United Kingdom. Freedom of establishment - Right to leave the Member State of origin - Legal persons. Case 81/87.

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1 . Free movement of persons - Freedom of establishment - Company incorporated under the legislation of a Member State and having its registered office there - Right to transfer the central management and control of a company to another Member State - None

(EEC Treaty, Arts 52 and 58)

2 . Free movement of persons - Freedom of establishment - Directive 73/148 - Not applicable to legal persons

(Council Directive 73/148)

1 . The Treaty regards the differences in national legislation concerning the connecting factor required of companies incorporated thereunder and the question whether - and if so how - the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions, which have not yet been adopted or concluded. Therefore, in the present state of Community law, Articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State.

2 . The title and provisions of Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services refer solely to the movement and residence of natural persons, and the provisions of the directive cannot, by their nature, be applied by analogy to legal persons . Therefore, Directive 73/148, properly construed, confers no right on a company to transfer its central management and control to another Member State.

In Case 81/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the High Court of Justice, Queen' s Bench Division, for a preliminary ruling in the proceedings pending before that court between

The Queen

and

HM Treasury and Commissioners of Inland Revenue

ex parte Daily Mail and General Trust PLC

on the interpretation of Articles 52 and 58 of the EEC Treaty and the provisions of Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (Official Journal 1973, L 172, p. 14),

THE COURT

composed of : Lord Mackenzie Stuart, President, G. Bosco, O. Due and G . C . Rodríguez Iglesias (Presidents of Chambers), T. Koopmans, U . Everling, K. Bahlmann, Y. Galmot, R. Joliet, T. F. O' Higgins and F. A. Schockweiler, Judges,

Advocate General : M. Darmon

Registrar : D. Louterman, Administrator

after considering the observations submitted on behalf of

Daily Mail and General Trust PLC, the applicant in the main proceedings, represented by David Vaughan, QC, and Derrick Wyatt, Barrister, instructed by F. Sandison, Solicitor, of Freshfields, London,

the United Kingdom, by S. J. Hay, Treasury Solicitor, Queen Anne' s Chambers, acting as Agent, assisted by R. Buxton, QC, of Gray' s Inn, and A . Moses and N. Green, Barristers,

the Commission, by its Legal Adviser D. Gilmour, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 22 March 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 7 June 1988,

gives the following

Judgment

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

2 Those questions arose in proceedings between Daily Mail and General Trust PLC, the applicant in the main proceedings (hereinafter 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.

First question

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

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

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

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

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

15 Faced with those diverging opinions, the Court must first point out, as it has done on numerous occasions, that freedom of establishment constitutes one of the fundamental principles of the Community and that the provisions of the Treaty guaranteeing that freedom have been directly applicable since the end of the transitional period. Those provisions secure the right of establishment in another Member State not merely for Community nationals but also for the companies referred to in Article 58.

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

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

treatment as nationals of that Member State as regards participation in the capital of the new company .

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

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

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

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

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

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

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

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

26 Having regard to that answer, there is no need to reply to the second part of the first question.

Second question

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

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

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

Third and fourth questions

30 Having regard to the answers given to the first two questions referred by the national court, there is no need to reply to the third and fourth questions.

Costs

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

On those grounds,

THE COURT,

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

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

(2) Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, properly construed, confers no right on a company to transfer its central management and control to another Member State.

DOCNUM	61987J0081
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community

PUBREF	European Court reports 1988 Page 05483 Swedish special edition Page 00693 Finnish special edition Page 00713
DOC	1988/09/27
LODGED	1987/03/19
JURCIT	11957E052 : N 1 8 - 25 11957E058 : N 1 8 - 25 11957E220 : N 21 11957E221 : N 17 11957E054-P3LG : N 22 31973L0148 : N 1 9 16 27 - 29
CONCERNS	Interprets 11957E052 - Interprets 11957E058 - Interprets 31973L0148 -
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	English
OBSERV	United Kingdom ; Commission ; Member States ; Institutions
NATIONA	United Kingdom
NATCOUR	*A9* High Court of Justice (England), Queen's Bench Division, order and judgment of 06/02/1987 (CO/902/86) ; - Common Market Law Reports 1987 Vol.2 p.1-10
NOTES	Van Thiel, Servaas: Daily Mail Case. Tax Planning and the European Right of Establishment. A Setback, European Taxation 1988 p.357-366 ; Schmitthoff, Clive: Tax and Company Migration, Business Law Brief 1988 december p.2-3 ; Frommel, S.N.: EEC Companies and Migration: A Setback for Europe, Intertax 1988 p.409-416 ; Schmitthoff, Clive M.: Daily Mail Loses in the European Court, The Journal of Business Law 1988 p.454-455 ; Carli, Carlo Cesare: Diritto tributario europeo e "paradisi fiscali": abuso del diritto... di stabilimento o lacuna del sistema fiscale comunitario?, Rivista di diritto europeo 1988 p.128-138 ; Boutard-Labarde, Marie-Chantal: Chronique de jurisprudence de la Cour de justice des Communautés européennes. Libre circulation des personnes et des services, Journal du droit international 1989 p.428-431 ; Gill, A.V.: Migration of Companies and the Right of Establishment in E.C. Law, Irish Law Times and Solicitors' Journal 1989 p.59-61 ; Sandrock, Otto ; Austmann, Andrea: Das Internationale Gesellschaftsrecht nach der Daily Mail-Entscheidung des Europäischen Gerichtshofs : Quo vadis?, Recht der internationalen Wirtschaft 1989 p.249-253 ; Roos, Peter: Europees vennootschapsrecht, vestigingsvrijheid, zetelverplaatsing en ipr, Ars aequi 1989 p.382-390 ; Van Hoorn Jr., J.: Il trasferimento di sede di società alla luce del diritto comunitario, Diritto e pratica tributaria 1989 p.377-383 ; X: Libertad de establecimiento. Derecho a abandonar el Estado miembro de origen. Persona jurídica, Gaceta Jurídica de la CEE

- Boletín 1989 no 40 p.40-42 ; Cartou, Louis: Droit communautaire, Recueil Dalloz Sirey 1989 Som. p.227 ; Großfeld, Bernhard ; Luttermann, Claus: Juristenzeitung 1989 p.386-387 ; Behrens, Peter: Die grenzüberschreitende Sitzverlegung von Gesellschaften in der EWG, Praxis des internationalen Privat- und Verfahrensrechts 1989 p.354-361 ; Vara de Paz, Nemesio: Traslado de la sede social (sede de direccion) en el ambito de la Comunidad Economica Europea, Revista de Instituciones Europeas 1989 p.871-882 ; Lever, Jeremy: Common Market Law Review 1989 p.331-334 ; Mok, M.R.: Zetelverplaatsing vennootschap, TVVS ondernemingsrecht en rechtspersonen 1990 p.104-105 ; Ebke, Werner F. ; Gockel, Markus: European Corporate Law, The International Lawyer 1990 p.239-250 ; Meilicke, Wienand: Sitztheorie und EWG-Vertrag nach Handels- und Steuerrecht, Recht der internationalen Wirtschaft 1990 p.449-452 ; Capelli, Fausto: Trasferimento della sede amministrativa di società nella CEE: diritto di stabilimento e problematiche fiscali, Diritto comunitario e degli scambi internazionali 1990 p.50-54 ; Timmermans, C.W.A.: S.E.W. ; Sociaal-economische wetgeving 1991 p.69-73 ; Drobnig, Ulrich: Gemeinschaftsrecht und internationales Gesellschaftsrecht, Europäisches Gemeinschaftsrecht und Internationales Privatrecht 1991 p.185-206 ; Großfeld, Bernhard ; König, Thomas: Das Internationale Gesellschaftsrecht in der Europäischen Gemeinschaft, Recht der internationalen Wirtschaft 1992 p.433-440 ; Wouters, Jan: The Case-Law of the European Court of Justice on Direct Taxes: Variations upon a Theme, Maastricht Journal of European and Comparative Law 1994 p.179-220 ; Görk, Stefan: Notarius International 1999 p.86-94 ; Kessler, Alexander ; Legeais, Dominique ; Grassi, Irene ; Lauser, Karl-Heinz ; Birds, John: Casebook Europäisches Gesellschafts- und Unternehmensrecht, Casebooks Entscheidungen des EuGH 2002 Bd. 3 p.62-75 ; Nelson, Maria: Aktiebolags etableringsrätt i EU - en studie utifrån målen Segers, Daily Mail och Centros, Svensk Skattetidning 2002 p.635-656 ; Ballarino, Tito: Sulla mobilità delle società nella Comunità Europea. Da Daily Mail a Überseering: norme imperative, norme di conflitto e libertà comunitarie, Rivista delle società 2003 p.669-698 ; Wymeersch, Eddy: Il trasferimento della sede della società nel diritto societario europeo, Rivista delle società 2003 p.723-764 ; , : 2007 p.14-16

PROCEDU Reference for a preliminary ruling

ADVGEN Darmon

JUDGRAP Due

DATES of document: 27/09/1988
of application: 19/03/1987

**Judgment of the Court
of 9 March 1999
Centros Ltd v Erhvervs- og Selskabsstyrelsen. Reference for a preliminary ruling: Højesteret - Denmark. Freedom of establishment - Establishment of a branch by a company not carying on any actual business - Circumvention of national law - Refusal to register. Case C-212/97.**

Freedom of movement for persons - Freedom of establishment - Company formed in accordance with the law of a Member State in which it has its registered office but in which it conducts no business - Establishment of a branch in another Member State - Registration refused - Not permissible - Member States free to adopt measures to combat fraud

(EC Treaty, Arts 52 and 58)

It is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. Given that the right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment.

That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.

In Case C-212/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Højesteret (Denmark) for a preliminary ruling in the proceedings pending before that court between

Centros Ltd

and

Erhvervs- og Selskabsstyrelsen,

on the interpretation of Articles 52, 56 and 58 of the EC Treaty,

THE COURT,

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

Advocate General: A. La Pergola,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Erhvervs- og Selskabsstyrelsen, by Kammeradvokaten, represented by Karsten Hagel-Sørensen, Advokat, Copenhagen,

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

- the French Government, by Kareen Rispal-Bellanger, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Gautier Mignot, Secretary for Foreign Affairs in that Directorate, acting as Agents,

- the Netherlands Government, by Adriaan Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

- the United Kingdom Government, by Stephanie Ridley, of the Treasury Solicitor's Department, acting as Agent, and Derrick Wyatt QC,

- the Commission of the European Communities, by Antonio Caeiro, Legal Adviser, and Hans Støvlbæk, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Erhvervs- og Selskabsstyrelsen, represented by Karsten Hagel-Sørensen; the French Government, represented by Gautier Mignot; the Netherlands Government, represented by Marc Fiestra, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; the Swedish Government, represented by Erik Brattgård, Departementsråd in the Legal Service of the Ministry of Foreign Affairs, acting as Agent; the United Kingdom Government, represented by Derrick Wyatt; and the Commission, represented by Antonio Caeiro and Hans Støvlbæk, at the hearing on 19 May 1998,

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

gives the following

Judgment

Costs

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

On those grounds,

THE COURT,

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

It is contrary to Articles 52 and 58 of the EC Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising

fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.

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

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

3 It is clear from the documents in the main proceedings that Centros has never traded since its formation. Since United Kingdom law imposes no requirement on limited liability companies as to the provision for and the paying-up of a minimum share capital, Centros's share capital, which amounts to GBP 100, has been neither paid up nor made available to the company. It is divided into two shares held by Mr and Mrs Bryde, Danish nationals residing in Denmark. Mrs Bryde is the director of Centros, whose registered office is situated in the United Kingdom, at the home of a friend of Mr Bryde.

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

5 In particular, Article 117 of the Law provides:

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

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

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

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

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

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

11 According to Centros the fact that it has never traded since its formation in the United Kingdom has no bearing on its right to freedom of establishment. In its judgment in Case 79/85 Segers v Bedrijfsvereniging voor Bank- en Verzekeringswegen, Groothandel en Vrije Beroepen [1986] ECR 2375, the Court ruled that Articles 52 and 58 of the Treaty prohibited the competent authorities of a Member State from excluding the director of a company from a national sickness insurance scheme solely on the ground that the company had its registered office in another Member State, even though

it did not conduct any business there.

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

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

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

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

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

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

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

18 That Mrs and Mrs Bryde formed the company Centros in the United Kingdom for the purpose of avoiding Danish legislation requiring that a minimum amount of share capital be paid up has not

been denied either in the written observations or at the hearing. That does not, however, mean that the formation by that British company of a branch in Denmark is not covered by freedom of establishment for the purposes of Article 52 and 58 of the Treaty. The question of the application of those articles of the Treaty is different from the question whether or not a Member State may adopt measures in order to prevent attempts by certain of its nationals to evade domestic legislation by having recourse to the possibilities offered by the Treaty.

19 As to the question whether, as Mr and Mrs Bryde claim, the refusal to register in Denmark a branch of their company formed in accordance with the law of another Member State in which 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, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law (see, in particular, regarding freedom to supply services, Case 33/74 Van Binsbergen v Bedrijfsvereniging Metaalnijverheid [1974] ECR 1299, paragraph 13, Case C-148/91 Veronica Omroep Organisatie v Commissariaat voor de Media [1993] ECR I-487, paragraph 12, and Case C-23/93 TV 10 v Commissariaat voor de Media [1994] ECR I-4795, paragraph 21; regarding freedom of establishment, Case 115/78 Knoors [1979] ECR 399, paragraph 25, and Case C-61/89 Bouchoucha [1990] ECR I-3551, paragraph 14; regarding the free movement of goods, Case 229/83 Leclerc and Others v `Au Blé Vert' and Others [1985] ECR 1, paragraph 27; regarding social security, Case C-206/94 Brennet v Paletta [1996] ECR I-2357, `Paletta II', paragraph 24; regarding freedom of movement for workers, Case 39/86 Lair v Universität Hannover [1988] ECR 3161, paragraph 43; regarding the common agricultural policy,

Case C-8/92 General Milk Products v Hauptzollamt Hamburg-Jonas [1993] ECR I-779, paragraph 21, and regarding company law, Case C-367/96 Kefalas and Others v Greece [1988] ECR I-2843, paragraph 20).

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

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

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

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

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

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

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

32 Referring both to Article 56 of the Treaty and to the case-law of the Court on imperative requirements in the general interest, the Board argues that the requirement that private limited companies provide for and pay up a minimum share capital pursues a dual objective: first, to reinforce the financial soundness of those companies in order to protect public creditors against the risk of seeing the public debts owing to them become irrecoverable since, unlike private creditors, they cannot secure those debts by means of guarantees and, second, and more generally, to protect all creditors, whether public or private, by anticipating the risk of fraudulent bankruptcy due to the insolvency of companies whose initial capitalisation was inadequate.

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

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

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

36 Since the company concerned in the main proceedings holds itself out as a company governed by the law of England and Wales and not as a company governed by Danish law, its creditors are on notice that it is covered by laws different from those which govern the formation of private limited companies in Denmark and they can refer to certain rules of Community law which protect them, such as the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11), and the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ 1989 L 395, p. 36).

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

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

39 The answer to the question referred must therefore be that it is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. That interpretation does not, however, prevent the authorities of the Member State concerned from adopting

any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.

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CONCERNS	Interprets 11992E052 - Interprets 11992E058 -
SUB	Freedom of establishment and services ; Right of establishment
AUTLANG	Danish
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NATCOUR	*A9* Højesteret, beslutning af 03/06/1997 (402/95) ; - Zeitschrift für Wirtschaftsrecht 2000 p.XII (résumé) ; *P1* Højesteret, dom af 03/02/2000 (402/1995) ; - Tidsskrift for skatter og afgifter 2000 no 244 ; - Ugeskrift for Retsvæsen A 2000 p.1079-1083
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JUDGRAP	Wathelet
DATES	of document: 09/03/1999 of application: 05/06/1997
NOTES	Werlauff, Erik: Ligeværdigt udenlandsk "discountselskab", Tidsskrift for skatter og afgifter 1999 no 324 ; Werlauff, Erik: Udenlandsk selskab til indenlandsk aktivitet, Ugeskrift for Retsvæsen 1999 B p.163-171 ; Hofstötter, Michael: Niederlassungsfreiheit für Gesellschaften: Welcome to Delaware!, European Law Reporter 1999 p.156-157 ; Sedemund, Jochim ; Hausmann, Friedrich Ludwig: Betriebs-Berater 1999 p.810-811 ; Travers, Noel: The Right of Establishment of Companies which are Economically Inactive in their Member State of Registration, Commercial Law Practitioner 1999 p.159-166 ; Cruysmans, M.: Revue de droit commercial belge 1999 p.364-366 ; Simon, Denys: Europe 1999 Mai Comm. no 165 p.10 ; Idot, Laurence: Europe 1999 Mai Comm. no 183 p.17-18 ; Meilicke, Wienand: Der Betrieb 1999 p.627-628 ; Neye, Hans-Werner: Entscheidungen zum Wirtschaftsrecht 1999 p.259-260 ; Cascante, José Christian: Niederlassungsfreiheit contra Sitztheorie - Goodbye "Daily Mail"?, Recht der internationalen Wirtschaft 1999 p.450-451 ; Höfling, Barbara: Die Centros-Entscheidung des EuGH - auf dem Weg zu einer Überlagerungstheorie für Europa, Der Betrieb 1999 p.1206-1208 ; Geyrhalter, Volker: Niederlassungsfreiheit contra Sitztheorie - Good Bye "Daily Mail"?, Europäisches Wirtschafts- & Steuerrecht - EWS 1999 p.201-203 ; Jungk, Antje: BRAK-Mitteilungen 1999 p.115 ; Eilers, Stephan ; Wienands, Hans-Gerd: Neue steuerliche und gesellschaftsrechtliche Aspekte der Doppelansässigkeit von Kapitalgesellschaften nach der EuGH-Entscheidung, Internationales Steuerrecht 1999 p.289-296 ; Roth, Günter H.: Gründungstheorie: Ist der Damm gebrochen?, Zeitschrift für Wirtschaftsrecht 1999 p.861-867 ; Werlauff, Erik: Ausländische Gesellschaft für inländische Aktivität, Zeitschrift für Wirtschaftsrecht 1999 p.867-876 ; Freitag, Robert: Der Wettbewerb der Rechtsordnungen im Internationalen Gesellschaftsrecht, Europäische Zeitschrift für Wirtschaftsrecht 1999 p.267-270 ; De Kluiver, H.J.: De wet formeel buitenlandse vennootschappen

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Judgment of the Court (Fifth Chamber)
of 9 March 2000
Commission of the European Communities v Kingdom of Belgium. Failure of a Member State to fulfil its obligations - Free movement of workers - Freedom of establishment - Freedom to provide services - Private security activities - Requirement of prior authorisation - Obligation for legal persons to have their place of business in national territory - Obligation for managers and employees to reside in national territory - Requirement of an identification card issued in accordance with national legislation. Case C-355/98.

1. Actions for failure to fulfil obligations - Examination of the merits by the Court - Situation to be taken into consideration - Situation at the end of the period laid down in the reasoned opinion

(EC Treaty, Art. 169 (now Art. 226 EC))

2. Freedom of movement for persons - Freedom of establishment - Freedom to provide services - Derogations - Activities connected with the exercise of official authority - Activities of private security undertakings and staff - Excluded

(EC Treaty, Art. 55, first para., and Art. 66 (now Art. 45, first para., EC and Art. 55 EC))

3. Freedom to provide services - Restrictions - Obligation for security undertakings to have their place of business in national territory - Not permissible - Justification on grounds of public policy and public security - None

(EC Treaty, Arts 56 and 59 (now, after amendment, Arts 46 EC and 49 EC) and Art. 66 (now Art. 55 EC))

4. Freedom of movement for persons - Workers - Freedom of establishment - Restrictions - Directors and managers of security undertakings subject to a residence condition - Not permissible - Public security justification - None

(EC Treaty, Arts 48, 52 and 56(1) (now, after amendment, Arts 39 EC, 43 EC and 46(1) EC))

5. Freedom to provide services - Restrictions justified in the public interest - Whether permissible - Conditions

(EC Treaty, Art. 59 (now, after amendment, Art. 49 EC) and Art. 60 (now Art. 50 EC))

1. In the context of proceedings under Article 169 of the Treaty (now Article 226 EC), the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes.

(see para. 22)

2. As a derogation from the fundamental rule of freedom of establishment, the exception provided for in the first paragraph of Article 55 of the Treaty (now the first paragraph of Article 45 EC) combined, where appropriate, with Article 66 of the Treaty (now Article 55 EC), must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority. That does not apply to the business of security firms, internal security services and security systems.

(see paras 24-26)

3. By requiring a security firm to have its place of business in national territory, thereby making it impossible for undertakings established in other Member States to provide services in that territory, a Member State fails to fulfil its obligations under Article 59 of the Treaty (now, after amendment, Article 49 EC). Such a requirement cannot be justified on grounds of public policy and public

security. The right of Member States to restrict the free movement of persons and services on those grounds is not intended to exclude economic sectors such as the private security sector from the application of the principle of free movement, from the point of view of access to employment, but to allow Member States to refuse access to their territory or residence there to persons whose access or residence would in itself constitute a danger for public policy, public security or public health.

(see paras 27-29, 41 and operative part)

4. A rule of national law requiring managers and staff of security firms and internal security services, save for administrative and logistical staff, to reside in the territory of the Member State in which they are established constitutes a restriction on both the freedom of establishment and the free movement of workers. That residence condition cannot be justified by the need to check the background and conduct of the persons in question. The need to obtain information in that respect may be satisfied by means less restrictive of freedom of movement, if necessary through cooperation between the authorities of Member States. Moreover, checks may be carried out and penalties may be imposed on any undertaking established in a Member State, whatever the place of residence of its managers.

(see paras 31-34, 41 and operative part)

5. The freedom to provide services, being one of the fundamental principles of the Treaty, may be restricted only by rules justified by the public interest and applicable to all persons and undertakings operating in the territory of the Member State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established.

(see para. 37)

6. A rule of national law requiring every staff member of a security firm or internal security service to carry an identification card issued in accordance with national legislation constitutes a restriction on the freedom to provide services. The formalities involved in obtaining such a card are likely to make the provision of services across frontiers more difficult. Moreover, since the provider of a service who goes to another Member State must be in possession of an identity card or a passport, the requirement of an additional identity document is disproportionate in relation to the need to ensure the identification of the persons in question.

(see paras 39-41 and operative part)

In Case C-355/98,

Commission of the European Communities, represented by Maria Patakia, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Belgium, represented by Jan Devadder, General Adviser in the Legal Directorate of the Ministry of Foreign Affairs, Foreign Trade and Cooperation with Developing Countries, acting as Agent, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

defendant,

APPLICATION for a declaration that, by adopting, within the framework of the Law of 10 April 1990 on security firms, security systems firms and internal security services, provisions which

(a) make the operation of a business falling within that Law subject to the obtaining of prior authorisation which depends on a certain number of conditions, namely that:

- a security firm must have a place of business in Belgium;

- persons who

- have charge of the actual management of a security firm or internal security service, or who

- work in or on behalf of such an undertaking or are employed for the purposes of its activities, with the exception of internal staff working in administration or logistics,

must have their permanent residence or, failing that, their habitual residence in Belgium;

- an undertaking established in another Member State must obtain authorisation, for the purpose of which no account is taken of the evidence and guarantees already presented by it for the pursuit of its activity in the Member State of establishment; and

(b) require every person wishing to exercise a security activity or provide an internal security service in Belgium to be issued with an identification card in accordance with that Law,

the Kingdom of Belgium has failed to fulfil its obligations under Articles 48, 52 and 59 of the EC Treaty (now, after amendment, Articles 39 EC, 43 EC and 49 EC),

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Sixth Chamber, acting as President of the Fifth Chamber, L. Sevon, C. Gulmann, J.-P. Puissochet and P. Jann (Rapporteur), Judges,

Advocate General: F.G. Jacobs,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 16 September 1999,

gives the following

Judgment

Costs

42 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Belgium has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that by adopting, within the framework of the Law of 10 April 1990 on security firms, security systems firms and internal security services, provisions which

(a) make the operation of a business falling within that Law subject to the obtaining of prior authorisation which depends on a certain number of conditions, namely that:

- a security firm must have a place of business in Belgium;

- persons who

- have charge of the actual management of a security firm or internal security service, or who

- work in or on behalf of such an undertaking or are employed for the purposes of its activities, with the exception of internal staff working in administration or logistics,

must have their permanent residence or, failing that, their habitual residence in Belgium;

- an undertaking established in another Member State must obtain authorisation, for the purpose of which no account is taken of the evidence and guarantees already presented by it for the pursuit of its activity in the Member State of establishment; and

(b) require every person wishing to exercise a security activity or provide an internal security service in Belgium to be issued with an identification card in accordance with that Law,

the Kingdom of Belgium has failed to fulfil its obligations under Articles 48, 52 and 59 of the EC Treaty (now, after amendment, Articles 39 EC, 43 EC and 49 EC);

2. Orders the Kingdom of Belgium to pay the costs.

1 By application lodged at the Court Registry on 29 September 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by adopting, within the framework of the Law of 10 April 1990 on security firms, security systems firms and internal security services (Moniteur Belge of 29 May 1990, p. 10963; the Law), provisions which

(a) make the operation of a business falling within that Law subject to the obtaining of prior authorisation which depends on a certain number of conditions, namely that:

- a security firm must have a place of business in Belgium;

- persons who

- have charge of the actual management of a security firm or internal security service, or who

- work in or on behalf of such an undertaking or are employed for the purposes of its activities, with the exception of internal staff working in administration or logistics,

must have their permanent residence or, failing that, their habitual residence in Belgium;

- an undertaking established in another Member State must obtain authorisation, for the purpose of which no account is taken of the evidence and guarantees already presented by it for the pursuit of its activity in the Member State of establishment; and

(b) require every person wishing to exercise a security activity or provide an internal security service in Belgium to be issued with an identification card in accordance with that Law,

the Kingdom of Belgium has failed to fulfil its obligations under Articles 48, 52 and 59 of the EC Treaty (now, after amendment, Articles 39 EC, 43 EC and 49 EC).

Legal background

2 Article 1 of the Law provides:

1. For the purposes of this Law, a security firm shall be taken to mean any natural or legal person carrying on an activity which consists in supplying to third parties, on a permanent or occasional basis, services of:

(a) guarding and protecting movable or immovable property;

(b) protecting persons;

(c) guarding and protecting the transport of property;

(d) operating alarm networks.

2. For the purposes of this Law, an internal security service shall be taken to mean any service organised by a natural or legal person, to meet the needs of such person, in places accessible to the public, in the form of the activities listed in paragraph 1(a), (b) or (c).

3. For the purposes of this Law, a security systems firm shall be taken to mean any natural or legal person carrying on an activity which consists in the supply to third parties, on a permanent or occasional basis, design, installation and maintenance services for alarm systems and networks.

...

3 Article 2 of the Law prohibits the operation of a security firm or the organisation of an internal security service without prior authorisation from the Minister for the Interior pursuant to an opinion from the Minister for Justice. Security firms may take the form of legal persons constituted under the legislation of a Member State of the European Union, but their place of business must be situated in Belgium. Article 4 of the Law prohibits the operation of a security systems firm without prior approval of the Minister for the Interior.

4 Under Article 5 of the Law, persons who have charge of the actual management of a security firm or internal security service must have their permanent residence or, failing that, their habitual residence in Belgium. Under Article 6 of the Law, that condition also applies to the staff of security firms and internal security services, save for administrative and logistical staff.

5 Article 8 of the Law requires persons working for or on behalf of a security firm or an internal security service to carry an identification card issued by the Minister for the Interior.

6 The Law was amended, as from 28 August 1997, by the Law of 18 July 1997 (Moniteur Belge, 28 August 1997, p. 21964). However, the amendments thereby introduced do not concern those aspects of the Law that form the subject-matter of this action for failure to fulfil obligations.

Pre-litigation procedure

7 By letter of 11 April 1996, the Commission formally requested the Belgian Government to submit its observations on the compatibility of the provisions of the Law with the freedom to provide services, freedom of establishment and the free movement of workers.

8 The Belgian Government replied on 14 June 1996 that the restrictions on those freedoms imposed by the Law were justified by the exceptions laid down in Article 48(3) of the Treaty and Article 56 of the EC Treaty (now, after amendment, Article 46 EC), combined, in appropriate cases, with Article 66 of the EC Treaty (now Article 55 EC).

9 By letter of 10 June 1997, the Commission sent the Belgian Government a reasoned opinion, calling on it to take the measures necessary to comply with that opinion within two months of its notification.

10 In its reply dated 6 May 1998, the Belgian Government cited the specific nature of the private security industry, referring in that respect to Article 55 of the EC Treaty (now Article 45 EC).

11 As regards, more particularly, the obligation for the undertaking to have its place of business in Belgium, the Belgian Government has argued that this was justified on grounds of public policy referred to in Article 56 of the Treaty. As far as the requirement of a prior authorisation or approval is concerned, the Government draws attention to the absence of cooperation between Member States in the matter and to the fact that it had not been demonstrated that services similar to those authorised in Belgium were provided in other Member States. Finally, as regards the condition

of permanent or habitual residence, the Belgian Government refers to the need to screen persons wishing to work in the security industry.

12 Being dissatisfied with that reply, the Commission brought this action for failure to fulfil obligations.

Arguments of the parties

13 The Commission argues that the Law entails several restrictions on the freedom to provide services. Those restrictions flow from the obligation for security firms to have their place of business in Belgium, from the requirement of an authorisation to carry on business as a security firm and an approval to carry on business as a security systems firm, and, finally, from the obligation for the staff of undertakings and of internal security services to carry an identification card issued by the Belgian Minister for the Interior.

14 The Commission also maintains that the Law restricts freedom of establishment and the free movement of workers in so far as it imposes a residence condition on, first, persons having charge of the actual management of a security firm or internal security service, and, secondly, the staff of those undertakings and services, save in administration or logistics.

15 The Commission considers that Article 55 of the Treaty does not apply, since security firms, internal security services and security systems firms are not involved in the exercise of official authority.

16 Regarding the obligation that the place of business be in Belgium, the Commission considers that such a requirement may be justified on public policy grounds under Article 56 of the Treaty only if it is established that the individual conduct of the person or undertaking in question constitutes a present, genuine and sufficiently serious threat, affecting a fundamental interest of society. Proof of such a threat has not been supplied in this case. Furthermore, the Commission considers that the requirement in question is disproportionate in relation to the aim pursued.

17 The requirement for an authorisation or approval and for an identification card, issued by the Belgian Minister for the Interior, are, the Commission argues, also disproportionate in the case of an occasional supply of services. First, the Law does not allow account to be taken of guarantees already presented by the person supplying the services for the pursuit of his activity in the Member State of establishment. Moreover, under Article 4(2) of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14), any person entering Belgian territory on a temporary basis for the purpose of providing a service is already required to be in possession of a current identity card or passport.

18 As for the residence conditions imposed by the Law, the Commission considers that they cannot be justified by the need to carry out a screening of the persons concerned.

19 The Belgian Government argues that, by reason of its specific nature, the security business requires strict regulation, which is lacking at Community level and in most Member States. According to that government, every security firm is capable of constituting a genuine and sufficiently serious threat, affecting a fundamental interest of society, namely public policy and public security.

20 Concerning the residence conditions, the Belgian Government states that it has taken note of the judgment in Case C-114/97 Commission v Spain [1998] ECR I-6717 and that, in accordance with that judgment, the possibility of amending the disputed provisions of the Law is now being examined.

21 By letter of 23 August 1999, the Belgian Government sent to the Court of Justice the text of the Law of 9 June 1999 amending the Law of 10 April 1990 (Moniteur Belge, 29 July 1999, p. 28316) and a copy of a letter in which it asked the Commission to consider withdrawing these proceedings.

Findings of the Court

22 Concerning the Belgian Government's letter of 23 August 1999, it should be recalled that, under consistent case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, in particular, Case C-316/96 Commission v Italy [1997] ECR I-7231, paragraph 14).

23 As regards the provisions of the Law, in the version in force at the end of the period laid down in the reasoned opinion, which form the subject-matter of the present action, the Belgian Government does not deny that they constitute restrictions on the free movement of workers, freedom of establishment and the freedom to provide services. It maintains, however, that those measures are justified.

24 By way of preliminary observation, it should be noted that the exception laid down in the first paragraph of Article 55 of the Treaty, combined in appropriate cases with Article 66 of the Treaty, does not apply in this case.

25 According to established case-law, that derogation must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority (Case 2/74 Reyners [1974] ECR 631, paragraph 45; Commission v Spain, cited above, paragraph 35).

26 The activities of security firms, security systems firms and internal security services are not normally directly and specifically connected with the exercise of official authority, and the Belgian Government has not adduced any evidence to permit the contrary to be established.

The obligation to have the place of business in Belgium

27 The condition that a security firm must have its place of business in Belgium directly negates the freedom to provide services in so far as it makes it impossible for undertakings established in other Member States to provide services in Belgium (see Case 205/84 Commission v Germany [1986] ECR 3755, paragraph 52).

28 As regards the reasons of public policy and public security relied upon in order to justify that requirement, it should be noted, first, that the concept of public policy assumes a genuine and sufficiently serious threat affecting one of the fundamental interests of society. Like all derogations from a fundamental principle of the Treaty, the public policy exception must be interpreted restrictively (see Case C-348/96 Calfa [1999] ECR I-11, paragraphs 21 and 23).

29 Moreover, the right of Member States to restrict the free movement of persons and services on grounds of public policy, public security or public health is not intended to exclude economic sectors such as the private security sector from the application of that principle, from the point of view of access to employment, but to allow Member States to refuse access to their territory or residence there to persons whose access or residence would in itself constitute a danger for public policy, public security or public health (see Commission v Spain, cited above, paragraph 42).

30 Since the Belgian Government's argument that any security firm is capable of constituting a genuine and sufficiently serious threat to public policy and public security is obviously unfounded and, in any event, unproven, it cannot justify the restriction on the freedom to provide services resulting from the obligation for companies running such a business to have their place of business in Belgium.

The residence obligation

31 The residence obligation imposed on both managers and staff of security firms and internal security

services, save for administrative and logistical staff, constitutes a restriction on both the freedom of establishment (see Commission v Spain, cited above, paragraph 44) and the free movement of workers (see Case C-350/96 Clean Car Autoservice v Landeshauptmann von Wien [1998] ECR I-2521, paragraphs 27 to 30).

32 That condition cannot be justified by the need to check the background and conduct of the persons in question, as the Belgian Government maintained in its reply to the reasoned opinion.

33 The need to obtain information on the conduct of managers and staff may be satisfied by means less restrictive of freedom of movement, if necessary through cooperation between the authorities of Member States.

34 Moreover, checks may be carried out and penalties may be imposed on any undertaking established in a Member State, whatever the place of residence of its managers (Commission v Spain, paragraph 47).

The requirement of prior authorisation or approval

35 According to consistent case-law, national legislation which makes the provision of certain services on national territory by an undertaking established in another Member State subject to the issue of an administrative authorisation constitutes a restriction on the freedom to provide services within the meaning of Article 59 of the Treaty (see, inter alia, Case C-43/93 Vander Elst v Office des Migrations Internationales [1994] ECR I-3803, paragraph 15).

36 As regards the specific nature of the security and security systems businesses and the absence of legislation at Community level and in most Member States, which are matters relied upon by the Belgian Government in order to justify this requirement, it must be noted that, in any event, the Law goes beyond what is necessary to attain the objective sought, which is to ensure close supervision of those activities.

37 The freedom to provide services, being one of the fundamental principles of the Treaty, may be restricted only by rules justified by the public interest and applicable to all persons and undertakings operating in the territory of the Member State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established (Case 279/80 Webb [1981] ECR 3305, paragraph 17).

38 By requiring all undertakings to fulfil the same conditions for obtaining prior authorisation or approval, the Belgian legislation makes it impossible for account to be taken of obligations to which the person providing the service is already subject in the Member State in which he is established.

The requirement of an identification card

39 The condition that every staff member of a security firm or internal security service must carry an identification card issued by the Belgian Minister for the Interior must also be regarded as a restriction on the freedom to provide services. The formalities involved in obtaining such an identification card are likely to make the provision of services across frontiers more difficult.

40 Moreover, as the Commission has rightly emphasised, the provider of a service who goes to another Member State must be in possession of an identity card or a passport. It follows that the requirement of an additional identity document, issued by the Belgian Minister for the Interior, is disproportionate in relation to the need to ensure the identification of the persons in question.

41 It follows from the whole of the above considerations that, by adopting within the framework of the Law provisions which

(a) make the operation of a business falling within that Law subject to the obtaining of prior

authorisation which depends on a certain number of conditions, namely that:

- a security firm must have a place of business in Belgium;

- persons who

- have charge of the actual management of a security firm or internal security service, or who

- work in or on behalf of such an undertaking or are employed for the purposes of its activities, with the exception of internal staff working in administration or logistics,

must have their permanent residence or, failing that, their habitual residence in Belgium;

- an undertaking established in another Member State must obtain authorisation, for the purpose of which no account is taken of the evidence and guarantees already presented by it for the pursuit of its activity in the Member State of establishment; and

(b) require every person wishing to exercise a security activity or provide an internal security service in Belgium to be issued with an identification card in accordance with that Law,

the Kingdom of Belgium has failed to fulfil its obligations under Articles 48, 52 and 59 of the Treaty.

DOCNUM	61998J0355
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2000 Page I-01221
DOC	2000/03/09
LODGED	1998/09/29
JURCIT	11992E048 : N 1 41 11992E052 : N 1 41 11992E055-L1 : N 24 11992E059 : N 1 35 41 11992E066 : N 24 61974J0002-N45 : N 25 61980J0279-N17 : N 37 61984J0205-N52 : N 27 61993J0043-N15 : N 35 61996J0316-N14 : N 22 61996J0348-N21 : N 28 61996J0348-N23 : N 28 61996J0350-N27-30 : N 31 61997J0114-N35 : N 25

61997J0114-N42 : N 29
61997J0114-N44 : N 31
61997J0114-N47 : N 34

CONCERNS Failure concerning 11992E048 -
Failure concerning 11992E052 -
Failure concerning 11992E059 -

SUB Free movement of workers ; Freedom of establishment and services ; Right of establishment ; Free movement of services

AUTLANG French

APPLICA Commission ; Institutions

DEFENDA Belgium ; Member States

NATIONA Belgium

NOTES Buschle, Dirk: Private Sicherheitsdienste in Belgien am Massstab der Grundfreiheiten, European Law Reporter 2000 p.113-114 ; D'Orlando, Elena: Riserva di ordine pubblico e principio di proporzionalità quali strumenti di ragionevolezza nei bilanciamenti della Corte di giustizia delle Comunità europee, Diritto pubblico comparato ed europeo 2000 p.728-733

PROCEDU Action for failure to fulfil obligations - successful

ADVGEN Jacobs

JUDGRAP Jann

DATES of document: 09/03/2000
of application: 29/09/1998

**Judgment of the Court (Fifth Chamber)
of 18 December 1997
European Information Technology Observatory, Europäische Wirtschaftliche Interessenvereinigung. Reference for a preliminary ruling: Oberlandesgericht Frankfurt am Main - Germany. European Economic Interest Grouping - Business name. Case C-402/96.**

In Case C-402/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Oberlandesgericht Frankfurt am Main (Germany) for a preliminary ruling in the proceedings pending before that court, concerning the commercial registration of an undertaking in the process of formation, brought by

European Information Technology Observatory, Europäische Wirtschaftliche Interessenvereinigung

on the interpretation of Article 5(a) of Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) (OJ 1985 L 199, p. 1),

THE COURT

(Fifth Chamber),

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

Advocate General: A. La Pergola,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- European Information Technology Observatory, Europäische Wirtschaftliche Interessenvereinigung, by D. Ehle, Rechtsanwalt, Cologne,

- the German Government, by A. Dittrich, Ministerialrat in the Federal Ministry of Justice, and B. Kloke, Oberregierungsrat in the Federal Ministry of the Economy, acting as Agents,

- the Commission of the European Communities, by G. zur Hausen and A. Caeiro, Legal Advisers, acting as Agents,

having regard to the report of the Judge-Rapporteur,

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

gives the following

Judgment

1 By order of 9 December 1996, received at the Court on 23 December 1996, the Oberlandesgericht (Higher Regional Court), Frankfurt am Main, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 5(a) of Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) (OJ 1985 L 199, p. 1, `the Regulation').

2 That question was raised in proceedings in which the Amtsgericht (Local Court), Frankfurt am Main, refused to enter European Information Technology Observatory, Europäische Wirtschaftliche Interessenvereinigung (`EITO'), an undertaking in the process of formation, with its official address in Frankfurt am Main, in Part A of the commercial register, on the ground that under German law the name of an Europäische Wirtschaftliche Interessenvereinigung, namely a European Economic Interest Grouping (`EEIG' or `grouping'), may be derived only from purely personal names or from personal names with further additions, but the EEIG may not be registered if its name is purely

descriptive of the object of the undertaking.

3 The Landgericht (Regional Court), Frankfurt am Main, upheld, by order of 21 June 1995, the Amtsgericht's refusal of that registration and EITO appealed to the Oberlandesgericht Frankfurt am Main.

4 Before those courts, EITO claimed that the refusal to register it in the commercial register was contrary to Article 5(a) of the Regulation, according to which a contract for the formation of a grouping is to include either the words `European Economic Interest Grouping' or `EEIG', unless those words or initials already form part of the name.

5 The Oberlandesgericht considered that EITO's appeal was not well founded. It referred to its decision of 18 May 1993 in which it held that the business name of an EEIG may not be entered in the commercial register if it is a name purely descriptive of the object of the undertaking, since the law applicable to the business names of general partnerships governed by German law (offene Handelsgesellschaften), to which EEIGs are subject, provides exclusively for the use of purely personal names or of personal names with further additions. In that decision, the Oberlandesgericht expressly rejected the view that Article 5(a) of the regulation requires a business name to be purely descriptive of the object of the undertaking. In its view, that provision states only that the words `European Economic Interest Grouping' or the initials `EEIG' need not necessarily precede or follow the name and, consequently, apart from the addition specifying the type of legal entity, the question of business names is governed solely by national law.

6 Nevertheless, the Oberlandesgericht considered itself bound to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

`Is Article 5(a) of Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping to be interpreted as meaning that, apart from the additions of "European Economic Interest Grouping" or "EEIG", the name or business name of an EEIG may consist of a purely descriptive designation, even where internal law in principle precludes the use of such a name for the formation of a European Economic Interest Grouping?'

7 First of all, the Regulation creates a legal framework in which natural persons, companies, firms and other legal entities can cooperate across frontiers, by means of a new legal instrument.

8 According to Article 1(1), EEIGs are to be formed upon the terms, in the manner and with the effects laid down in the Regulation.

9 Article 2(1) provides: `Subject to the provisions of this Regulation, the law applicable, on the one hand, to the contract for the formation of a grouping, except as regards matters relating to the status or capacity of natural persons and to the capacity of legal persons and, on the other hand, to the internal organization of a grouping shall be the internal law of the State in which the official address is situated, as laid down in the contract for the formation of the grouping.'

10 Article 5 of the Regulation provides: `A contract for the formation of a grouping shall include at least:

(a) the name of the grouping preceded or followed either by the words "European Economic Interest Grouping" or by the initials "EEIG", unless those words or initials already form part of the name;

...'.

11 EITO considers that the question referred by the national court should be answered in the affirmative. It refers first to the actual wording of Article 5(a), and in particular to the part of the sentence `unless those words or initials already form part of the name'. It argues that where a business

name is derived from personal names, the words `European Economic Interest Grouping' or the initials `EEIG' can only be a further addition and cannot already form part of the name. The phrase referred to above, which would otherwise be meaningless, shows that it is possible to adopt a name descriptive of the object of the undertaking.

12 EITO goes on to cite the objectives listed in the recitals in the preamble to the Regulation. It claims that the legislature intended to encourage cross-frontier cooperation by according the members of the grouping considerable freedom in the organization of their contractual relations. That necessarily involves accepting business names descriptive of the object of the undertaking. In its view, there is a direct link between the name of an EEIG and the organization of its contractual relations and internal operations.

13 Moreover, according to EITO, equal treatment of the members of an EEIG must also be reflected in its business name, possibly by including the name of each member in the business name. That, however, would raise two problems: first, the number of members might make such a business name impracticable and, second, it would not guarantee that the business name gave a suitable indication of the EEIG's sphere of operations. The result of refusing names descriptive of the object of the undertaking would therefore be to prevent EEIGs from achieving their objective of promoting cooperation within the Community.

14 Last, EITO points out that the importance of business names descriptive of the object of the undertaking for cross-frontier cooperation is illustrated by the fact that more than 80% of EEIGs set up have such a name. If descriptive names were not allowed, there would be a risk of legal divergence within the common market which is precisely what a uniform legal structure is supposed to eliminate. Accordingly, interpretation and application of the Regulation must not be guided solely by German law.

15 The German Government and the Commission consider that the answer to the question referred should be in the negative. The German Government notes in particular that Article 5(a) of the Regulation does no more than determine the manner in which the legal form of the EEIG is to be mentioned in the name and makes no provision regarding the content of the grouping's name. The rules applicable to the content of the grouping's name are consequently a matter for national law exclusively. That follows directly from Article 2(1) of the Regulation.

16 The Commission states that, subject to the provisions of the Regulation, the law applicable, in accordance with Article 2(1), is the internal law of the Member State in which the official address is situated. In its view, the business name of a grouping falls within the sphere of domestic law.

17 The argument that the expression `unless those words or initials already form part of the name' means that the Regulation necessarily offers the possibility of a name purely descriptive of the object of the undertaking, the Commission submits, is not convincing. That argument relies on provisions of national law to interpret a provision of Community law, which, however, must be interpreted independently and may not be influenced by the necessarily differing rules of the various Member States.

18 The Commission adds that the freedom afforded by the Regulation with regard to the business names of EEIGs is confirmed by Article 1(3), which provides that the Member States are to determine whether or not groupings registered at their registries have legal personality.

19 As the German Government and the Commission have rightly submitted, the interpretation of Article 5(a) put forward by EITO cannot be accepted.

20 It is clear from Article 2(1) that, subject to the provisions of the Regulation, the law applicable

is the internal law of the State in which the official address is situated, as laid down in the contract for the formation of the grouping.

21 As the Advocate General has indicated at point 5 of his Opinion, all that Article 5(a) requires is that the business name of an EEIG should contain either the words `European Economic Interest Grouping' or the initials `EEIG'. The purpose of that provision is to enable the grouping to be identified and distinguished in its relations with third parties by means of the reference to the type of association established by the Regulation. It does not, however, impose any other requirement as to the content of the grouping's business name. In particular, the phrase `unless those words or initials already form part of the name' is simply intended, where appropriate, to avoid any pointless repetition.

22 The Regulation thus provides that the business name of an EEIG must include the words `European Economic Interest Grouping' or the initials `EEIG', but is silent as to the content of the name. It follows that requirements in that connection may, in accordance with Article 2(1) of the Regulation, be imposed by the provisions of internal law applicable in the Member State in which the grouping has its official address.

23 The answer to the national court's question must therefore be that Article 5(a) of the Regulation is to be interpreted as meaning that the business name of an EEIG must include the words `European Economic Interest Grouping' or the initials `EEIG', whilst the other elements to be included may be imposed by the provisions of internal law applicable in the Member State in which the grouping has its official address.

Costs

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

On those grounds,

THE COURT

(Fifth Chamber),

in answer to the question referred to it by the Oberlandesgericht Frankfurt am Main by order of 9 December 1996, hereby rules:

Article 5(a) of Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) is to be interpreted as meaning that the business name of an EEIG must include the words `European Economic Interest Grouping' or the initials `EEIG', whilst the other elements to be included may be imposed by the provisions of internal law applicable in the Member State in which the grouping has its official address.

DOCNUM	61996J0402
AUTHOR	Court of Justice of the European Communities
FORM	Judgment

TREATY	European Economic Community
PUBREF	European Court reports 1997 Page I-07515
DOC	1997/12/18
LODGED	1996/12/23
JURCIT	31985R2137-A01P3 : N 18 31985R2137-A02P1 : N 9 20 22 31985R2137-A05LA : N 6 10 21 23
CONCERNS	Interprets 31985R2137 -A05LA
SUB	Freedom of establishment and services ; Right of establishment
AUTLANG	German
OBSERV	Federal Republic of Germany ; Commission ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A9* Oberlandesgericht Frankfurt/Main, Vorlagebeschluß vom 09/12/1996 (20 W 308/95) ; - Der Betrieb 1997 p.221 ; - Entscheidungen zum Wirtschaftsrecht 1997 p.283 (résumé) ; - Europäische Zeitschrift für Wirtschaftsrecht 1997 p.285-286 ; - Europäisches Wirtschafts- & Steuerrecht - EWS 1997 p.71 (résumé) ; - Recht der internationalen Wirtschaft 1997 p.683-684 ; - Zeitschrift für Wirtschaftsrecht 1997 p.591-593 ; - Neye, Hans-Werner: Entscheidungen zum Wirtschaftsrecht 1997 p.283-284 ; *P1* Oberlandesgericht Frankfurt/Main, Schreiben vom 10/02/1998 (20 W 308/95)
NOTES	Schmittmann, Jens M.: Internationales Steuerrecht 1998 p.95-96 ; Joller, Gallus: Sachfirma einer EWIV?, European Law Reporter 1998 p.38 ; Idot, Laurence: Europe 1998 Février Comm. no 65 p.21 ; Conesa Hernandez, Angel: De la denominacion social (estatal o comunitaria) de las agrupaciones europeas de interés economico, La ley - Union Europea 1998 no 4488 p.4-5 ; Dios, José María de: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1998 p.608-610
PROCEDU	Reference for a preliminary ruling
ADVGEN	La Pergola
JUDGRAP	Gulmann
DATES	of document: 18/12/1997 of application: 23/12/1996

Judgment of the Court (Sixth Chamber)
of 14 December 2000
Algemene Maatschappij voor Investering en Dienstverlening NV (AMID) v Belgische Staat.
Reference for a preliminary ruling: Hof van Beroep Gent - Belgium. Freedom of establishment - Tax legislation - Direct taxes - Deduction of business losses - Previous tax year. Case C-141/99.

Freedom of movement for persons Freedom of establishment Tax legislation Corporation tax National legislation limiting the possibility of deducting losses incurred in the Member State concerned for companies which have a permanent establishment in another Member State Not permissible

(EC Treaty, Art. 52 (now, after amendment, Art. 43 EC))

$$Article 52 of the Treaty (now, after amendment, Article 43 EC) precludes legislation of a Member State under which a company incorporated under national law, having its seat in that Member State, may, for the purposes of corporation tax, deduct a loss incurred the previous year from the taxable profit for the current year only on the condition that that loss was not capable of being set off against the profit made during that same previous year by one of its permanent establishments situated in another Member State, to the extent that a loss thus set off cannot be deducted from taxable income in either of the Member States concerned, whereas it would be deductible if the establishments of that company were situated exclusively in the Member State in which it has its seat. Such legislation establishes a differentiated tax treatment as between companies incorporated under national law having establishments only on national territory and those having establishments in another Member State.

(see paras 23, 33 and operative part)

In Case C-141/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Hof van Beroep te Gent (Belgium) for a preliminary ruling in the proceedings pending before that court between

Algemene Maatschappij voor Investering en Dienstverlening NV (AMID)

and

Belgische Staat,

on the interpretation of Article 52 of the EC Treaty (now, after amendment, Article 43 EC),

THE COURT (Sixth Chamber),

composed of: C. Gulmann (Rapporteur), President of the Chamber, V. Skouris and J.-P. Puissochet, Judges,

Advocate General: S. Alber,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

Algemene Maatschappij voor Investering en Dienstverlening NV (AMID), by F. Marck, of the Antwerp Bar,

the Belgian Government, by P. Rietjens, Director-General in the Legal Service of the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

the Commission of the European Communities, by H. Michard and H. Speyart, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Belgian Government, represented by B. van de Walle de Ghelcke, of the Brussels Bar, and the Commission, represented by H. Speyart at the hearing on 13 April 2000,

after hearing the Opinion of the Advocate General at the sitting on 8 June 2000,

gives the following

Judgment

Costs

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

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Hof van Beroep te Gent by judgment of 13 April 1999, hereby rules:

Article 52 of the EC Treaty (now, after amendment, Article 43 EC) precludes legislation of a Member State under which a company incorporated under national law, having its seat in that Member State, may, for the purposes of corporation tax, deduct a loss incurred the previous year from the taxable profit for the current year only on the condition that that loss was not capable of being set off against the profit made during that same previous year by one of its permanent establishments situated in another Member State, when the loss, although set off, cannot be deducted from taxable income in either of the Member States concerned, whereas it would be deductible if the establishments of that company were situated exclusively in the Member State in which it has its seat.

1 By judgment of 13 April 1999, received at the Court on 21 April 1999, the Hof van te Beroep te Gent (Ghent Court of Appeal) 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 52 of the EC Treaty (now, after amendment, Article 43 EC).

2 That question was raised in a dispute between Algemene Maatschappij voor Investering en Dienstverlening NV (AMID) and the Belgische Staat (Belgian State) concerning the latter's refusal to allow AMID, for tax purposes, to deduct losses incurred by its Belgian establishment in the previous accounting year from the profits made by that same establishment in the subsequent accounting year, on the ground that those losses should have been set off against the profits made by its Luxembourg establishment in the previous accounting year.

National legal background

3 Under Article 114 of the Belgian Income Tax Code, as consolidated by the Royal Decree of 26 February 1964 consolidating statutory provisions on income tax (Staatsblad of 10 April 1964, p. 3809; the of 1964 Code), there shall be set off against the profit made during a taxable period of the business losses incurred during the previous five taxable periods.

4 Article 66 of the Royal Decree of 4 March 1965 implementing the 1964 Code (Staatsblad of 30 April 1965, p. 4722; the Royal Decree implementing the 1964 Code) provides:

The total amount of profits determined in accordance with Article 65 shall where appropriate be broken down, according to their provenance, into:

1. profits made in Belgium, hereinafter referred to as "Belgian profits";

2. profits made abroad for which tax is reduced, hereinafter referred to as "profits taxable at a lower rate";

3. profits made abroad and exempted from tax by virtue of agreements to prevent double taxation, hereinafter referred to as "profits exempted by treaty".

Before such breakdown is carried out, any losses incurred during the taxable period, in one or more of the company's establishments in Belgium and abroad, are to be successively set off against the total amount of the profits of the other establishments in the order indicated below:

(a) losses incurred in a country for which the profits are exempted by treaty: first against profits exempted by treaty and, if these are insufficient, against profits taxable at a lower rate and then against Belgian profits;

(b) losses incurred in a country for which profits are taxable at a lower rate: first against profits taxable at a lower rate and, if these are insufficient, against profits exempted by treaty and then against Belgian profits;

(c) losses incurred in Belgium: first against Belgian profits and, if these are insufficient, against profits taxable at a lower rate and then against profits exempted by treaty.

5 Under Article 69 of the Royal Decree implementing the 1964 Code, the previous business losses referred to in Article 114 of the 1964 Code are to be offset in so far as they have not hitherto been capable of being offset or have not previously been covered by profits exempted by treaty.

6 The Kingdom of Belgium has concluded bilateral conventions with all the other Member States in order to avoid double taxation. All those conventions are based on a model established by the Organisation for Economic Cooperation and Development. The convention between the Kingdom of Belgium and the Grand Duchy of Luxembourg for the avoidance of double taxation (the Convention) was concluded on 17 September 1970.

7 Under Article 7 of the Convention, The profits of an undertaking of a contracting State are taxable only in that State, unless the undertaking carries on its business in the other contracting State through the intermediary of a permanent establishment which is situated there. If the undertaking carries on its business in such a manner, the profits of the undertaking are taxable in the other State, but only in so far as they are attributable to that permanent establishment. Under Article 5(2), point 3, of the Convention, the expression permanent establishment includes in particular an office or branch.

8 Under Article 23(2), point 1, of the Convention, income from Luxembourg which is taxable in that State by virtue of the Convention is exempt from tax in Belgium.

The dispute in the main proceedings

9 AMID is a Belgian limited liability company which has its seat and fiscal domicile in Belgium. The company also has a permanent establishment in the Grand Duchy of Luxembourg. Under the Convention, AMID's income from its permanent establishment in Luxembourg is exempt from tax in Belgium.

10 During the 1981 accounting year, AMID made a loss in Belgium of BEF 2 126 926, whereas in the same year its Luxembourg branch made a profit of LUF 3 541 118.

11 Since, under the Luxembourg corporation tax system, it was not possible to set off the Belgian loss against the Luxembourg profit, AMID, in its Belgian corporation tax return in respect of

the 1982 accounting year, deducted its Belgian loss of 1981 from its Belgian profits of 1982.

12 The Belgian administration for direct taxes rejected that deduction by notice of rectification on the ground that, in this case, the Belgian loss of 1981 should, in accordance with subparagraph (c) of the second paragraph of Article 66 of the Royal Decree implementing the 1964 Code, have been set off against the profits made the same year in Luxembourg, with the result that, taking into account Article 69 of the Royal Decree implementing the 1964 Code, it could not be deducted from the Belgian profits of 1982.

13 On 8 March 1985, AMID lodged a complaint against the tax notice of 8 October 1984 which had given effect to the notice of rectification. That complaint having been rejected by the regional director for direct taxes on 11 July 1990, AMID brought an action against that rejection decision before the Hof van Beroep te Gent.

14 In the proceedings before that court, AMID argued that the provisions applied to it were incompatible with the Convention and that, furthermore, they placed companies with branches abroad at a disadvantage compared with companies having branches only in Belgium, in breach of the EC Treaty.

15 The Hof van Beroep te Gent held that the disputed tax notice in the main proceedings complied with the Convention. It found, however, that AMID had been subject to corporation tax on profits made both in Belgium and at its permanent Luxembourg establishment without ever being able to deduct the losses incurred in Belgium in 1981 from the taxable profit. Had AMID had its branch not in Luxembourg but in Belgium, the losses incurred by that company in Belgium in 1981 could have been capable of being deducted from its taxable income. The Belgian court considered that it had to be asked whether the Belgian tax legislation did not thereby hinder the freedom of establishment guaranteed by the EC Treaty.

16 In those circumstances, the Hof van Beroep te Gent decided to stay the proceedings pending a preliminary ruling from the Court of Justice on the following question:

Does Article 52 of the Treaty of 25 March 1957 establishing the European Community preclude the application of national legislation of a Member State under which, for the purposes of assessment to corporation tax, a business loss incurred in that Member State during an earlier taxable period by a company established in that State can be offset against the profits made by that company during a later taxable period only to the extent to which that loss cannot be attributed to the profit made by a permanent establishment of that company in another Member State during that earlier taxable period, with the result that the loss thus attributed cannot be offset, in either of the Member States concerned, against the taxable income of that company for the purposes of assessment to corporation tax, whereas, if the permanent establishment were located in the same Member State as the company, the business losses in question could certainly be set off against the taxable income of that company?

The question referred for a preliminary ruling

17 By its question, the national court asks essentially whether Article 52 of the Treaty precludes legislation of a Member State under which a company incorporated under national law, having its seat in that Member State, may for the purposes of corporation tax deduct a loss incurred the previous year from the taxable profit for the current year only on the condition that that loss was not capable of being set off against the profit made during that same previous year by one of its permanent establishments situated in another Member State, when the loss, although set off, cannot be deducted from taxable income in either of the Member States concerned, whereas it would be deductible if the establishments of that company were situated exclusively in the Member State in which it has its seat.

18 In its observations the Commission has called into question whether the Belgian provisions that were applied in the case concerned in the main proceedings are in conformity with the Convention. There is, however, no need to reply on that point, since the referring court has not asked any question in that respect (see, in particular, Case C-435/97 World Wildlife Fund v Automome Provinz Bozen [1999] ECR I-5613, paragraph 29) and, in any event, the Court of Justice has no jurisdiction under Article 177 of the Treaty to rule on the interpretation of provisions other than those of Community law (see, in particular, the order of 12 November 1998 in Case C-162/98 Hartmann [1998] ECR I-7083, paragraphs 8, 9, 11 and 12).

19 That having been said, it should be remembered that, although direct taxation is a matter for the Member States, they must nevertheless exercise their direct taxation powers consistently with Community law (see Case C-279/93 Schumacker [1995] ECR I-225, paragraph 21; Case C-264/96 ICI v Colmer [1998] ECR I-4695, paragraph 19; Case C-35/98 Staatssecretaris van Financien v Verkooijen [2000] ECR I-0000, paragraph 32).

20 Moreover, according to established case-law, the freedom of establishment which Article 52 grants to nationals of the Member States and which entails the right for them to take up and pursue activities as self-employed persons under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected, includes, pursuant to Article 58 of the Treaty (now Article 48 EC), the right of 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, to pursue their activities in the Member State concerned through a branch or agency. With regard to companies, it should be noted in this context that it is their corporate seat in the above sense that serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons (Case 270/83 Commission v France [1986] ECR 273, paragraph 18; Case C-330/91 Commerzbank [1993] ECR I-4017, paragraph 13; ICI v Colmer, cited above, paragraph 20).

21 Finally, it must be pointed out that, even though, according to their wording, the provisions concerning freedom of establishment are mainly aimed at 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 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 of the Treaty (Case 81/87 Daily Mail and General Trust [1988] ECR 5483, paragraph 16; Case C-200/98 X and Y v Riksskatteverket [1999] ECR I-8261, paragraph 26).

22 As regards the calculation of the taxable income of companies, it must be noted that, for companies incorporated under the national law of a Member State which have their seat there and have used their right of free establishment in order to create branches in other Member States, the legislation at issue in the main proceedings limits the possibility of carrying forward losses incurred in that Member State during a previous tax period where, during that same tax period, those companies made profits in another Member State through the intermediary of a permanent establishment, whereas it would be possible to set off those losses if the establishments of those companies were situated exclusively in the Member State of origin.

23 Thus, by setting off domestic losses against profits exempted by treaty, the legislation of that Member State establishes a differentiated tax treatment as between companies incorporated under national law having establishments only on national territory and those having establishments in another Member State. As the Belgian Government itself recognises, where such companies have a permanent establishment in a Member State other than that of origin and a convention to prevent double taxation binds the two States, those companies are likely to suffer a tax disadvantage which they would not have to suffer if all their establishments were situated in the Member State of

origin.

24 The Belgian Government maintains that the legislation at issue in the main proceedings does not constitute a hindrance contrary to Article 52 of the Treaty, arguing that it should be evaluated in its overall context. The Government argues that, whilst it is true that the specific situation under examination by the referring court constitutes a disadvantage for AMID, it is equally true that, if that same undertaking were to make profits in Belgium and the establishment situated in Luxembourg made a loss, the basic amount which the undertaking in Belgium stood to have charged to tax would be diminished; that loss might moreover be set off in Luxembourg against profits subsequently made there. In that event, the position of that undertaking would be better than that of undertakings without a foreign establishment. Thus, to meet the complexity caused by the numerous situations in which undertakings may find themselves in relation to tax legislation, Article 66 of the Royal Decree implementing the 1964 Code had established an effective system of setting off losses, at the risk of putting a Belgian company with one or more of its establishments in other Member States at a disadvantage in some cases and an advantage in others. In reality, the Government argues, that system does not influence the choice by undertakings whether or not to create a foreign establishment. Bearing in mind that, when an undertaking decides to open a permanent establishment in another Member State, it does not know whether it will consistently make losses or profits, and that, moreover, it certainly does not know whether the losses will occur in the new permanent establishment or at the main seat of the business, that system does not create a hindrance contrary to the Treaty.

25 The Belgian Government further argues that, in this case, Belgian undertakings which have a permanent establishment abroad are not in the same position as undertakings which have concentrated all their operations in Belgium. The latter have the whole of their income calculated globally and taxed at the rate applicable in Belgium. Belgian companies with foreign establishments are taxed, in respect of the income of the latter, in accordance with the tax provisions of the Member State where those establishments are situated, subject to the provisions of conventions to prevent double taxation. The Belgian Government maintains that, from the point of view of their tax treatment, the two categories of undertaking will always be in a different situation, so that the application of a system leading to different results does not necessarily constitute discrimination.

26 Those arguments cannot be accepted.

27 Even if the Belgian tax system were favourable to companies with establishments abroad more often than not, that does not prevent it resulting, where that system proves disadvantageous for those companies, in an inequality of treatment in relation to companies without establishments outside Belgium and thus creating a hindrance to the freedom of establishment guaranteed by Article 52 of the Treaty (Commission v France, cited above, paragraph 21).

28 As for the argument based on the differences between Belgian companies having a permanent establishment abroad and those without, the differences referred to by the Belgian Government cannot in any way explain why the former cannot be treated in the same way as the latter for the purposes of the deduction of losses.

29 A Belgian company which, having no establishments outside Belgium, incurs a loss during a given tax year finds itself, for tax purposes, in a comparable situation with that of a Belgian company which, having an establishment in Luxembourg, incurs a loss in Belgium and makes a profit in Luxembourg during that same tax year.

30 Since an objective difference in the companies' respective positions has not been established, a difference in treatment as regards the deduction of losses when calculating the companies' taxable income cannot be accepted.

31 In the absence of justification, that difference in treatment is contrary to the provisions

of the EC Treaty on the freedom of establishment.

32 In that respect, it should be noted that the Belgian Government has not attempted to justify that difference in treatment in relation to the Treaty provisions on freedom of establishment on any grounds other than those indicated in paragraph 25 of this judgment.

33 In the light of the above, the answer to be given to the question referred must be that Article 52 of the Treaty precludes legislation of a Member State under which a company incorporated under national law, having its seat in that Member State, may, for the purposes of corporation tax, deduct a loss incurred the previous year from the taxable profit for the current year only on the condition that that loss was not capable of being set off against the profit made during that same previous year by one of its permanent establishments situated in another Member State, when the loss, although set off, cannot be deducted from taxable income in either of the Member States concerned, whereas it would be deductible if the establishments of that company were situated exclusively in the Member State in which it has its seat.

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NATCOUR	*A9* Hof van beroep Gent, 24e kamer, arrest van 13/04/1999 (1990/FR/3493) ; - Europäisches Wirtschafts- & Steuerrecht - EWS 1999 p.360 (résumé)
NOTES	Idot, Laurence: Europe 2001 Février Comm. no 60 p.20 ; Novak-Stief, Monika: Gewinne ausländischer Betriebsstätten: Doppelter Ausschluss des Verlustvortrags im belgischen Körperschaftssteuerrecht gemeinschaftswidrig, European Law Reporter 2001 p.50-52 ; Saß, Gert: Zur Verlustberücksichtigung bei grenzüberschreitender Unternehmenstätigkeit in der EU, Der Betrieb 2001 p.508-510 ; Lehner, Moris: Recht der internationalen Wirtschaft 2001 p.387 ; Hinnekens, Luc: AMID: The Wrong Bridge or a Bridge Too Far? An Analysis of a Recent Decision of the European Court of Justice, European Taxation 2001 Vol.41 p.206-210 ; Dassesse, Marc: The ECJ's Decision in AMID and its Implications for Belgian Companies, Bulletin for International Fiscal Documentation 2001 Vol.55 p.254-257 ; IMN: Finanz-Rundschau Ertragsteuerrecht 2001 p.159-160 ; Van Steenwinckel, Jean ; Van Vaeck, Jill: EC Tax Review 2001 p.98-101 ; Avery Jones, John F.: A Comment on "AMID: The Wrong Bridge or a Bridge Too Far?", European Taxation 2001 Vol.41 p.251 ; Van den Hurk, H.T.P.M.: S.E.W. ; Sociaal-economische wetgeving 2001 p.282-283 ; Dautzenberg, Norbert: EG-rechtswidrige Behandlung von negativen ausländischen Einfkünften nach den EuGH-Entscheidungen Vestergaard und AMID, Finanz-Rundschau Ertragsteuerrecht 2001 p.809-815 ; Hahn, Hartmut: Das AMID-Urteil - belgisches Internum oder Aufbruch zu neuen Ufern?, Internationales Steuerrecht 2001 p.465-469 ; Antonini, Massimo: Riflessi del diritto di stabilimento in materia di compensazione, ai fini fiscali, tra perdite della casa madre e utili della stabile organizzazione, Rivista di diritto finanziario e scienza delle finanze 2001 II p.60-69 ; Mok, M.R.: Ondernemingsrecht 2001 p.316 ; Kessler, Wolfgang ; Schmitt, Claudio Philipp ; Janson, Gunnar: Berücksichtigungsverbot abkommensrechtlich "beifreiter" Betriebsstättenverluste?, Internationales Steuerrecht 2001 p.729-737 ; Cervino, Giancarlo: Libertà di stabilimento e deducibilità delle perdite di esercizio: il caso Algemene Maatschappij voor Investering en Dienstverlening, Rassegna tributaria 2001 p.600-612 ; Martín Jiménez, Adolfo J.: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista española de Derecho Financiero 2002 p.168-171 ; De Broe, Luc: Cases Filed by Belgian Courts: the AMID Case, Direct taxation: recent ECJ developments (Ed. Linde - Wien) 2003 p.9-33 ; Bizioli, Gianluigi: Note minime in tema di libertà fondamentali e riporto delle perdite nell'ordinamento comunitario, Diritto e pratica tributaria 2003 p.633-640
PROCEDU	Reference for a preliminary ruling
ADVGEN	Alber
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Judgment of the Court of 20 April 1993

Ponente Carni SpA and Cispadana Costruzioni SpA v Amministrazione delle Finanze dello Stato. References for a preliminary ruling: Tribunale di Genova and tribunale di Milano - Italy. Directive 69/335/CEE - Register of companies - Registration of companies' instruments of incorporation - Annual charge. Joined cases C-71/91 and C-178/91.

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Tax provisions ° Harmonization of laws ° Indirect taxes on the raising of capital ° Registration of capital companies ° Collection of taxes not covered by the derogations contained in Directive 69/335 ° Not permissible ° Derogation ° Duties paid by way of fees or dues ° Concept

(Council Directive 69/335, Arts 10 and 12(1)(e))

Article 10 of Directive 69/335 concerning indirect taxes on the raising of capital, which lists the taxes with the same characteristics as capital duty, collection of which is consequently prohibited, must be interpreted as prohibiting, subject to the derogating provisions of Article 12, an annual charge due in respect of the registration of capital companies even though the product of that charge contributes to financing the department responsible for keeping the register of companies.

The said Article 12 must be interpreted as meaning that duties paid by way of fees or dues referred to in Article 12(1)(e) may be payment collected by way of consideration for transactions required by law in the public interest such as, for example, the registration of capital companies. The amount of such duties, which may vary according to the legal form taken by the company, must be calculated on the basis of the cost of the transaction, which may be assessed on a flat-rate basis, but may not be calculated on the basis of all the running and capital costs of the department responsible for effecting the registration.

In Joined Cases C-71/91 and C-178/91,

REFERENCES to the Court under Article 177 of the EEC Treaty by the President of the Tribunale di Genova in Case C-71/91 and by the President of the Tribunale di Milano in Case C-178/91 for preliminary rulings in the proceedings pending before those courts between

Ponente Carni SpA

and

Amministrazione delle Finanze dello Stato,

and between

Cispadana Costruzioni SpA

and

Amministrazione delle Finanze dello Stato,

on the interpretation of Articles 10 and 12 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412),

THE COURT,

composed of: G.C. Rodríguez Iglesias (President of Chamber), acting for the President, M. Zuleeg and J.L. Murray (Presidents of Chambers), G.F. Mancini, R. Joliet, F.A. Schockweiler, J.C. Moitinho de Almeida, F. Grévisse and D.A.O. Edward, Judges,

Advocate General: F.G. Jacobs,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

° Ponente Carni, by Giuseppe Conte and Giuseppe Michele Giacomini, of the Genoa Bar,

° Cispadana Costruzioni, by Ernesto Beretta and Aldo Bozzi, of the Milan Bar,

° the Italian Republic, by Professor Ferrari Bravo, Head of the Department for Legal Affairs of the Ministry of Foreign Affairs, acting as Agent, assisted by Ivo M. Braguglia, Avvocato dello Stato,

° the United Kingdom, by John E. Collins, of the Treasury Solicitor' s Department, acting as Agent,

° the Kingdom of the Netherlands, by B.R. Bot, Secretary General in the Ministry of Foreign Affairs, acting as Agent,

° the Commission of the European Communities, by Enrico Traversa, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Ponente Carni SpA, Cispadana Costruzioni SpA, the Italian Government, the Netherlands Government and the Commission at the hearing on 8 July 1992,

after hearing the Opinion of the Advocate General at the sitting on 30 September 1992,

gives the following

Judgment

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the President of the Tribunale di Genova by order of 14 January 1991 and by the President of the Tribunale di Milano by order of 17 June 1991, hereby rules:

1. Article 10 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital must be interpreted as prohibiting, subject to the derogating provisions of Article 12, an annual charge due in respect of the registration of capital companies even though the product of that charge contributes to financing the department responsible for keeping the register of companies.

2. Article 12 of the Directive must be interpreted as meaning that duties paid by way of fees or dues referred to in Article 12(1)(e) may be payment collected by way of consideration for transactions required by law in the public interest such as, for example, the registration of capital companies. The amount of such duties, which may vary according to the legal form taken by the company, must be calculated on the basis of the cost of the transaction, which may be assessed on a flat-rate basis.

1 By order of 14 January 1991, received at the Court on 21 February 1991, the President of the Tribunale di Genova (District Court, Genoa) referred four questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation of Articles 10 and 12 of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (hereinafter "the Directive").

2 By order of 27 June 1991, received at the Court on 8 July 1991, the President of the Tribunale di Milano (District Court, Milan) referred three questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation of the same provisions.

3 The two cases were joined by order of the President of the Court of 11 May 1992.

4 The questions put by the order of 14 January 1991 in Case C-71/91 were raised in proceedings between Ponente Carni SpA and the Amministrazione delle Finanze dello Stato in relation to the "tassa di concessione governativa" (administrative charge) for the registration of companies in the register of companies.

5 That charge, introduced by Presidential Decree No 641 of 26 October 1972 (GURI No 292 of 11 November 1972, Supplement No 3) applies to the registration in the register of companies of the principal measures concerning the existence of companies. The register is kept by court registrars pending the creation of the register of companies provided for by Article 2188 of the Codice Civile.

6 The amount of the administrative charge and the period covered thereby, in so far as it applies to the registration of companies' instruments of incorporation has been repeatedly amended.

7 The amount of the charge for registration was increased from LIT 81 000 to LIT 5 000 000 for public limited companies and limited partnerships with a share capital, to LIT 1 000 000 for private limited companies and to LIT 100 000 for other companies by Article 3(18) of Decree-Law No 853 of 19 December 1984 (GURI No 347 of 19 December 1984), converted into Law No 17 of 17 February 1985 (GURI No 41bis of 17 February 1985).

8 Decree-Law No 173 of 30 May 1988 (GURI No 125 of 30 May 1988) increased those amounts. Article 1 of Law No 291 of 26 July 1988 (GURI No 175 of 27 July 1988), which converted that decree into a Law, increased the amount of the charge to LIT 2 500 000 for private limited companies and to LIT 500 000 for other companies. For public limited companies and limited partnerships with a share capital the Law set five different charges ranging from LIT 9 000 000 to 120 000 000 according to the amount of the authorized capital.

9 Article 36(8) of Decree-Law No 69 of 2 March 1989 (GURI No 51 of 2 March 1989), converted into Law No 154 of 27 April 1989 (GURI No 99 of 29 April 1989), set the amount of the charge at LIT 12 000 000 for public limited companies and limited partnerships, at LIT 3 500 000 for private limited companies and LIT 500 000 for other companies.

10 The abovementioned Law No 154 added a paragraph 8bis to Article 36 of the Decree-Law of 2 March 1989, the result of which is that the amount of the charge for 1988 is LIT 15 000 000 for public limited companies and limited partnerships with a share capital, LIT 3 500 000 for private limited companies and LIT 500 000 for other companies. Those provisions replaced the aforesaid provisions of Law No 291 of 26 July 1988.

11 As regards the period covered by the charge, the abovementioned Decree-Law No 853 provides that the charge is payable not only when the company' s instruments of association are entered on the register but also on 30 June of each subsequent calendar year.

12 Ponente Carni considered that the charge was contrary to Articles 10 and 12 of the Directive and applied to the President to the Tribunale di Genova for an order to the Amministrazione delle Finanze to refund the administrative charge which the company had paid for 1988, 1989 and 1990.

13 In those circumstances the President of the Tribunale di Genova stayed the proceedings and referred the following four questions to the Court for a preliminary ruling:

"(1) Are 'duties paid by way of fees or dues' within the meaning of Article 12(1)(e) of Council Directive 69/335/EEC of 17 July 1969 to be construed as meaning solely charges made for optional services performed individually by the public authorities in the specific interests of the person requesting them, or do they cover the broader concept of charges generally imposed for services performed in the public interest?

(2) Do the administrative acts performed by the State in order to 'maintain the appropriate machinery for making public all documents relating to the conduct of companies' acquire by virtue of Community law the nature of a service performed individually and giving rise to a claim for payment of a pecuniary charge in accordance with Article 12(1)(e) of the said Directive and, if so, is Article 12(1)(e) of that Directive compatible with national legislation which makes a company within the meaning of Article 3 thereof liable for the payment of charges which are not quantified on the basis of the cost of the service?

(3) Is Article 12(2) of the Directive compatible with certain provisions of national law (Articles 36(8) and 8 bis of Law No 154 of 27 April 1989) which impose on public limited companies (Società per Azioni) falling under Article 3 of the Directive annual charges which are not quantified on the basis of the cost of the service and which are higher than the charges applied within the territory of the State to private limited capital companies (Società di Capitali a Responsabilità Limitata) in respect of like transactions?

(4) Should the annual State fee for enrolling a company in the companies' register, imposed by Article 36(8) of Law No 154 of 27 April 1989, be viewed as a tax prohibited under Article 10 of the Directive?"

14 The question referred to the Court for a preliminary ruling by the order of 27 June 1991 in Case C-178/91 was raised in proceedings between Cispadana Costruzioni and the Amministrazione delle Finanze in relation to the administrative charge, previously described, due for the enrolment of the company' s instruments of incorporation in the register.

15 In an application for an interim order before the President of the Tribunale di Milano, Cispadana Costruzioni, which also challenged in the main proceedings the validity of the charge, sought suspension of the time-limit for payment of the charge.

16 In those circumstances the President of the Tribunale di Milano stayed the proceedings and referred the following three questions to the Court for a preliminary ruling:

"1. Are 'duties paid by way of fees or dues' , referred to in Article 12(1)(e) of Directive 69/335/EEC of 17 July 1969 to be construed as meaning solely the charges made for services (optional or mandatory) performed by the public administration specifically for the person requesting them, or do the said 'duties paid by way of fees or dues' include charges made for services performed in the public interest?

2. Must the pecuniary charge allowed by Article 12(1)(e) of Directive 69/335/EEC of 17 July 1969 ° in respect of 'duties paid by way of fees or dues' ° be proportional to the actual cost of the service provided (as held on several occasions by the Court of Justice, albeit in cases concerning another matter, namely customs, in relation to costs for a service which was not optional but mandatory: see for example the judgment of 12 July 1977 in Case 89/76 Commission v Netherlands [1977] ECR 1355, paragraph 16; and subsequent judgments, most recently that of 21 March 1991 in Case C-209/89 Commission v Italian Republic) or may the actual cost of the service be completely disregarded?

3. Must Article 10 and Article 12(1)(e) of Directive 69/335/EEC be interpreted as precluding

the introduction and/or maintenance of national legislation ° of the type introduced by the Italian legislature in the form of Article 3(19) of Decree Law No 853 of 19 December 1984 (converted into Law No 17 of 17 February 1985) and amended by Article 36(8) of Decree Law No 69 of 2 March 1989, converted into Law No 154 of 27 April 1989 ° which required the annual payment of a charge which is not quantified or quantifiable on the basis of the cost of the service provided and, moreover, is of an amount considerably higher than that charged to other capital companies and other undertakings for the same service (for example, for a Società a Responsibilità Limitata (private limited company) the tax is LIT 3.5 million; for other types of companies it is LIT 500 thousand)?"

17 Reference is made to the Report for the Hearing for a fuller account of the facts of the two cases, 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.

18 First it is appropriate to state the objects and content of the Directive.

19 As the recitals in the preamble indicate, the Directive aims at encouraging the free movement of capital which is regarded as essential for the creation of an economic union whose characteristics are similar to those of a domestic market. As far as concerns taxes on the raising of capital the pursuit of such an objective presupposes the abolition of indirect taxes in force in the Member States until then and imposing in place of them a duty charged only once in the common market and at the same level in all the Member States.

20 For these purposes the Directive provides for charging on the raising of capital a capital duty, which, as stated in the seventh recital, should be harmonized with regard both to its structures and to its rates (Case 161/78 Conradsen [1979] ECR 2221, paragraph 11). That capital duty is governed by the provisions of Articles 2 to 9 of the Directive.

21 Article 3 defines the capital companies to which the provisions of the Directive apply and they include in particular the Società per Azioni (public limited company), the Società in Accomandita per Azioni (limited partnership with a share capital) and the Società a Responsabilità Limitata (private limited company).

22 Article 4, Article 8 as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23) and Article 9 list, subject to Article 7, the transactions subject to capital duty and certain transactions which the Member States may exempt. According to Article 4(1)(a) transactions subject to capital duty include the formation of a capital company.

23 According to the last recital in the preamble the Directive also provides for the abolition of other indirect taxes with the same characteristics as the capital duty or the stamp duty on securities, the retention of which might frustrate the purposes of the measures provided for. Those indirect taxes, the levying of which is prohibited, are listed in Articles 10 and 11 of the Directive. Article 10 provides:

> "Apart from capital duty, Member States shall not charge, with regard to companies, firms, associations or legal persons operating for profit, any taxes whatsoever:

(a) in respect of the transactions referred to in Article 4;

(b) ...

(c) in respect of registration or any other formality required before the commencement of business to which a company, firm, association or legal person operating for profit may be subject by reason of its legal form."

24 Article 12(1) of the Directive lays down an exhaustive list of taxes and duties other than capital duty which, in derogation from Articles 10 and 11, may affect capital companies in connection with

the transactions referred to in those latter provisions (see to that effect Case 36/86 Ministeriet for Skatter og Afgifter v Dansk Sparinvest [1988] ECR 409, paragraph 9). Article 12(1)(e) of the directive concerns in particular "duties paid by way of fees or dues". Article 12(2) prohibits certain forms of discrimination concerning the duties and taxes referred to in paragraph 1.

Article 10 of the Directive

25 The questions put essentially ask first of all whether an annual charge for the registration of capital companies falls within the scope of the provisions of Article 10 of the Directive.

26 It should be emphasized first that in the case referred to by the national court the annual charge is distinct from the capital duty governed by the provisions of Articles 2 to 9 of the Directive and secondly that the registration, the consideration for which the charge is levied, is that provided for by the provisions of Article 3 of the first Council Directive (68/151/EEC) of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41).

27 The Italian, Netherlands and United Kingdom Governments claim that an annual charge intended to finance a public service required for keeping the register in which companies are registered is not included in the taxes prohibited by the provisions of Article 10 of the Directive. Those provisions, they contend, concern only charges with the same characteristics as capital duty, which is not the case with the charge referred to by the national courts.

28 The Commission, Ponente Carni and Cispadana Costruzioni claim, on the contrary, that such a charge, for which the chargeable event is the registration of the company and the maintenance of that registration, falls within the prohibition laid down in Article 10 of the Directive.

29 Indirect taxes which have the same characteristics as capital duty fall within the scope of Article 10 of the Directive. They thus cover, whatever their form, charges which are levied for the formation of a capital company (under (a)) or for registration or any other formality required before the commencement of business to which a company may be subject by reason of its legal form (under (c)).

30 It follows that the various charges and duties levied for the registration of a capital company fall within the scope of the aforementioned provisions and are, in principle, prohibited, subject to the derogating provisions of Article 12. Contrary to what the Italian, Netherlands and United Kingdom Governments contend, there is no reason based on the wording of the provision or on its objectives which makes it possible to refrain automatically from applying Article 10 in cases where the product of the charge contributes to the financing of the department responsible for keeping the register in which companies are registered. On the contrary, by enabling Member States to impose a charge, other than capital duty, on capital companies in respect of one of the essential formalities for their formation, the amount of which moreover would not be restricted by the provisions of Community law, the interpretation proposed by the abovementioned governments would run counter to the objectives of the Directive.

31 The fact that the charge is due not only on registration of the company but also in each subsequent year, cannot of itself free the charge from the prohibition laid down by Article 10. As the Commission and the undertakings which are parties to the main proceedings emphasize, any other interpretation would deprive the provisions of Article 10 of any practical effect since it would enable Member States to burden capital companies with an annual fiscal charge the chargeable event for which would be merely the maintenance of the company in the register.

32 Consequently the answer to the question must be that Article 10 of the Directive must be interpreted as prohibiting, subject to the derogating provisions of Article 12, an annual charge due in respect of the registration of capital companies even though the product of that charge contributes to financing the department responsible for keeping the register of companies.

The derogating provisions of Article 12 of the Directive and the concept of duties paid by way of fees or dues

33 The questions put also ask in substance whether charges levied as consideration for services rendered in the public interest, as, for example, those for the registration of companies, may be regarded as duties paid by way of fees or dues, whether that necessarily depends on the existence of a link between the amount of the charges and the cost of the services provided and finally whether the amount of the charges may, without disregarding the provisions of the Directive and in particular those of Article 12(2), vary according to whether the company liable for the charges is a public limited company or a private limited company.

Charges for services rendered in the public interest

34 The Commission, the Italian and United Kingdom Governments and Cispadana Costruzioni maintain that the principles laid down in the Court' s case-law for distinguishing charges having an effect equivalent to customs duties, which are prohibited by Articles 9 and 16 of the Treaty, from payment for services actually rendered cannot be transposed in their entirety to define duties paid by way of fees or dues within the meaning of the Directive. In contrast to payment for services rendered, duties paid by way of fees or dues may be the consideration for transactions prescribed by law and carried out in the general interest.

35 Ponente Carni on the other hand maintains that duties are paid by way of fees or dues within the meaning of the Directive only if they relate to an optional and well-defined service rendered by the State in the interests of the individual.

36 The principles identified by the Court in defining payment for services rendered seek to give full effect to the provisions of the Treaty prohibiting charges having an effect equivalent to customs duties which, by their nature, affect only imported products; such principles consequently seek to allow the levying of various charges and payments when a frontier is crossed only if the amounts so levied constitute consideration for a specific service actually and individually rendered to the trader (see to that effect Case 340/87 Commission v Italy [1989] ECR 1483, paragraph 15).

37 The object of the Directive is different from that of the provisions of the Treaty relating to charges having an effect equivalent to customs duties. While for the purposes of the application of Article 12 of the Directive the fact that the duties are paid by way of fees or dues implies that, unlike general taxes, they are the consideration for a service to the individual, no provision in Article 12 may be interpreted, in the absence of express requirements to that effect, as excluding from the concept of duty paid by way of fee or due a charge which is the consideration for a transaction required by law for an object of public interest.

38 That may be precisely the case with a charge required as consideration for a transaction such as the registration of capital companies which is required by national law, in accordance with Community law, in the interest of both third parties and of the companies themselves.

The link between the amount of the duties paid by way of fees or dues and the cost of the service rendered

39 The Commission, Cispadana Costruzioni and Ponente Carni argue, on the basis of the case-law relating to remuneration for services rendered, that a duty paid by way of fee or due must be proportionate to the cost of the service rendered. A flat-rate assessment of such costs may however be allowed

provided that there is a link between such cost and the amount of the duty.

40 The Italian Government contends that the levying of duties paid by way of fees or dues in the circumstances provided for by the Directive must be accepted even if it is impossible to calculate the cost of the service rendered, as in the case of the keeping of the register of companies.

41 The distinction between taxes prohibited by Article 10 of the Directive and duties paid by way of fees or dues implies that the latter cover only payments collected on registration or annually, the amount of which is calculated on the basis of the cost of the service rendered.

42 A payment the amount of which had no link with the cost of the particular service or was calculated not on the basis of the cost of the transaction for which it is a consideration but on the basis of all the running and capital costs of the department responsible for that transaction would have to be regarded as a tax falling solely under the prohibition of Article 10 of the directive.

43 For certain transactions such as, for example, the registration of a company, it may be difficult to determine their cost. In such a case the assessment of the cost can only be on a flat-rate basis and must be fixed in a reasonable manner, taking account, in particular, of the number and qualification of the officials, the time they take and the various material costs necessary for carrying out the transaction.

Duties of amounts varying according to the legal form of the company

44 Member States are not prohibited by any provision of the Directive, in particular Article 12(2), which merely prohibits certain forms of discrimination affecting all capital companies, from fixing different amounts for the registration of public limited companies and that of private limited companies, subject nevertheless, as the Commission, Cispadana and Ponente Carni emphasize, to ensuring that none of the amounts required for any of the companies exceeds the cost of the transaction of registration.

45 The answer to the question put must therefore be that Article 12 of the Directive must be interpreted as meaning that duties paid by way of fees or dues referred to in Article 12(1)(e) may be payment collected by way of consideration for operations required by law in the public interest such as, for example, the registration of capital companies. The amount of such duties, which may vary according to the legal form taken by the company, must be calculated on the basis of the cost of the transaction, which may be assessed on a flat-rate basis.

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PROCEDU Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Grévisse

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Judgment of the Court (Sixth Chamber)
of 23 April 1991
Klaus Höfner and Fritz Elser v Macrotron GmbH. Reference for a preliminary ruling: Oberlandesgericht München - Germany. Freedom to provide services - Exercise of public authority - Competition - Executive recruitment consultants. Case C-41/90.

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1. Competition - Community rules - To whom addressed - Undertakings - Concept - Public employment agency engaged in employment procurement - Included

(EEC Treaty, Arts 85 and 86)

2. Competition - Dominant position - Abuse - Undertaking with a statutory monopoly - Public employment agency engaged in employment procurement - Criteria for assessment

(EEC Treaty, Arts 86 and 90(1) and (2))

3. Freedom to provide services - Treaty provisions - Situations internal to a Member State - Not applicable

(EEC Treaty, Arts 7 and 59)

1. A public employment agency engaged in the business of employment procurement may be classified as an undertaking for the purpose of applying the Community competition rules since, in the context of competition law, that classification applies to every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.

2. As an undertaking entrusted with the operation of services of general economic interest, a public employment agency engaged in employment procurement activities is, pursuant to Article 90(2) of the Treaty, subject to the prohibition contained in Article 86 of the Treaty, so long as the application of that provision does not obstruct the performance of the particular task assigned to it. A Member State which has granted it an exclusive right to carry on that activity is in breach of Article 90(1) of the Treaty where it creates a situation in which that agency cannot avoid infringing Article 86 of the Treaty. That is the case, in particular, where the following conditions are satisfied:

- the exclusive right extends to executive recruitment activities;

- the public employment agency is manifestly incapable of satisfying demand prevailing on the market for such activities;

- the actual pursuit of those activities by private recruitment consultants is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void;

- the activities in question may extend to the nationals or to the territory of other Member States.

3. The provisions of the Treaty on freedom of movement cannot be applied to activities which are confined in all respects within a single Member State and therefore a recruitment consultant in a Member State may not rely on Articles 7 and 59 of the Treaty regarding the procurement of nationals of that Member State for posts in undertakings in the same State.

In Case C-41/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Oberlandesgericht Muenchen, Federal Republic of Germany, for a preliminary ruling in the proceedings pending before that court between

Klaus Hoefner and Fritz Elser

and

Macrotron GmbH

on the interpretation of Articles 7, 55, 56, 59, 86 and 90 of the EEC Treaty,

THE COURT (Sixth Chamber),

composed of: G.F. Mancini, President of the Chamber, T.F. O' Higgins, C.N. Kakouris, F.A. Schockweiler and P.J.G. Kapteyn, Judges,

Advocate General: F.G. Jacobs,

Registrar: V. Di Bucci, Administrator,

after considering the written observations submitted on behalf of

- Klaus Hoefner and Fritz Elser, by Joachim Mueller, Rechtsanwalt, Munich, and by Volker Emmerich, Professor of Law at the University of Bayreuth,

- Macrotron GmbH, represented by Holm Tipper, Rechtsanwalt, Munich,

- the German Government, represented by Ernst Roeder, Regierungsdirektor, Federal Ministry of the Economy, acting as Agent,

- the Commission of the European Communities, represented by Etienne Lasnet, Legal Adviser, and by Bernhard Jansen, a member of the Commission' s Legal Department, acting as Agents;

having regard to the Report for the Hearing,

after hearing oral argument presented by Messrs Hoefner and Elser, Macrotron GmbH, the German Government and the Commission of the European Communities at the hearing on 13 November 1990,

after hearing the Opinion of the Advocate General at the sitting on 15 January 1991,

gives the following

Judgment

Costs

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

On those grounds,

THE COURT (Sixth Chamber),

in reply to the questions referred to it by the Oberlandesgericht Muenchen by order of 31 January 1990, hereby rules:

1. A public employment agency engaged in employment procurement activities is subject to the prohibition contained in Article 86 of the Treaty, so long as the application of that provision does not obstruct the performance of the particular task assigned to it. A Member State which has conferred an exclusive right to carry on that activity upon the public employment agency is in breach of Article 90(1) of the Treaty where it creates a situation in which that agency cannot avoid infringing Article 86 of the Treaty. That is the case, in particular, where the following conditions are satisfied:

- the exclusive right extends to executive recruitment activities;

- the public employment agency is manifestly incapable of satisfying demand prevailing on the market for such activities;

- the actual pursuit of those activities by private recruitment consultants is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void;

- the activities in question may extend to the nationals or to the territory of other Member States.

2. A recruitment consultant in a Member State may not rely on Articles 7 and 59 of the Treaty regarding the procurement of nationals of that Member State for posts in undertakings in the same State.

1 By order of 31 January 1990, which was received at the Court Registry on 14 February 1990, the Oberlandesgericht Muenchen (Higher Regional Court, Munich) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 7, 55, 56, 59, 86 and 90 of the EEC Treaty,

2 The questions were raised in proceedings brought by Messrs Hoefner and Elser, recruitment consultants, against Macrotron GmbH, a company governed by German law, established in Munich. The dispute concerns fees claimed from that company by Messrs Hoefner and Elser pursuant to a contract under which the latter were to assist in the recruitment of a sales director.

3 Employment in Germany is governed by the Arbeitsfoerderungsgesetz (Law on the promotion of employment, hereinafter referred to as "the AFG"). According to Paragraph 1, measures taken under the AFG are intended, within the economic and social policy of the Federal Government, to achieve and maintain a high level of employment, constantly to improve job distribution and thus to promote economic growth. Paragraph 3 entrusts the attainment of the general aim described in Paragraph 2 to the Bundesanstalt fuer Arbeit (Federal Office for Employment, hereinafter referred to as "the Bundesanstalt"), whose activity consists essentially in bringing prospective employees into contact with employers and administering unemployment benefits.

4 The first of the abovementioned activities, defined in Paragraph 13 of the AFG, is carried out by the Bundesanstalt by virtue of the exclusive right granted to it for that purpose by Paragraph 4 of the AFG (hereinafter referred to as the "exclusive right of employment procurement").

5 However, Paragraph 23 of the AFG provides for the possibility of a derogation from the exclusive right of employment procurement. The Bundesanstalt may, in exceptional cases and after consulting the workers' and employers' associations concerned, entrust other institutions or persons with employment procurement for certain professions or occupations. However, their activities remain subject to the supervision of the Bundesanstalt.

6 The Bundesanstalt must, by virtue of Paragraphs 20 and 21 of the AFG, exercise its exclusive right of employment procurement impartially and without charging a fee. Paragraph 167 of the AFG, contained in the sixth title thereof, which deals with the financial resources enabling the Bundesanstalt to carry out its activities on that basis, allows the Bundesanstalt to collect contributions from employers and workers.

7 The eighth title of the AFG contains provisions concerning penalties and fines. Paragraph 228 provides that fines may be imposed for the conduct of any employment procurement activity in breach of the AFG.

8 Notwithstanding the Bundesanstalt' s exclusive right to undertake employment procurement, specific recruitment and employment procurement activity has developed in Germany for business executives. That activity is carried on by recruitment consultants who assist undertakings regarding personnel

policy.

9 The Bundesanstalt reacted to that development in two ways. First, in 1954 it decided to set up a special agency for the placement of highly qualified executives in management posts in undertakings. Secondly, it published circulars in which it declared that it was prepared, under an agreement between the Bundesanstalt, the Federal Ministry of Employment and several professional associations, to tolerate certain activities on the part of recruitment consultants concerning business executives. That tolerant attitude is also apparent in the fact that the Bundesanstalt has not systematically invoked Paragraph 228 of the AFG and prosecuted recruitment consultants for activities undertaken by them.

10 Whilst the activities of recruitment consultants are thus to some extent tolerated by the Bundesanstalt, the fact remains that any legal act which infringes a statutory prohibition is void under Paragraph 134 of the German Civil Code and, according to German case-law, that prohibition applies to employment procurement activities carried out in breach of the AFG.

11 The dispute in the main proceedings concerns the compatibility of the recruitment contract concluded between Messrs Hoefner and Elser, on the one hand, and Macrotron, on the other, with the AFG. As required by the contract, Messrs Hoefner and Elser presented Macrotron with a candidate for the post of sales director. He was a German national who, according to the recruitment consultants, was perfectly suitable for the post in question. However, Macrotron decided not to appoint that candidate and refused to pay the fees stipulated in the contract.

12 Messrs Hoefner and Elser then commenced proceedings against Macrotron before the Landgericht (Regional Court) Munich I in order to obtain payment of the agreed fees. The Landgericht dismissed their claim by judgment of 27 October 1987. The plaintiffs appealed to the Oberlandesgericht, Munich, which considered that the contract at issue was void by virtue of Paragraph 134 of the German Civil Code (Bundesgesetzbuch), since it was in breach of Paragraph 13 of the AFG. That court nevertheless considered that the outcome of the dispute ultimately depended on an interpretation of Community law and it therefore submitted the following questions for a preliminary ruling:

> "1. Does the provision of business executives by personnel consultants constitute a service within the meaning of the first paragraph of Article 60 of the EEC Treaty and is the provision of executives bound up with the exercise of official authority within the meaning of Articles 66 and 55 of the EEC Treaty?

2. Does the absolute prohibition on the provision of business executives by German personnel consultants, laid down in Paragraphs 4 and 13 of the Arbeitsfoerderungsgesetz, constitute a professional rule justified by the public interest or a monopoly, justified on grounds of public policy and public security (Articles 66 and 56(1) of the EEC Treaty)?

3. Can a German personnel consultant rely on Articles 7 and 59 of the EEC Treaty in connection with the provision of German nationals to German undertakings?

4. In connection with the provision of business executives is the Bundesanstalt fuer Arbeit [Federal Employment Office] subject to the provisions of the EEC Treaty, and in particular Article 59 thereof, in the light of Article 90(2) of the EEC Treaty, and does the establishment of a monopoly over the provision of business executives constitute an abuse of a dominant position on the market within the meaning of Article 86 of the EEC Treaty?"

13 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.

14 In its first three questions and the part of its fourth question concerning Article 59 of the

Treaty, the national court seeks essentially to determine whether the Treaty provisions on the free movement of services preclude a statutory prohibition of the procurement of employment for business executives by private recruitment consultancy companies. The fourth question is concerned essentially with the interpretation of Articles 86 and 90 of the Treaty, having regard to the competitive relationship existing between those companies and a public employment agency enjoying exclusive rights in respect of employment procurement.

15 The latter question raises the problem of the scope of that exclusive right and, therefore, of the statutory prohibition of employment procurement by private companies of the kind at issue in the main proceedings. It is therefore appropriate to consider that question first.

The interpretation of Articles 86 and 90 of the EEC Treaty

16 In its fourth question, the national court asks more specifically whether the monopoly of employment procurement in respect of business executives granted to a public employment agency constitutes an abuse of a dominant position within the meaning of Article 86, having regard to Article 90(2). In order to answer that question, it is necessary to examine that exclusive right also in the light of Article 90(1), which is concerned with the conditions that the Member States must observe when they grant special or exclusive rights. Moreover, the observations submitted to the Court relate to both Article 90(1) and Article 90(2) of the Treaty.

17 According to the appellants in the main proceedings, an agency such as the Bundesanstalt is both a public undertaking within the meaning of Article 90(1) and an undertaking entrusted with the operation of services of general economic interest within the meaning of Article 90(2) of the Treaty. The Bundesanstalt is therefore, they maintain, subject to the competition rules to the extent to which the application thereof does not obstruct the performance of the particular task assigned to it, and it does not in the present case. The appellants also claim that the action taken by the Bundesanstalt, which extended its statutory monopoly over employment procurement to activities for which the establishment of a monopoly is not in the public interest, constitutes an abuse within the meaning of Article 86 of the Treaty. They also consider that any Member State which makes such an abuse possible is in breach of Article 90(1) and of the general principle whereby the Member States must refrain from taking any measure which could destroy the effectiveness of the Community competition rules.

18 The Commission takes a somewhat different view. The maintenance of a monopoly on executive recruitment constitutes, in its view, an infringement of Article 90(1) read in conjunction with Article 86 of the Treaty where the grantee of the monopoly is not willing or able to carry out that task fully, according to the demand existing on the market, and provided that such conduct is liable to affect trade between Member States.

19 The respondent in the main proceedings and the German Government consider on the other hand that the activities of an employment agency do not fall within the scope of the competition rules if they are carried out by a public undertaking. The German Government states in that regard that a public employment agency cannot be classified as an undertaking within the meaning of Article 86 of the Treaty, in so far as the employment procurement services are provided free of charge. The fact that those activities are financed mainly by contributions from employers and employees does not, in its view, mean that they are not free, since those contributions are general and have no link with each specific service provided.

20 Having regard to the foregoing considerations, it is necessary to establish whether a public employment agency such as the Bundesanstalt may be regarded as an undertaking within the meaning of Articles 85 and 86 of the Treaty.

21 It must be observed, in the context of competition law, first that the concept of an undertaking

encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity.

22 The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities. That finding applies in particular to executive recruitment.

23 It follows that an entity such as a public employment agency engaged in the business of employment procurement may be classified as an undertaking for the purpose of applying the Community competition rules.

24 It must be pointed out that a public employment agency which is entrusted, under the legislation of a Member State, with the operation of services of general economic interest, such as those envisaged in Article 3 of the AFG, remains subject to the competition rules pursuant to Article 90(2) of the Treaty unless and to the extent to which it is shown that their application is incompatible with the discharge of its duties (see judgment in Case 155/73 Sacchi [1974] ECR 409).

25 As regards the manner in which a public employment agency enjoying an exclusive right of employment procurement conducts itself in relation to executive recruitment undertaken by private recruitment consultancy companies, it must be stated that the application of Article 86 of the Treaty cannot obstruct the performance of the particular task assigned to that agency in so far as the latter is manifestly not in a position to satisfy demand in that area of the market and in fact allows its exclusive rights to be encroached on by those companies.

26 Whilst it is true that Article 86 concerns undertakings and may be applied within the limits laid down by Article 90(2) to public undertakings or undertakings vested with exclusive rights or specific rights, the fact nevertheless remains that the Treaty requires the Member States not to take or maintain in force measures which could destroy the effectiveness of that provision (see judgment in Case 13/77 Inno [1977] ECR 2115, paragraphs 31 and 32). Article 90(1) in fact provides that the Member States are not to enact or maintain in force, in the case of public undertakings and the undertakings to which they grant special or exclusive rights, any measure contrary to the rules contained in the Treaty, in particular those provided for in Articles 85 to 94.

27 Consequently, any measure adopted by a Member State which maintains in force a statutory provision that creates a situation in which a public employment agency cannot avoid infringing Article 86 is incompatible with the rules of the Treaty.

28 It must be remembered, first, that an undertaking vested with a legal monopoly may be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty (see judgment in Case 311/84 CBEM [1985] 3261) and that the territory of a Member State, to which that monopoly extends, may constitute a substantial part of the common market (judgment in Case 322/81 Michelin [1983] ECR 3461, paragraph 28).

29 Secondly, the simple fact of creating a dominant position of that kind by granting an exclusive right within the meaning of Article 90(1) is not as such incompatible with Article 86 of the Treaty (see Case 311/84 CBEM, above, paragraph 17). A Member State is in breach of the prohibition contained in those two provisions only if the undertaking in question, merely by exercising the exclusive right granted to it, cannot avoid abusing its dominant position.

30 Pursuant to Article 86(b), such an abuse may in particular consist in limiting the provision of a service, to the prejudice of those seeking to avail themselves of it.

31 A Member State creates a situation in which the provision of a service is limited when the undertaking to which it grants an exclusive right extending to executive recruitment activities

is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind and when the effective pursuit of such activities by private companies is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void.

32 It must be observed, thirdly, that the responsibility imposed on a Member State by virtue of Articles 86 and 90(1) of the Treaty is engaged only if the abusive conduct on the part of the agency concerned is liable to affect trade between Member States. That does not mean that the abusive conduct in question must actually have affected such trade. It is sufficient to establish that that conduct is capable of having such an effect (see Case 322/81 Michelin, above, paragraph 104).

33 A potential effect of that kind on trade between Member States arises in particular where executive recruitment by private companies may extend to the nationals or to the territory of other Member States.

34 In view of the foregoing considerations, it must be stated in reply to the fourth question that a public employment agency engaged in employment procurement activities is subject to the prohibition contained in Article 86 of the Treaty, so long as the application of that provision does not obstruct the performance of the particular task assigned to it. A Member State which has conferred an exclusive right to carry on that activity upon the public employment agency is in breach of Article 90(1) of the Treaty where it creates a situation in which that agency cannot avoid infringing Article 86 of the Treaty. That is the case, in particular, where the following conditions are satisfied:

- the exclusive right extends to executive recruitment activities;

- the public employment agency is manifestly incapable of satisfying demand prevailing on the market for such activities;

- the actual pursuit of those activities by private recruitment consultants is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void;

- the activities in question may extend to the nationals or to the territory of other Member States.

The interpretation of Article 59 of the EEC Treaty

35 In its third question, the national court seeks essentially to determine whether a recruitment consultancy company in a Member State may rely on Articles 7 and 59 of the Treaty regarding the procurement of nationals of that Member State for posts in undertakings in the same State.

36 It must be recalled, in the first place, that Article 59 of the EEC Treaty guarantees, as regards the freedom to provide services, the application of the principle laid down in Article 7 of that Treaty. It follows that where rules are compatible with Article 59 they are also compatible with Article 7 (judgment in Case 90/76 Van Ameyde [1977] ECR 1091, paragraph 27).

37 It must then be pointed out that the Court has consistently held that the provisions of the Treaty on freedom of movement cannot be applied to activities which are confined in all respects within a single Member State and that the question whether that is the case depends on findings of fact which are for the national court to make (see, in particular, the judgment in Case 52/79 Debauve]1980] ECR 833, paragraph 9).

38 The facts, as established by the national court in its order for reference, show that in the present case the dispute is between German recruitment consultants and a German undertaking concerning the recruitment of a German national.

39 Such a situation displays no link with any of the situations envisaged by Community law. That finding cannot be invalidated by the fact that a contract concluded between the recruitment consultants

and the undertaking concerned includes the theoretical possibility of seeking German candidates resident in other Member States or nationals of other Member States.

40 It must therefore be stated in reply to the third question that a recruitment consultant in a Member State may not rely on Articles 7 and 59 of the Treaty regarding the procurement of nationals of that Member State for posts in undertakings in the same State.

41 In view of the above answer, it is unnecessary to consider the first two questions and the part of the fourth question concerned with the question whether Article 59 of the Treaty precludes a statutory prohibition of the pursuit, by private recruitment consultancy companies in a Member State, of the business of executive recruitment.

DOCNUM	61990J0041
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1991 Page I-01979 Swedish special edition Page I-00135 Finnish special edition Page I-00147
DOC	1991/04/23
LODGED	1990/02/14
JURCIT	11957E007 : N 1 12 35 36 40 11957E055 : N 1 12 11957E056 : N 1 11957E059 : N 1 12 14 35 - 40 11957E060 : N 1 11957E086 : N 1 12 14 16 - 34 11957E090 : N 1 14 11957E060-L1 : N 12 11957E066 : N 1 12 11957E056-P1 : N 12 11957E090-P2 : N 12 16 - 34 11957E090-P1 : N 16 - 34 11957E085 : N 20 26 61973J0155 : N 24 61977J0013 : N 26 61984J0311 : N 28 29 61981J0322 : N 28 32 11957E086-L2LB : N 30 61976J0090 : N 36 61979J0052 : N 37

CONCERNS	Interprets 11957E007 - Interprets 11957E059 - Interprets 11957E086 - Interprets 11957E090 -P1
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Competition ; Rules applying to undertakings ; Dominant position
AUTLANG	German
OBSERV	Federal Republic of Germany ; Commission ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A7* Landgericht München I, Urteil vom 27/10/1987 (3 O 3633/87) ; *A8* Oberlandesgericht München, Beschluß vom 22/06/1988 (15 U 6478/87) ; - Europarecht 1988 p.409-411 ; - Nicolaysen, Gert: Difficile est satiram non scribere, Europarecht 1988 p.411-412 ; *A9* Oberlandesgericht München, Vorlagebeschluß vom 06/12/1989 (15 U 6478/87) ; - Europäische Zeitschrift für Wirtschaftsrecht 1990 p.196-197
NOTES	Brouwer, O.W.: Overheidsmonopolie arbeidsbemiddeling veroordeeld, Nederlandse staatscourant 1991 no 106 p.4 ; Speyer, Stefan: Disparität zwischen gesetzlichem Vermittlungsmonopol und Marktausfüllung als Missbrauchstatbestand, Europäische Zeitschrift für Wirtschaftsrecht 1991 p.399-401 ; X: Revue de jurisprudence sociale 1991 p.474-475 ; Eichenhofer, Eberhard: Das Arbeitsvermittlungsmonopol der Bundesanstalt für Arbeit und das EG-Recht, Neue juristische Wochenschrift 1991 p.2857-2860 ; Mok, M.R.: Arbeidsbemiddeling, vrijheid van dienstenverkeer en misbruik van machtspositie, TVVS ondernemingsrecht en rechtspersonen 1991 p.327-328 ; Shaw, Josephine: Captains of Industry, the Labour Market and the Competition Rules, European Law Review 1991 p.501-506 ; Ehricke, Ulrich: Staatliches Arbeitsvermittlungsmonopol und Gemeinschaftsrecht, Wirtschaft und Wettbewerb 1991 p.970-977 ; Slot, Piet Jan: Common Market Law Review 1991 p.964-988 ; Cath, I.G.F.: Duits wettelijke arbeidsbemiddelingsmonopolie verboden, Euridica 1991 no 5 p.3-4 ; Garrido Falla, Fernando: Los organismos oficiales para colocacion de trabajadores y el Principio de Libre Concurrencia, Noticias CEE 1992 no 86 p.81-84 ; Hermitte, Marie-Angèle: Chronique de jurisprudence de la Cour de justice des Communautés européennes. Concurrence, Journal du droit international 1992 p.467-470 ; Mummenhoff, Winfried: Arbeitnehmerüberlassung bei Freigabe der Arbeitsvermittlung, Der Betrieb 1992 p.1982-1985 ; Pitschas, Rainer: "Soziale" Kohäsionspolitik im Verfassungsstaat Europa und nationale Arbeitsvermittlung, Die Sozialgerichtsbarkeit 1992 p.484-487 ; Romano Tassone, Antonio: Monopoli pubblici e abuso di posizione dominante, Rivista italiana di diritto pubblico comunitario 1992 p.1329-1334 ; Carnelutti, A.: Gazette du Palais 1992 I Jur. p.200-201 ; Pijnacker Hordijk, E.H. ; Smulders, N.M.P.: S.E.W. ; Sociaal-economische wetgeving 1993 p.406-417 ; Taylor, Simon M.: Article 90 and Telecommunications Monopolies, European Competition Law Review 1994 p.322-334 ; Manzini, Pietro: L'intervento pubblico nell'economia alla luce dell'art.90 del Trattato CE, Rivista di diritto internazionale 1995 p.379-396 ; Lasok, K.P.E.: When is an Undertaking not an Undertaking?, European Competition Law

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PROCEDU Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Kapteyn

DATES of document: 23/04/1991
of application: 14/02/1990

Judgment of the Court (Sixth Chamber) of 19 October 1995

Job Centre Coop. ARL. Reference for a preliminary ruling: Tribunale civile e penale di Milano - Italy. National legislation prohibiting private undertakings from providing job placement for workers - Lack of jurisdiction of the Court. Case C-111/94.

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Preliminary rulings ° Reference to the Court ° National court or tribunal within the meaning of Article 177 of the Treaty ° Definition ° Court decision in non-contentious proceedings ° Excluded

(EC Treaty, Art. 177)

Whilst Article 177 of the Treaty does not make reference to the Court subject to the proceedings during which the national court frames a question for a preliminary ruling being inter partes, it is none the less apparent from that provision that a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

A court exercising administrative authority in "non-contentious" proceedings concerning an application for confirmation of the memorandum of association of a company with a view to its registration cannot, therefore, make a reference to the Court. In such a situation it is acting independently of any dispute, since a dispute, and thus contentious proceedings, can only arise if confirmation is refused.

In Case C-111/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunale Civile e Penale di Milano, Italy, for a preliminary ruling in the non-contentious proceedings (giurisdizione volontaria) brought before that court by

Job Centre Coop. arl,

on the interpretation of Articles 48, 55, 59, 60, 66, 86 and 90 of the EC Treaty,

THE COURT (Sixth Chamber),

composed of: G.F. Mancini, acting for the President of the Chamber, F.A. Schockweiler, P.J.G. Kapteyn (Rapporteur), J.L. Murray and H. Ragnemalm, Judges,

Advocate General: M.B. Elmer,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

° Job Centre Coop. arl, by Pietro Ichino, Guglielmo Burragato and Caterina Rucci, of the Milan Bar,

° the German Government, by Ernst Roeder, Ministerialrat in the Federal Ministry of the Economy, and Bernd Kloke, Regierungsrat in the same ministry, acting as Agents, and

° the Commission of the European Communities, by Marie-José Jonczy, Legal Adviser, and Nicola Annecchino, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Job Centre Coop. arl, of the Italian Government, represented by Danilo Del Gaizo, Avvocato dello Stato, and of the Commission, represented by Marie-José Jonczy, and by Enrico Traversa, of its Legal Service, at the hearing on 23 March 1995,

after hearing the Opinion of the Advocate General at the sitting on 8 June 1995,

gives the following

Judgment

1 By order of 31 March 1994, received at the Court on 11 April 1994, the Tribunale Civile e Penale di Milano (Civil and Criminal District Court, Milan) referred for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 48, 55, 59, 60, 66, 86 and 90 of the EC Treaty.

2 Those questions were raised in the context of an application submitted by the representatives of Job Centre ("JCC") to the Tribunale Civile e Penale di Milano for confirmation of its memorandum of association, in accordance with Article 2330(3) of the Italian Civil Code.

3 JCC is a cooperative society with limited liability which is in the course of being set up with its head office in Milan. Under its articles of association, its activities are to include, in particular, serving as an intermediary between supply and demand on the employment market and providing temporary staff for third parties. Its object is to enable workers and undertakings, whether they are members or not, to draw on such services on the employment market in Italy and the Community.

4 In Italy, the employment market is subject to a mandatory placement system administered by public employment agencies and regulated by Law No 264 of 29 April 1949. Article 11(1) of that Law prohibits the pursuit of any activity, even unremunerated, as an intermediary between supply and demand for paid employment. The first paragraph of Article 1 of Law No 1369 of 23 October 1960 lays down a prohibition on acting as an intermediary or subcontractor in employment relationships, failure to comply with which gives rise, inter alia, to penal sanctions.

5 In the proceedings before the Tribunale Civile e Penale di Milano, JCC submitted that the prohibition of private placement and provision of temporary workers are contrary to Community law. The national court therefore sought a preliminary ruling from the Court on the following questions:

> "1. May the national laws on employment procurement and temporary work, which relate to matters of public policy because their purpose is to protect the interests of workers and of the national economy, be considered as instances of the exercise of official authority within the meaning of the combined provisions of Articles 66 and 55 of the EEC Treaty?
>
> 2. May the Community rules relied upon by the applicants, in the absence of specific implementing provisions in that area, be considered directly applicable (calling into question the public policy aims of the Italian laws currently governing employment procurement and temporary work) and do they permit any person subject to public or private law to pursue, without specific supervision or authorization, any activity as an intermediary between supply and demand on the employment market and/or as provider of labour on a temporary basis for third persons, in the event that a Member State is not able through its own administrative apparatus fully to meet the demand for services on the labour market?"

6 The Commission and the Italian Government have raised objections as to the admissibility of the questions referred. In particular, they have submitted that those questions were raised in the context of "non-contentious proceedings" whose purpose is not to settle a dispute after hearing argument from opposing parties but to issue an administrative decision.

7 It appears from the documents before the Court that an application for confirmation of the articles of association of a company is examined, in Italy, in non-contentious proceedings ("giurisdizione volontaria"). In the present case, such an application was lodged with the Tribunale Civile e Penale di Milano. Under Article 2330(3) of the Italian Civil Code, if after hearing the submissions

of the public authorities the Tribunale finds that the articles of association meet the conditions laid down by law, it must order the registration of the company. Under Article 2331(1), the company acquires legal personality on registration. The person legally empowered to apply for confirmation or registration may appeal against any adverse decision under Articles 2330(4) or 2189(3) of the Italian Civil Code.

8 Under Article 177 of the Treaty, the Court has jurisdiction to give preliminary rulings concerning the interpretation of the Treaty and of acts of the institutions of the Community. The second paragraph of that article adds: "Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon."

9 Whilst that provision does not make reference to the Court subject to the proceedings during which the national court frames a question for a preliminary ruling being inter partes (see, most recently, Case C-18/93 Corsica Ferries Italia v Corpo dei Piloti del Porto di Genova [1994] ECR I-1783, paragraph 12), it is none the less apparent from Article 177 that a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (Case 138/80 Borker [1980] ECR 1975, paragraph 4, and Case 318/85 Greis Unterweger [1986] ECR 955, paragraph 4).

10 That is not the case in the present instance.

11 When, in accordance with the applicable national legislation and under the "giurisdizione volontaria" procedure, the national court rules on an application for confirmation of a company' s articles of association with a view to its registration, it is performing a non-judicial function which, in other Member States, is entrusted to administrative authorities. It is exercising administrative authority without being at the same time called upon to settle any dispute. Only if the person empowered under national law to apply for such confirmation seeks judicial review of a decision rejecting that application ° and thus of the application for registration ° may the court seised be regarded as exercising a judicial function, for the purposes of Article 177, in respect of an application for the annulment of a measure adversely affecting the petitioner (see Case 32/74 Haaga [1974] ECR 1201).

12 The Court therefore has no jurisdiction to rule on the questions raised by the Tribunale Civile e Penale di Milano.

Costs

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

On those grounds,

THE COURT (Sixth Chamber)

The Court of Justice of the European Communities has no jurisdiction to answer the questions raised by the Tribunale Civile e Penale di Milano in its order for reference of 31 March 1994.

DOCNUM 61994J0111

AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1995 Page I-03361
DOC	1995/10/19
LODGED	1994/04/12
JURCIT	11992E177 : N 6 - 11 61993J0018-N12 : N 9 61980O0138-N4 : N 9 61985O0318-N4 : N 9 61974J0032 : N 11
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	Italian
OBSERV	Federal Republic of Germany ; Italy ; Commission ; Member States ; Institutions
NATIONA	Italy
NATCOUR	*A9* Tribunale civile e penale di Milano, Sezione VIII civile, ordinanza del 31/03/1994 ; - Il Foro italiano 1994 I Col.2886-2894 ; - Massimario di giurisprudenza del lavoro 1994 p.150-151 ; - Rivista italiana di diritto del lavoro 1994 II p.273-276 ; - X: Rivista italiana di diritto del lavoro 1994 II p.273-274 ; - Ichino, Pietro: Rivista italiana di diritto del lavoro 1994 III p.113-150 ; - X: Massimario di giurisprudenza del lavoro 1994 p.150 ; - Meliado, Giuseppe: Il Foro italiano 1994 I Col.2887-2894 ; - Capelli, Fausto: Rivista italiana di diritto del lavoro 1995 I p.23-39 ; - Roccella, Massimo: Rivista italiana di diritto del lavoro 1995 I p.3-22 ; *P1* Tribunale di Milano, Sezione VIII civile, provvedimento del 18/12/1995 (1461/94 vol.) ; *P2* Corte d'Appello di Milano, Sezione I civile, ordinanza del 30/01/1996 16/02/1996 (185 - RG 25/1996) ; - Il Foro italiano 1996 I Col.1028-1030 ; - Rivista italiana di diritto del lavoro 1996 II p.278-282 ; - Meliado, Giuseppe: Il Foro italiano 1996 I Col.1028 ; - Rucci, Caterina: Rivista italiana di diritto del lavoro 1996 II p.278-280
NOTES	X: Europe 1995 Décembre Comm. no 415 p.6-7 ; X: Giustizia civile 1995 I p.2862-2863 ; Berrod, F.: Revue du marché unique européen 1995 no 4 p.180-181 ; Nizzo, Carlo: La notion de juridiction au sens de l'article 177: la portée de l'arrêt Job Centre, Rivista di diritto europeo 1995 p.335-343 ; D'Harmant François, Antonio: L'ordinamento italiano del collocamento ed il diritto europeo: brevi note, Massimario di giurisprudenza del lavoro 1995 p.694-698 ; Mok, M.R.: Voluntaire jurisdictie en prejudiciele beslissing, TVVS ondernemingsrecht en rechtspersonen 1996 p.27 ; Abele, Roland: Europäische Zeitschrift für Wirtschaftsrecht 1996 p.48-49 ; Cornwell-Kelly, Malachy ; McFarlane, Gavin: Making the Luxembourg Connection, New Law Journal 1996 p.340 ; Meliado, Giuseppe: Il monopolio pubblico del collocamento

e il lavoro interinale in Italia innanzi ai giudici di Lussemburgo: mancate risposte e problemi aperti, Il Foro italiano 1996 IV Col.77-83 ; C.R.: Rivista italiana di diritto del lavoro 1996 II p.3-4 ; Heukels, T.: Onbevoegdheid Hof van Justitie in prejudiciele procedure, Nederlands tijdschrift voor Europees recht 1996 p.23 ; Adobati, Enrica: Il monopolio del collocamento di manodopera, Diritto comunitario e degli scambi internazionali 1996 p.125-126 ; Capelli, Fausto: Il monopolio pubblico italiano del collocamento di manodopera è dannoso e va abolito, Diritto comunitario e degli scambi internazionali 1996 p.126-127 ; Simon, Denys: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes. Institutions et ordre juridique communautaire, Journal du droit international 1996 p.488-490 ; M.A.: Rivista italiana di diritto pubblico comunitario 1996 p.466-467

PROCEDU Reference for a preliminary ruling - inadmissible

ADVGEN Elmer

JUDGRAP Kapteyn

DATES of document: 19/10/1995
of application: 12/04/1994

Judgment of the Court of 6 April 1995

Lloyd's Register of Shipping v Société Campenon Bernard. Reference for a preliminary ruling: Cour de cassation - France. Brussels Convention - Article 5 (5) - Dispute arising out of the operations of a branch. Case C-439/93.

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Convention on Jurisdiction and the Enforcement of Judgments ° Special jurisdiction ° Dispute arising out of the operations of a branch, agency or other establishment ° Definition of "operations" ° Undertakings entered into by an ancillary establishment in the name of its parent body ° Undertakings to be performed abroad ° Included

(Convention of 27 September 1968, Art. 5(5))

The expression "dispute arising out of the operations of a branch, agency or other establishment" in Article 5(5) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, does not presuppose that the undertakings giving rise to the dispute, entered into by a branch in the name of its parent body, are to be performed in the Contracting State in which the branch is established.

In Case C-439/93,

REFERENCE to the Court, pursuant to the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, by the French Cour de Cassation for a preliminary ruling in the proceedings pending before that court between

Lloyd' s Register of Shipping

and

Société Campenon Bernard

on the interpretation of Article 5(5) of the Convention of 27 September 1968, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and ° the amended version ° p. 77),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, F.A. Schockweiler (Rapporteur), P.J.G. Kapteyn, C. Gulmann (Presidents of Chambers), C.N. Kakouris, J.C. Moitinho de Almeida, J.L. Murray, D.A.O. Edward and J.-P. Puissochet, Judges,

Advocate General: M.B. Elmer,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

° Lloyd' s Register of Shipping, by Didier Le Prado and Luc Grellet, of the Paris Bar,

° Société Campenon Bernard, by André Moquet and Arnaud Lyon-Caen, of the Paris Bar,

° the French Government, by Catherine de Salins, Deputy Director of the Legal Affairs Directorate of the Ministry of Foreign Affairs and Nicolas Eybalin, Foreign Affairs Secretary of that Directorate, acting as Agents,

° the Greek Government, by Michail Apessos, Assistant Legal Adviser, and Vassileia Pelekou, Legal Agent, acting as Agents,

° the United Kingdom, by Lucinda Hudson, of the Treasury Solicitor' s Department, acting as Agent, assisted by S. Lee, Barrister,

° the Commission of the European Communities, by Marie-José Jonczy, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations made on behalf of Lloyd' s Register of Shipping, Société Campenon Bernard, represented by Elie Kleiman, of the Paris Bar, the Greek Government and the Commission of the European Communities at the hearing on 10 January 1995,

after hearing the Opinion of the Advocate General at the sitting on 21 February 1995,

gives the following

Judgment

1 By judgment of 26 October 1993, received at the Court on 10 November 1993, the French Cour de Cassation (Court of Cassation) referred to the Court for a preliminary ruling pursuant to the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters a question concerning the interpretation of Article 5(5) of that Convention, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and ° the amended version ° p. 77, hereinafter the "Convention").

2 The question arose in proceedings, which concerned the proper performance of a contract to test concrete reinforcing steel, between Campenon Bernard, a company governed by French law and established in Clichy (France), and Lloyd' s Register of Shipping, an English registered charity, established in London.

3 At the end of November 1985, Campenon Bernard contacted the French branch of Lloyd' s Register in order to arrange for the testing of concrete reinforcing steel which it was to use in the construction of a motorway in Kuwait. The object was to check that the concrete reinforcing steel complied with a United States technical standard which had been added to the tender specifications by the Kuwait Ministry of Public Works and, if so, to have a certificate of compliance issued.

4 Following negotiations, in a letter of 3 December 1985 Campenon Bernard placed the order with the French branch of Lloyd' s Register. That letter specified that inspection would take place in Spain and would be carried out by the Spanish branch of Lloyd' s Register. It also stated that payment would be effected in pesetas. On 9 December 1985 the French branch communicated its acceptance.

5 Although the Spanish branch of Lloyd' s Register issued certificates of compliance, the Kuwait Ministry of Public Works refused to accept the concrete reinforcing steel on the ground that it did not comply with the United States technical standard.

6 On 2 February 1988 Campenon Bernard paid the invoice issued by the Spanish branch of Lloyd' s Register, having been pressed to do so by the French branch, but without prejudice to its rights. Alleging that Lloyd' s Register had wrongly stated that the steel complied with the United States technical standard, it then brought a claim for damages in the Tribunal de Commerce (Commercial Court), Paris, through the intermediary of the French branch.

7 Lloyd' s Register pleaded that the French courts lacked jurisdiction.

8 The plea was rejected at first instance on the basis of domestic law. It was only on appeal that the plea was examined in the light of Article 5(1) and (5) of the Convention, pursuant to which:

"A person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question;

...

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated."

9 In its judgment of 5 June 1991 the Cour d' Appel (Court of Appeal), Paris, held that the case concerned the operations of the French branch of Lloyd' s Register within the meaning of Article 5(5) of the Convention and that consequently it had jurisdiction. It pointed out that Campenon Bernard had had dealings solely with the French branch, since it had negotiated and concluded the contract and subsequently demanded payment. It was not significant that the undertakings entered into had been performed in Spain. According to the Cour d' Appel, Article 5(5) of the Convention did not require that the undertakings entered into were to be performed in the Contracting State where the place of business was established. To allow such a restriction would render Article 5(5) redundant in relation to Article 5(1), which already gave jurisdiction to the courts for the place of performance of the obligation in question.

10 Lloyd' s Register applied for review inter alia on the ground that Article 5(5) had been infringed. In its view, a dispute arises out of the operations of a branch, agency or other establishment within the meaning of that provision only in so far as the undertakings entered into by that place of business are to be performed in the Contracting State where it is established.

11 In the circumstances, by judgment of 26 October 1993 the Cour de Cassation asked the Court whether,

"in the light of the first paragraph of Article 5 of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the expression 'dispute arising out of the operations of a branch...' in Article 5(5) of the Convention necessarily presupposes that the undertakings in question entered into by the branch in the name of its parent body are to be performed in the Contracting State where the branch is established."

12 Lloyd' s Register contends that in its judgment in Case 33/78 Somafer v Saar Ferngas [1978] ECR 2183, at paragraph 13, the Court held that the rule set out in Article 5(5) applies to actions relating to undertakings which have been entered into by that establishment in the name of the parent body, provided that they are to be performed in the Contracting State of the ancillary establishment.

13 According to Lloyd' s Register, such a requirement as to place is in accordance with the interests of the proper administration of justice which underlie the provision. It is aimed at enabling an action that has its origin in the actual activities of a branch to be heard by the courts for the place in which it is situated on practical and evidential grounds.

14 Moreover, it states, since an ancillary establishment may not confine itself to transmitting orders to its parent body but must also take part in their performance, and in that connection the range of activity of an ancillary establishment is naturally confined to the territory of the Contracting State in which it has been set up, jurisdiction under Article 5(5) is justified only where the undertakings in question entered into by the ancillary establishment in the name of its parent body are to be performed on the territory of the Contracting State in which it is situated.

15 That argument cannot be accepted.

16 First, the actual wording of Article 5(5) of the Convention in no way requires that the undertakings negotiated by a branch should be performed in the Contracting State in which it is established in order for them to form part of its operations.

17 Secondly, the interpretation put forward by the appellant in the main proceedings would render Article 5(5) almost wholly redundant. Since Article 5(1) already allows the plaintiff to bring an action in contract in the courts for the place of performance of the obligation in question, Article 5(5) would duplicate that provision if it applied solely to undertakings entered into by a branch which were to be performed in the Contracting State in which the branch was established. At the very most it would create a second head of special jurisdiction where, within the Contracting State of the branch, the place of performance of the obligation in question was situated in a judicial area other than that of the branch.

18 Thirdly, it should be noted that an ancillary establishment is a place of business which has the appearance of permanency such as the extension of a parent body, has a management and is equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, whose seat is in another Contracting State, do not have to deal directly with such parent body (see Somafer, cited above, at paragraph 12).

19 A branch, agency or other ancillary establishment within the meaning of Article 5(5) is therefore an entity capable of being the principal, or even exclusive, interlocutor for third parties in the negotiation of contracts.

20 There does not necessarily have to be a close link between the entity with which a customer conducts negotiations and places an order and the place where the order will be performed. Accordingly, undertakings may form part of the operations of an ancillary establishment within the meaning of Article 5(5) of the Convention even though they are to be performed outside the Contracting State where it is situated, possibly by another ancillary establishment.

21 That interpretation is, moreover, in conformity with the objective of the special rules of jurisdiction. As the Jenard Report (OJ 1979 C 59, at p. 22) makes clear, those rules allow the plaintiff to sue the defendant in courts other than those of his domicile because there is a specially close connecting factor between the dispute and the court with jurisdiction to resolve it.

22 In the light of the foregoing considerations, the answer to the question referred by the Cour de Cassation must be that the expression "dispute arising out of the operations of a branch, agency or other establishment" in Article 5(5) of the Convention does not presuppose that the undertakings in question entered into by the branch in the name of its parent body are to be performed in the Contracting State in which the branch is established.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the Cour de Cassation of the French Republic by judgment of 26 October 1993, hereby rules:

The expression "dispute arising out of the operations of a branch, agency or other establishment" in Article 5(5) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, does not presuppose that the undertakings in question entered into by the branch in the name of its parent body are to be performed in the Contracting State in which the branch is established.

DOCNUM	61993J0439
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1995 Page I-00961
DOC	1995/04/06
LODGED	1993/11/10
JURCIT	41978A1009(01) : N 1 41968A0927(01)-A05PT5 : N 1 8 - 22 41968A0927(01)-A05PT1 : N 8 9 11 17 61978J0033-N13 : N 12 61978J0033-N12 : N 18
CONCERNS	Interprets 41968A0927(01) -A05PT5
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	French
OBSERV	France ; Greece ; United Kingdom ; Commission ; Member States ; Institutions
NATIONA	France
NATCOUR	*A9* Cour de cassation (France), Chambre commerciale, financière et économique, arrêt du 26/10/1993 (1611 91-17.851) ; - Bulletin des arrêts de la Cour de Cassation - Chambres civiles 1993 IV no 358 ; - La Semaine juridique - édition générale 1993 IV p.334 (résumé) ; - Recueil Dalloz Sirey 1993 IR. p.248 (résumé) ; - Journal du droit international 1994 p.426-428 ; - Revue critique de droit international privé 1994 p.802 (résumé) ; - Revue de jurisprudence de droit des affaires 1994 p.292 ; - Cahiers de droit européen 1996 p.203 (résumé) ; - International Litigation Procedure 1994

p.199-201 ; - X: Rapport de la Cour de Cassation 1993 p.421-422 ; - X: Revue de jurisprudence de droit des affaires 1994 p.292 ; - Sturlese, Bruno: Journal du droit international 1994 p.428-431 ; - X: Rapport de la Cour de Cassation 1993 p.421-422 ; - X: Revue de jurisprudence de droit des affaires 1994 p.292 ; - Sturlese, Bruno: Journal du droit international 1994 p.428-431

NOTES Idot, Laurence: Europe 1995 Juin Comm. no 240 p.20 ; Vlas, P.: The EEC Convention on Jurisdiction and Judgments, Netherlands International Law Review 1995 p.425-428 ; Droz, Georges A.L.: Revue critique de droit international privé 1995 p.774-776 ; X: Revue de jurisprudence de droit des affaires 1995 p.832-833 ; Reinhard, Yves: Droit communautaire et international des groupements, La Semaine juridique - édition entreprise 1995 I 484 no 3 ; Klesta Dosi, Laurence: Corte di giustizia delle Comunità europee (1o ottobre 1994 - 30 aprile 1995), La nuova giurisprudenza civile commentata 1995 II p.397-398 ; Sancho Villa, Diana: Revista española de Derecho Internacional 1995 p.393-395 ; Borras Rodríguez, Alegría: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1996 p.269-271 ; D.S.V.: Determinacion de la competencia en litigios derivados de contratos celebrados por sucursales, La ley - Union Europea 1996 no 3997 p.8 ; Hill, Jonathan: Jurisdiction under Article 5(5) of the Brussels Convention, Civil Justice Quarterly 1996 p.94-97 ; Hartley, Trevor: Article 5(5): Contracts Concluded by a Branch, European Law Review 1996 p.162-164 ; Volken, Paul: Rechtsprechung zum Lugano-Übereinkommen (1995), Schweizerische Zeitschrift für internationales und europäisches Recht 1996 p.140-141 ; Bischoff, Jean-Marc: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes, Journal du droit international 1996 p.564-567 ; Tagaras, H.: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles. Années judiciaires 1994-1995 et 1995-1996, Cahiers de droit européen 1997 p.191-192 ; Hudig-van Lennep, W.: Art. 5 sub 5 EEX - geschil inzake de exploitatie van een filiaal - nakoming van door het filiaal namens het moederbedrijf aangegane contractuele verplichtingen, TVVS ondernemingsrecht en rechtspersonen 1997 p.221-222 ; Margellos, M. Theofilos: Episkopisi tis nomologias 1995 tou Dikastiriou ton Evropaikon Koinotiton, Koinodikion 1997 p.104-113

PROCEDU Reference for a preliminary ruling

ADVGEN Elmer

JUDGRAP Schockweiler

DATES of document: 06/04/1995
of application: 10/11/1993

Judgment of the Court of 6 April 1995

Lloyd's Register of Shipping v Société Campenon Bernard. Reference for a preliminary ruling: Cour de cassation - France. Brussels Convention - Article 5 (5) - Dispute arising out of the operations of a branch. Case C-439/93.

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Convention on Jurisdiction and the Enforcement of Judgments ° Special jurisdiction ° Dispute arising out of the operations of a branch, agency or other establishment ° Definition of "operations" ° Undertakings entered into by an ancillary establishment in the name of its parent body ° Undertakings to be performed abroad ° Included

(Convention of 27 September 1968, Art. 5(5))

The expression "dispute arising out of the operations of a branch, agency or other establishment" in Article 5(5) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, does not presuppose that the undertakings giving rise to the dispute, entered into by a branch in the name of its parent body, are to be performed in the Contracting State in which the branch is established.

In Case C-439/93,

REFERENCE to the Court, pursuant to the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, by the French Cour de Cassation for a preliminary ruling in the proceedings pending before that court between

Lloyd' s Register of Shipping

and

Société Campenon Bernard

on the interpretation of Article 5(5) of the Convention of 27 September 1968, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and ° the amended version ° p. 77),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, F.A. Schockweiler (Rapporteur), P.J.G. Kapteyn, C. Gulmann (Presidents of Chambers), C.N. Kakouris, J.C. Moitinho de Almeida, J.L. Murray, D.A.O. Edward and J.-P. Puissochet, Judges,

Advocate General: M.B. Elmer,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

° Lloyd' s Register of Shipping, by Didier Le Prado and Luc Grellet, of the Paris Bar,

° Société Campenon Bernard, by André Moquet and Arnaud Lyon-Caen, of the Paris Bar,

° the French Government, by Catherine de Salins, Deputy Director of the Legal Affairs Directorate of the Ministry of Foreign Affairs and Nicolas Eybalin, Foreign Affairs Secretary of that Directorate, acting as Agents,

° the Greek Government, by Michail Apessos, Assistant Legal Adviser, and Vassileia Pelekou, Legal Agent, acting as Agents,

° the United Kingdom, by Lucinda Hudson, of the Treasury Solicitor' s Department, acting as Agent, assisted by S. Lee, Barrister,

° the Commission of the European Communities, by Marie-José Jonczy, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations made on behalf of Lloyd' s Register of Shipping, Société Campenon Bernard, represented by Elie Kleiman, of the Paris Bar, the Greek Government and the Commission of the European Communities at the hearing on 10 January 1995,

after hearing the Opinion of the Advocate General at the sitting on 21 February 1995,

gives the following

Judgment

1 By judgment of 26 October 1993, received at the Court on 10 November 1993, the French Cour de Cassation (Court of Cassation) referred to the Court for a preliminary ruling pursuant to the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters a question concerning the interpretation of Article 5(5) of that Convention, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and ° the amended version ° p. 77, hereinafter the "Convention").

2 The question arose in proceedings, which concerned the proper performance of a contract to test concrete reinforcing steel, between Campenon Bernard, a company governed by French law and established in Clichy (France), and Lloyd' s Register of Shipping, an English registered charity, established in London.

3 At the end of November 1985, Campenon Bernard contacted the French branch of Lloyd' s Register in order to arrange for the testing of concrete reinforcing steel which it was to use in the construction of a motorway in Kuwait. The object was to check that the concrete reinforcing steel complied with a United States technical standard which had been added to the tender specifications by the Kuwait Ministry of Public Works and, if so, to have a certificate of compliance issued.

4 Following negotiations, in a letter of 3 December 1985 Campenon Bernard placed the order with the French branch of Lloyd' s Register. That letter specified that inspection would take place in Spain and would be carried out by the Spanish branch of Lloyd' s Register. It also stated that payment would be effected in pesetas. On 9 December 1985 the French branch communicated its acceptance.

5 Although the Spanish branch of Lloyd' s Register issued certificates of compliance, the Kuwait Ministry of Public Works refused to accept the concrete reinforcing steel on the ground that it did not comply with the United States technical standard.

6 On 2 February 1988 Campenon Bernard paid the invoice issued by the Spanish branch of Lloyd' s Register, having been pressed to do so by the French branch, but without prejudice to its rights. Alleging that Lloyd' s Register had wrongly stated that the steel complied with the United States technical standard, it then brought a claim for damages in the Tribunal de Commerce (Commercial Court), Paris, through the intermediary of the French branch.

7 Lloyd' s Register pleaded that the French courts lacked jurisdiction.

8 The plea was rejected at first instance on the basis of domestic law. It was only on appeal that the plea was examined in the light of Article 5(1) and (5) of the Convention, pursuant to which:

"A person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question;

...

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated."

9 In its judgment of 5 June 1991 the Cour d' Appel (Court of Appeal), Paris, held that the case concerned the operations of the French branch of Lloyd' s Register within the meaning of Article 5(5) of the Convention and that consequently it had jurisdiction. It pointed out that Campenon Bernard had had dealings solely with the French branch, since it had negotiated and concluded the contract and subsequently demanded payment. It was not significant that the undertakings entered into had been performed in Spain. According to the Cour d' Appel, Article 5(5) of the Convention did not require that the undertakings entered into were to be performed in the Contracting State where the place of business was established. To allow such a restriction would render Article 5(5) redundant in relation to Article 5(1), which already gave jurisdiction to the courts for the place of performance of the obligation in question.

10 Lloyd' s Register applied for review inter alia on the ground that Article 5(5) had been infringed. In its view, a dispute arises out of the operations of a branch, agency or other establishment within the meaning of that provision only in so far as the undertakings entered into by that place of business are to be performed in the Contracting State where it is established.

11 In the circumstances, by judgment of 26 October 1993 the Cour de Cassation asked the Court whether,

"in the light of the first paragraph of Article 5 of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the expression 'dispute arising out of the operations of a branch...' in Article 5(5) of the Convention necessarily presupposes that the undertakings in question entered into by the branch in the name of its parent body are to be performed in the Contracting State where the branch is established."

12 Lloyd' s Register contends that in its judgment in Case 33/78 Somafer v Saar Ferngas [1978] ECR 2183, at paragraph 13, the Court held that the rule set out in Article 5(5) applies to actions relating to undertakings which have been entered into by that establishment in the name of the parent body, provided that they are to be performed in the Contracting State of the ancillary establishment.

13 According to Lloyd' s Register, such a requirement as to place is in accordance with the interests of the proper administration of justice which underlie the provision. It is aimed at enabling an action that has its origin in the actual activities of a branch to be heard by the courts for the place in which it is situated on practical and evidential grounds.

14 Moreover, it states, since an ancillary establishment may not confine itself to transmitting orders to its parent body but must also take part in their performance, and in that connection the range of activity of an ancillary establishment is naturally confined to the territory of the Contracting State in which it has been set up, jurisdiction under Article 5(5) is justified only where the undertakings in question entered into by the ancillary establishment in the name of its parent body are to be performed on the territory of the Contracting State in which it is situated.

15 That argument cannot be accepted.

16 First, the actual wording of Article 5(5) of the Convention in no way requires that the undertakings negotiated by a branch should be performed in the Contracting State in which it is established in order for them to form part of its operations.

17 Secondly, the interpretation put forward by the appellant in the main proceedings would render Article 5(5) almost wholly redundant. Since Article 5(1) already allows the plaintiff to bring an action in contract in the courts for the place of performance of the obligation in question, Article 5(5) would duplicate that provision if it applied solely to undertakings entered into by a branch which were to be performed in the Contracting State in which the branch was established. At the very most it would create a second head of special jurisdiction where, within the Contracting State of the branch, the place of performance of the obligation in question was situated in a judicial area other than that of the branch.

18 Thirdly, it should be noted that an ancillary establishment is a place of business which has the appearance of permanency such as the extension of a parent body, has a management and is equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, whose seat is in another Contracting State, do not have to deal directly with such parent body (see Somafer, cited above, at paragraph 12).

19 A branch, agency or other ancillary establishment within the meaning of Article 5(5) is therefore an entity capable of being the principal, or even exclusive, interlocutor for third parties in the negotiation of contracts.

20 There does not necessarily have to be a close link between the entity with which a customer conducts negotiations and places an order and the place where the order will be performed. Accordingly, undertakings may form part of the operations of an ancillary establishment within the meaning of Article 5(5) of the Convention even though they are to be performed outside the Contracting State where it is situated, possibly by another ancillary establishment.

21 That interpretation is, moreover, in conformity with the objective of the special rules of jurisdiction. As the Jenard Report (OJ 1979 C 59, at p. 22) makes clear, those rules allow the plaintiff to sue the defendant in courts other than those of his domicile because there is a specially close connecting factor between the dispute and the court with jurisdiction to resolve it.

22 In the light of the foregoing considerations, the answer to the question referred by the Cour de Cassation must be that the expression "dispute arising out of the operations of a branch, agency or other establishment" in Article 5(5) of the Convention does not presuppose that the undertakings in question entered into by the branch in the name of its parent body are to be performed in the Contracting State in which the branch is established.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the Cour de Cassation of the French Republic by judgment of 26 October 1993, hereby rules:

The expression "dispute arising out of the operations of a branch, agency or other establishment" in Article 5(5) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, does not presuppose that the undertakings in question entered into by the branch in the name of its parent body are to be performed in the Contracting State in which the branch is established.

DOCNUM	61993J0439
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1995 Page I-00961
DOC	1995/04/06
LODGED	1993/11/10
JURCIT	41978A1009(01) : N 1 41968A0927(01)-A05PT5 : N 1 8 - 22 41968A0927(01)-A05PT1 : N 8 9 11 17 61978J0033-N13 : N 12 61978J0033-N12 : N 18
CONCERNS	Interprets 41968A0927(01) -A05PT5
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	French
OBSERV	France ; Greece ; United Kingdom ; Commission ; Member States ; Institutions
NATIONA	France
NATCOUR	*A9* Cour de cassation (France), Chambre commerciale, financière et économique, arrêt du 26/10/1993 (1611 91-17.851) ; - Bulletin des arrêts de la Cour de Cassation - Chambres civiles 1993 IV no 358 ; - La Semaine juridique - édition générale 1993 IV p.334 (résumé) ; - Recueil Dalloz Sirey 1993 IR. p.248 (résumé) ; - Journal du droit international 1994 p.426-428 ; - Revue critique de droit international privé 1994 p.802 (résumé) ; - Revue de jurisprudence de droit des affaires 1994 p.292 ; - Cahiers de droit européen 1996 p.203 (résumé) ; - International Litigation Procedure 1994

p.199-201 ; - X: Rapport de la Cour de Cassation 1993 p.421-422 ; - X: Revue de jurisprudence de droit des affaires 1994 p.292 ; - Sturlese, Bruno: Journal du droit international 1994 p.428-431 ; - X: Rapport de la Cour de Cassation 1993 p.421-422 ; - X: Revue de jurisprudence de droit des affaires 1994 p.292 ; - Sturlese, Bruno: Journal du droit international 1994 p.428-431

NOTES Idot, Laurence: Europe 1995 Juin Comm. no 240 p.20 ; Vlas, P.: The EEC Convention on Jurisdiction and Judgments, Netherlands International Law Review 1995 p.425-428 ; Droz, Georges A.L.: Revue critique de droit international privé 1995 p.774-776 ; X: Revue de jurisprudence de droit des affaires 1995 p.832-833 ; Reinhard, Yves: Droit communautaire et international des groupements, La Semaine juridique - édition entreprise 1995 I 484 no 3 ; Klesta Dosi, Laurence: Corte di giustizia delle Comunità europee (1o ottobre 1994 - 30 aprile 1995), La nuova giurisprudenza civile commentata 1995 II p.397-398 ; Sancho Villa, Diana: Revista española de Derecho Internacional 1995 p.393-395 ; Borras Rodríguez, Alegría: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1996 p.269-271 ; D.S.V.: Determinacion de la competencia en litigios derivados de contratos celebrados por sucursales, La ley - Union Europea 1996 no 3997 p.8 ; Hill, Jonathan: Jurisdiction under Article 5(5) of the Brussels Convention, Civil Justice Quarterly 1996 p.94-97 ; Hartley, Trevor: Article 5(5): Contracts Concluded by a Branch, European Law Review 1996 p.162-164 ; Volken, Paul: Rechtsprechung zum Lugano-Übereinkommen (1995), Schweizerische Zeitschrift für internationales und europäisches Recht 1996 p.140-141 ; Bischoff, Jean-Marc: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes, Journal du droit international 1996 p.564-567 ; Tagaras, H.: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles. Années judiciaires 1994-1995 et 1995-1996, Cahiers de droit européen 1997 p.191-192 ; Hudig-van Lennep, W.: Art. 5 sub 5 EEX - geschil inzake de exploitatie van een filiaal - nakoming van door het filiaal namens het moederbedrijf aangegane contractuele verplichtingen, TVVS ondernemingsrecht en rechtspersonen 1997 p.221-222 ; Margellos, M. Theofilos: Episkopisi tis nomologias 1995 tou Dikastiriou ton Evropaikon Koinotiton, Koinodikion 1997 p.104-113

PROCEDU Reference for a preliminary ruling

ADVGEN Elmer

JUDGRAP Schockweiler

DATES of document: 06/04/1995
of application: 10/11/1993

Judgment of the Court (Sixth Chamber) of 30 May 1991

Marina Karella and Nicolas Karellas v Minister for Industry, Energy and Technology and Organismos Anasygkrotiseos Epicheiriseon AE. References for a preliminary ruling: Symvoulio Epikrateias - Greece. Company law - Directive - Direct effect - Primacy. Joined cases C-19/90 and C-20/90.

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Free movement of persons - Freedom of establishment - Companies - Directive 77/91 - Change in the capital of a public limited liability company - Direct effect of Article 25(1) of the directive - National rules providing for the capital of a company in difficulties to be increased by administrative act - Not permissible

(Council Directive 77/91, Arts 25 and 41(1))

Article 25 of the Second Council Directive 77/91/EEC on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, may be relied upon by individuals against the public authorities before national courts.

By providing that any increase in capital must be decided upon by the general meeting, Article 25(1) lays down provisions which appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise for them to be held to have direct effect.

Article 25 in conjunction with Article 41(1) of that directive must be interpreted as meaning that they preclude national rules which, in order to ensure the survival and continued operation of undertakings which are of particular economic and social importance for society as a whole and are in exceptional circumstances by reason of their excessive debt burden, provide for the adoption by administrative act of a decision to increase the company capital, without prejudice to the right of pre-emption of the original shareholders when the new shares are issued. In that regard, it is irrelevant that those rules provide that the shares so created may, in the context of a policy of encouraging shareholding by private individuals, be transferred to employees of the company or other groups of private individuals as long as that possibility has not crystallized.

In Joined Cases C-19/90 and C-20/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Symvoulio Epikrateias (Council of State) in the proceedings pending before that court between

Marina Karella

and

Minister of Industry, Energy and Technology, and

Organismos Anasygkrotiseos Epicheiriseon AE,

and between

Nikolaos Karellas

and

Minister of Industry, Energy and Technology, and

Organismos Anasygkrotiseos Epicheiriseon AE,

on the interpretation of Articles 25, 41 and 42 of the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (Official Journal 1977 L 26, p. 1),

THE COURT (Sixth Chamber),

composed of: G.F. Mancini, President of the Chamber, T.F. O' Higgins, C.N. Kakouris, F.A. Schockweiler and P.J.G. Kapteyn, Judges,

Advocate General: G. Tesauro,

Registrar: H.A. Ruehl, Principal Administrator,

After considering the written observations submitted on behalf of:

Marina Karella and Nikolaos Karellas, by Konstantinos Adamantopoulos, of the Athens Bar, and Philip Bentley, Barrister of Lincoln' s Inn;

the Greek Government, by Panagiotis Milonopoulos, Lawyer, Legal Adviser of the Second Class in the Department for Community Legal Affairs of the Ministry of Foreign Affairs, Konstantinos Stavropoulos, Lawyer, also a member of that department, and Nikos Fragkakis, Lawyer, acting as Agents;

the Commission of the European Communities, by Antonio Caeiro, Legal Adviser, and Maria Patakia, a member of its Legal Service, acting as Agents;

having regard to the Report for the Hearing,

after hearing oral argument at the hearing on 12 December 1990 from Marina Karella and Nikolaos Karellas; Organismos Anasygkrotiseos Epicheiriseon AE, represented by Leonidas Georgakopoulos and Andreas Tsouderos, of the Athens Bar; the Greek Government; and the Commission,

after hearing the Opinion of the Advocate General delivered at the sitting on 30 January 1991,

gives the following

Judgment

Costs

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

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Symvoulio Epikrateias by two judgments dated 25 May 1989, hereby rules:

(1) Article 25 of the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration

of their capital, with a view to making such safeguards equivalent, may be relied upon by individuals against the public authorities before national courts;

(2) Article 25 in conjunction with Article 41(1) of the Second Directive must be interpreted as meaning that they preclude national rules which, in order to ensure the survival and continued operation of undertakings which are of particular economic and social importance for society as a whole and are in exceptional circumstances by reason of their excessive debt burden, provide for the adoption by administrative act of a decision to increase the company capital, without prejudice to the right of pre-emption of the original shareholders when the new shares are issued.

1 By two judgments dated 25 May 1989 which were received at the Court on 22 January 1990, the Symvoulio Epikrateias (Council of State) referred to the Court pursuant to Article 177 of the EEC Treaty three questions for a preliminary ruling on the interpretation of Articles 25, 41 and 42 of the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (Official Journal 1977 L 26, p. 1, hereinafter referred to as "the Second Directive").

2 Those questions were raised in two sets of proceedings between two shareholders in the company Klostiria Velka AE, on the one hand, and the Minister of Industry, Energy and Technology and Organismos Anasygkrotiseos Epicheiriseon AE (Business Reconstruction Organization, hereinafter referred to as "the OAE"), on the other. Those proceedings are concerned with an increase in that company' s capital which was decided upon by the OAE and approved by the State Secretary for Industry, Energy and Technology.

3 The OAE is a public-sector body having the form of a public limited liability company which acts in the public interest under the control of the State. It was set up by Greek Law No 1386/1983 of 5 August 1983 (Official Journal of the Hellenic Republic No 107/A of 8 August 1983, p. 14). Under Article 2(2) of that law, the purpose of the OAE is to contribute to the economic and social development of the country through the financial rejuvenation of undertakings, the importation and application of foreign know-how and the development of Greek know-how and through the establishment and operation of nationalized or mixed economy undertakings.

4 Article 2(3) of Law No 1386/1983 lists the powers conferred on the OAE in order to achieve those objects. It may take over the administration and day-to-day operation of undertakings undergoing rejuvenation or nationalized undertakings; participate in the capital of undertakings; grant loans and issue or agree certain loans; acquire bonds; and make over shares, in particular to employees or their representative bodies, local government bodies or other legal entities governed by public law, charitable institutions, social organizations or private individuals.

5 Under Article 5(1) of Law No 1386/1983, the Minister for the National Economy may make undertakings undergoing serious financial difficulties subject to the system established by the Law.

6 Under Article 7 of Law No 1386/1983, the competent minister may decide to transfer to the OAE the administration of the undertaking subject to the system established by the Law, deal with the undertaking' s debts so as to secure its viability or wind it up.

7 Article 8 of Law No 1386/1983 contains provisions on transferring the administration of the undertaking to the OAE. Article 8(1), as amended by Law No 1472/1984 (Official Journal of the Hellenic Republic No 112/A of 6 August 1984, p. 1273) lays down the rules as to how the transfer is to be effected and governs relations between the persons appointed by the OAE to administer

the undertaking and the undertaking' s bodies. Accordingly, it provides that publication of the ministerial decision to subject the undertaking to the system established by the Law terminates the powers of the undertaking' s administrative bodies and that the general meeting is to continue to exist but cannot terminate the appointment of the members of the administration appointed by the OAE.

8 Article 8(8) of Law No 1386/1983 provides that, during its provisional administration of the company subject to the system established by the Law, the OAE may decide, by way of derogation from the provisions in force relating to public limited liability companies, to increase the capital of the company concerned. The increase, which has to be approved by the minister, may take the form of contributions in cash or in kind. The undertaking' s capital may also be increased by set-off. However, the original shareholders retain their pre-emptive rights, which they may exercise within a time-limit laid down in the ministerial decision granting approval.

9 By decision of 14 December 1983 the State Secretary for the Economy subjected Klostiria Velka AE to the provisions of Law No 1386/1983 (Decree No 2057, Official Journal of the Hellenic Republic No 725/B of 14 December 1983). The OAE took over the administration of that company in accordance with Article 8 of the Law.

10 During its provisional administration the OAE decided, under Article 8(8) of Law No 1386/1983, to increase the capital of the company subjected to the system established by the Law by DR 400 million. The State Secretary for Industry, Energy and Technology approved that decision (Decree No 162 of 6 June 1986, Official Journal of the Hellenic Republic No 374/B of 10 October 1986). The decree provided that the original shareholders would have an unlimited pre-emptive right which they had to exercise within one month of the publication of the decision.

11 Marina Karella and Nikolaos Karellas, who are shareholders in Klostiria Velka AE, brought actions for the annulment of that decree in the Greek Council of State on the ground that it was contrary to the Greek Constitution and the Second Directive.

12 In its judgments of 25 May 1989 the Council of State held that the applicants' pleas in law seeking the annulment of the decree on the ground of its unconstitutionality were unfounded. However, it decided that it should refer to the Court for a preliminary ruling the following questions - identically worded in the two cases - on the interpretation of the Second Directive:

> "(1) Are the provisions of Article 25 in conjunction with Article 41(1) and Article 42 of Council Directive 77/91/EEC of 13 December 1976 free of conditions which lie within the discretion of the Member States and sufficiently precise that they can be relied upon against the State before a national court by an individual claiming that a provision of a law is incompatible with those provisions of the directive?

(2) Does a legal provision come within the scope of Article 25 of Directive 77/91/EEC where it does not permanently govern matters relating to increases in the capital of a limited liability company but is intended to deal with the exceptional circumstances of over-indebted companies which are of particular economic and social importance for society as a whole and provides, in order to ensure the survival and continued operation of those companies for the adoption by administrative act of a decision to increase the company capital, without prejudice, however, to the pre-emptive right of the existing shareholders when the new shares are distributed, and if so to what extent is it compatible with that provision in conjunction with Article 41(1) of the directive?

(3) Is such a law compatible with the provisions of Article 42 of Directive 77/91/EEC in view of the fact that it does not prescribe that the price of the shares is to be fixed by the State on the basis of the objectively established net worth of the undertaking and the resultant inherent value of the old shares but leaves it to the discretion of the administration to fix the price so as to make possible the necessary immediate inflow of capital into companies which, because of their

difficulties, have had confidence in them shaken, although it does safeguard the pre-emptive right of existing shareholders when the new shares are distributed?"

13 Reference is made to the Report for the Hearing for a fuller account of the facts in the main proceedings, the applicable legislation 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.

14 The national court' s questions essentially raise two issues. The first is concerned with Article 25(1) of the Second Directive. The national court wishes to establish whether, having regard to Article 41(1) of the Second Directive, Article 25(1) may be relied upon against the administration by individuals in the national courts. It then asks whether Article 25(1), in conjunction with Article 41(1), is applicable with regard to public rules, such as those provided for in Law No 1386/1983, which govern the completely exceptional cases of undertakings which are of particular economic and social importance for society and are undergoing serious financial difficulties.

15 The second issue is concerned with Article 42 of the Second Directive. The national court asks whether that provision may be relied upon by individuals and whether it has to be interpreted as precluding national rules of the type referred to above.

16 The Court will initially consider the first issue, since, in the cases at issue in the main proceedings, the lawfulness of the increase in capital predominates over the question of the value of the issue price.

The direct effect of Article 25(1) of the Second Directive

17 As the Court has consistently held, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, individuals are entitled to invoke them against the State (see, in particular, the judgment in Case 8/81 Becker v Finanzamt Muenster-Innenstadt [1982] ECR 53).

18 Consequently, it should be examined whether Article 25(1) of the Second Directive, which provides that any increase in capital must be decided upon by the general meeting, satisfies those conditions.

19 It must be held in that connection that that provision is clearly and precisely worded and lays down, unconditionally, a rule enshrining the general principle that the general meeting has the power to decide upon increases in capital.

20 The unconditional nature of that provision is not affected by the derogation provided for in Article 25(2) of the Second Directive to the effect that the company' s instrument of incorporation or the general meeting may authorize an increase in the subscribed capital up to a maximum amount which is to be fixed with due regard for any maximum amount provided for by law. That individual, clearly defined derogation does not leave Member States any possibility of making the principle of the power of the general meeting subject to any exceptions other than that for which express provision is made.

21 The same applies to Article 41(1) of the Second Directive, under which Member States may derogate from Article 25(1) and Article 9(1) and the first sentence of Article 19(1)(a) and (b) to the extent that such derogations are necessary to encourage the participation of employees or other groups of persons defined by national law in the capital of undertakings. That derogation, too, is strictly confined to the case provided for.

22 Moreover, the fact that the Community legislature provided for precise, concrete derogations confirms the unconditional character of the principle set forth in Article 25(1) of the Second Directive.

23 It is appropriate therefore to answer the national court by stating that Article 25(1) of the

Second Directive may be relied upon by individuals against the public authorities before national courts.

The scope of Article 25(1) of the Second Directive

24 As for the scope of Article 25(1) of the Second Directive with respect to a law, such as Law No 1386/1983, it should be examined in the first place whether such a law falls within the field of application of the directive, since that legislation does not set out the basic rules on increases of capital and merely seeks to deal with exceptional situations. If that legislation falls within the field of application of the Second Directive, it should then be considered whether it can qualify for the benefit of the derogation provided for in Article 41(1) of that directive.

25 As far as the field of application of the Second Directive is concerned, it should be stated first of all that, in accordance with Article 54(3)(g) of the Treaty, it seeks to coordinate the safeguards which, for the protection of the interests of members and others, are required by Member States of companies and firms within the meaning of the second paragraph of Article 58 of the Treaty with a view to making such safeguards equivalent. Consequently, the aim of the Second Directive is to provide a minimum level of protection for shareholders in all the Member States.

26 That objective would be seriously frustrated if the Member States were entitled to derogate from the provisions of the directive by maintaining in force rules - even rules categorized as special or exceptional - under which it is possible to decide by administrative measure, outside any decision by the general meeting of shareholders, to effect an increase in the company' s capital which would have the effect either of obliging the original shareholders to increase their contributions to the capital or of imposing on them the addition of new shareholders, thus reducing their involvement in the decision-taking power of the company.

27 However, that observation does not signify that Community law prevents Member States from derogating from those provisions in any circumstances. The Community legislature has made specific provision for well-defined derogations and for procedures which may result in such derogations with the aim of safeguarding certain vital interests of the Member States which are liable to be affected in exceptional situations. Instances of this are Articles 19(2) and (3), Article 40(2), Article 41(2) and Article 43(2) of the directive.

28 In this connection, it must be held that no derogating provision which would allow the Member States to derogate from Article 25(1) of the directive in crisis situations is provided for either in the EEC Treaty or in the Second Directive itself. On the contrary, Article 17(1) of the directive provides expressly that, in the case of a serious loss of the subscribed capital, a general meeting of shareholders must be called within the period laid down by the laws of the Member States to consider whether the company should be wound up or any other measures taken. Consequently, that provision confirms the principle laid down by Article 25(1) and applies even where the company concerned is undergoing serious financial difficulties.

29 The OAE further claimed at the hearing that the Second Directive could not apply to the special collective liquidation or rejuvenation procedures for companies incapable of meeting their commitments, since its field of application was confined to the normal operation of companies.

30 That objection cannot be accepted. The directive is intended to ensure that members' and third parties' rights are safeguarded, in particular in operations for setting up companies and increasing and reducing company capital. In order to be effective, that safeguard must be secured for members as long as the company continues to exist with its own structures. Whilst the directive does not preclude the taking of execution measures and, in particular, liquidation measures placing the company under compulsory administration in the interests of safeguarding creditors' rights, it nevertheless continues to apply as long as the company' s shareholders and normal bodies have not been divested

of their powers. Certainly, this is true where there is a straightforward rejuvenation measure involving public bodies or companies governed by private law where the members' right to the capital and to decision-making power in the company is in question.

31 It follows that, in the absence of a derogation provided for by Community law, Article 25(1) of the Second Directive must be interpreted as precluding the Member States from maintaining in force rules incompatible with the principle set forth in that article, even if those rules cover only exceptional situations. To recognize the existence of a general reservation covering exceptional situations, outside the specific conditions laid down in the provisions of the Treaty and the Second Directive, would, moreover, be liable to impair the binding nature and uniform application of Community law (see, to this effect, the judgment in Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, paragraph 26).

32 As for the idea that rules comparable to those set out in Law No 1386/1983 might qualify under the derogation provided for in Article 41(1), it should be observed that that provision pursues a precise, well-defined social-policy aim, namely to encourage private individuals to hold shares. Like the exceptions provided for in Article 19(3) and Article 23(2) of the Second Directive, it is intended solely to encourage, in an objective and concrete manner, persons, such as employees, who generally do not have the means necessary to do so under the normal conditions of company law in the Member States, to participate in the capital of undertakings.

33 Consequently, a national rule cannot take advantage of that derogation unless its practical application helps to achieve the objective of Article 41(1) of the Second Directive.

34 In that connection, it should be made clear that that condition is not fulfilled merely because rules, such as those contained in Law No 1386/1983, provide for the possibility, as one of the available means of achieving their objective, of the public restructuring body' s transferring shares to employees or to individuals. Such a possibility is merely hypothetical and ancillary.

35 It should further be made clear, as stated by the Advocate General in paragraph 5 of his Opinion, that the reference in Article 41(1) of the Second Directive to other groups of persons refers to shareholding by private individuals and is not concerned with the transfer of shares to credit institutions or to public-law bodies.

36 Consequently, the answer to the national court' s second question must be that Article 25 in conjunction with Article 41(1) of the Second Directive must be interpreted as meaning that they preclude national rules which, in order to ensure the survival and continued operation of undertakings which are of particular economic and social importance for society as a whole and are in exceptional circumstances by reason of their excessive debt burden, provide for the adoption by administrative act of a decision to increase the company capital, without prejudice to the right of pre-emption of the original shareholders when the new shares are issued.

37 In view of the answers set out above there is no need to consider the national court' s third question or the part of the first question which is concerned with the direct effect of Article 42 of the Second Directive.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment

TREATY	European Economic Community
PUBREF	European Court reports 1991 Page I-02691
DOC	1991/05/30
LODGED	1990/01/22
JURCIT	31977L0091-A25 : N 1 12 31977L0091-A42 : N 1 12 15 37 31977L0091-A41P1 : N 1 12 14 21 24 32 - 36 31977L0091-A25P1 : N 14 17 - 36 61981J0008 : N 17 31977L0091-A25P2 : N 20 31977L0091-A09P1 : N 21 31977L0091-A19P1LA : N 21 31977L0091-A19P1LB : N 21 11957E054-P3LG : N 25 11957E058-L2 : N 25 31977L0091-A19P2 : N 27 31977L0091-A19P3 : N 27 32 31977L0091-A40P2 : N 27 31977L0091-A41P2 : N 27 31977L0091-A43P2 : N 27 31977L0091-A17P1 : N 28 61984J0222 : N 31 31977L0091-A23P2 : N 32
CONCERNS	Interprets 31977L0091 -A25 Interprets 31977L0091 -A25P1 Interprets 31977L0091 -A41P1
SUB	Freedom of establishment and services ; Right of establishment
AUTLANG	Greek
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OBSERV	Greece ; Commission ; Member States ; Institutions
NATIONA	Greece
NATCOUR	** AFFAIRE 20/1990 ** ; *A9* Symvoulio tis Epikrateias, Tmima 4, apofasis tis 25/05/1989 (3313/1989) ; - Dioikitiki Dikaiosyni 1990 p.361-375 ; *P1* Symvoulio tis Epikrateias, Tmima 4, synedriasis tis 06/10/1992 (803/1992) ; *A9* Symvoulio tis Epikrateias, Tmima 4, apofasis tis 24/10/1989 (3312/1989) ; - To koinotiko dikaio stin elliniki nomologia. Syllogi apofaseon 1981-1990 (Ed. Sakkoulas - Athina/Komotini) 1994 p.143-157 ; - Armenopoulos 1989 p.1018-1026 ; - Elliniki Epitheorisi Evropaïkou Dikaiou 1990 p.500-516 ; - Epitheorisis Dimosiou Dikaiou kai Dioikitikou Dikaiou 1990 p.37-51 ; - Epitheorisis Ergatikou Dikaiou 1990 p.33-35 ; - Evropaïko Vima 1990 p.122-128 ; - Nomiko Vima 1990 p.509-514 ; - Dioikitiki Dikaiosyni 1991 p.237-250 ; - The Relationship between European Community Law and National Law: The Cases 1994 p.583-588 ; - Kalavros, G.E.: Evropaïko Vima 1990

p.128-131 ; - N.F.: Nomiko Vima 1990 p.514-515 ; *P1* Symvoulio tis Epikrateias, Tmima 4, synedriasis tis 06/10/1992 (802/1992)

NOTES Bouckaert, Jan: Het principe van de bevoegdheid van de algemene vergadering tot kapitaalverhoging, Tijdschrift voor rechtspersoon en vennootschap 1991 p.413-416 ; Soufleros, E.: Epitheorisis tou Emporikou Dikaiou 1991 p.735-740 ; Douvlis, Vasilis A.: Elliniki Dikaiosyni 1991 p.1606-1623 ; Bartman, S.M.: Aandeelhouders moeten beslissen over kapitaalverhoging, Euridica 1991 no 6 p.9-10 ; Tridimas, Takis: Direct Effect and the Second Company Law Directive, European Law Review 1992 p.158-163 ; Samara-Krispis, Anastasia ; Steindorff, Ernst: Common Market Law Review 1992 p.615-624 ; Lasserre, Marc: La législation d'un Etat membre ne peut permettre qu'il puisse être décidé par acte administratif de l'augmentation de capital d'une société anonyme, même si celle-ci est dans une situation exceptionnelle, Revue des sociétés 1992 p.533-535 ; Tellis, Nikolaos: Unternehmenssanierung durch Zwangskapitalerhöhungen - das Beispiel Griechenlands aus europarechtlicher Sicht, Europäische Zeitschrift für Wirtschaftsrecht 1992 p.657-663 ; Pellisé, Cristina: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1992 p.268-270 (PM) ; Schutte-Veenstra, J.N.: S.E.W. ; Sociaal-economische wetgeving 1993 p.478-485 ; Tridimas, Takis: International and Comparative Law Quarterly 1993 p.726-728 ; Soufleros, Ilias Evr.: I ypochreotiki afxisi tou metochikou kefalaiou os meso exygiansis pistotikon idrymaton kai to arthro 25 par. 1 tis defteris etairikis odigias (odigia 77/91/EOK) - Symvoli stin dierevnisi tis ektasis efarmogis tis nomologias tou DEK gia tis ellinikes provlimatikes epicheiriseis stin periptosi tis exygiansis trapezikon anonymon etairion, Elliniki Epitheorisi Evropaïkou Dikaiou 1994 p.289-338 ; Psychomanis, Spyros D.: I nomologia tou DEK gia tin "anagkastiki" afxisi metochikou kefalaiou A.E. sta plaisia tis nomothesias gia tin exygiansi epicheiriseon, Episkopisi Emporikou Dikaiou 1996 p.57-65

PROCEDU Reference for a preliminary ruling

ADVGEN Tesauro

JUDGRAP Kapteyn

DATES of document: 30/05/1991
of application: 22/01/1990

Judgment of the Court of 19 November 1996

Siemens AG v Henry Nold. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Company law - Increase in capital - Consideration in kind - Shareholders' right of pre-emption - Withdrawal. Case C-42/95.

Freedom of movement for persons ° Freedom of establishment ° Companies ° Directive 77/91 ° Change in the capital of a public limited company ° Shareholders' right of pre-emption provided for in the event of an increase in capital by contributions in cash ° National legislation granting a right of pre-emption in the event of an increase in capital by contributions in kind ° Permissibility

(Council Directive 77/91, Art. 29(1) and (4))

The Second Council Directive (77/91/EEC) on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, in particular Article 29(1) and (4), does not preclude a Member State' s domestic law from granting a right of pre-emption to shareholders in the event of an increase in capital by consideration in kind and from subjecting the legality of a decision withdrawing that right of pre-emption to a substantive review which secures a higher level of protection for shareholders than that required by Article 29(4) of the directive in the case of contributions in cash.

The fact that that provision does not refer to increases in capital by consideration in kind does not mean that the conclusion can be drawn that the Community legislator elected to restrict the shareholders' right of pre-emption to increases in capital by consideration in cash, thereby precluding Member States from extending it also to increases in capital by consideration in kind. On the contrary, since the Second Directive merely prescribes a right of pre-emption in the event of increases in capital by consideration in cash, whilst refraining from laying down rules on the complex situation ° unknown in most Member States ° where the right of pre -emption is exercised in the event of increases in capital by consideration in kind, it left Member States at liberty to provide or not to provide for a right of pre-emption in the latter case. In addition, a national rule extending the principle that shareholders should have a right of pre-emption to increases in capital by consideration in kind, while providing for the possibility of restricting or withdrawing that right in certain circumstances, is consistent with one of the aims of the Second Directive, namely that of ensuring more effective protection for shareholders.

In Case C-42/95,

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

Siemens AG

and

Henry Nold,

on the interpretation of the Second Council Directive (77/91/EEC) of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1), in particular Article 29(1) and (4) thereof,

THE COURT,

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

Advocate General: G. Tesauro,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

° Siemens AG, by Oliver C. Braendel, Rechtsanwalt, Karlsruhe-Durlach,

° Mr Nold, by Hans Norbert Goetz, Rechtsanwalt, Karlsruhe,

° the Italian Government, by Professor Umberto Leanza, Head of the Department for Contentious Diplomatic Affairs of the Ministry of Foreign Affairs, acting as Agent, assisted by Ivo M. Braguglia, Avvocato dello Stato,

° the Finnish Government, by Holger Rotkirch, Ambassador, Head of the Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agent,

° the Commission of the European Communities, by Antonio Caeiro and Juergen Grunwald, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Siemens AG, Mr Nold and the Commission at the hearing on 2 July 1996,

after hearing the Opinion of the Advocate General at the sitting on 19 September 1996,

gives the following

Judgment

1 By order of 30 January 1995, received at the Court on 23 February 1995, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of the Second Council Directive (77/91/EEC) of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1; "the Second Directive"), in particular Article 29(1) and (4).

2 The question was raised in proceedings between Siemens AG ("Siemens"), a company incorporated under the laws of Germany, and one of its shareholders, Mr Nold, who seeks to have set aside a resolution of Siemens' general meeting authorizing the management board to carry out an increase in capital by issuing ordinary shares up to a specified ceiling in return for consideration in cash or in kind. The increase in capital was purportedly intended, inter alia, to enable shares to be offered to employees and holdings to be acquired in other companies. By its resolution giving authority to the management board, the general meeting withdrew the shareholders' right of pre-emption.

3 The order for reference states that under German company law any shareholder who so requests is entitled to be allocated some of the new shares in proportion to the capital represented by his shares in the event of an increase in capital for consideration either in cash or in kind. That right of pre-emption may not be withdrawn by the general meeting unless ° among a number of other

conditions ° the management board has presented a written report setting out the reasons for withdrawing the right of pre-emption and justifying the proposed issue price.

4 In addition, the Bundesgerichtshof has formulated case-law, which, through the imposition of supplementary conditions, subjects resolutions of the general meeting providing for the withdrawal of the shareholders' right of preemption to substantive review.

5 Accordingly, in a judgment of 13 March 1978 (BGHZ 71, 40), the Bundesgerichtshof held that the shareholders' right of pre-emption could be withdrawn only if, having regard to the resulting consequences for shareholders from whom it is withdrawn, such a measure is justified on objective grounds in the company' s interest. Reviewing that objective condition of validity entails considering the respective interests of the company and the shareholders and whether the means are proportionate to the intended aim.

6 Furthermore, in a judgment of 19 April 1982 (BGHZ 83, 319), which was concerned with an increase in capital within the limits of the authorized capital, the Bundesgerichtshof held that, if the general meeting resolves to withdraw the right of pre-emption in the actual resolution authorizing the increase, the aforementioned conditions must be publicized at the time of the resolution and be sufficiently certain as to enable them to be assessed by the general meeting.

7 In this case, the Bundesgerichtshof held that the resolution of Siemens' general meeting did not satisfy the conditions set out in its case-law in so far as it withdrew the shareholders' right of pre-emption in the event of the issue of ordinary shares in return for acquisitions of holdings in other companies, and therefore had to be regarded as unlawful.

8 The national court has, however, expressed doubts as to the compatibility of its case-law with Article 29 of the Second Directive, paragraph 1 of which provides for a right of pre-emption only where the capital is increased by consideration in cash, with the result that the rule set out in paragraph 4 may not apply to increases in capital by consideration in kind.

9 Paragraphs 1 and 4 of Article 29 provide as follows:

> "1. Whenever the capital is increased by consideration in cash, the shares must be offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares.
>
> ...
>
> 4. The right of pre-emption may not be restricted or withdrawn by the statutes or instrument of incorporation. This may, however, be done by decision of the general meeting. The administrative or management body shall be required to present to such a meeting a written report indicating the reasons for restriction or withdrawal of the right of pre-emption, and justifying the proposed issue price. The general meeting shall act in accordance with the rules for a quorum and a majority laid down in Article 40. Its decision shall be published in the manner laid down by the laws of each Member State, in accordance with Article 3 of Directive 68/151/EEC."

10 The Bundesgerichtshof takes the view that if that provision had to be interpreted as meaning that an increase in capital for consideration in kind is not subject to any condition designed to protect shareholders against depreciation of their shares, but is subject only to review to establish possible abuse, it would preclude the substantive review laid down in its case-law in so far as that review would subject resolutions of the general meeting providing for an increase in capital by consideration in kind and involving concurrent withdrawal of the shareholders' right of pre-emption to considerably stricter requirements than those necessitated by a mere review to establish possible abuse.

11 In those circumstances, the national court stayed proceedings and referred the following question to the Court for a preliminary ruling:

"Is it compatible with the Second Council Directive of 13 December 1976 (77/91/EEC; OJ 1977 L 26, p. 1), in particular Article 29(1) and (4) thereof, for the legality of a resolution of a general meeting of shareholders relating to an increase in capital in return for contributions in kind while at the same withdrawing the shareholders' right of pre-emption to be determined on the basis of a substantive review in accordance with the principles laid down in the Bundesgerichtshof' s judgments of 13 March 1978 (BGHZ 71, 40) and 19 April 1982 (BGHZ 83, 319)?"

12 By its question the national court essentially seeks to establish whether the Second Directive, in particular Article 29(1) and (4) thereof, precludes a Member State' s domestic law from granting a right of pre-emption to shareholders in the event of an increase in capital by consideration in kind and from subjecting the legality of a decision withdrawing that right of pre-emption to a substantive review of the kind evolved by the Bundesgerichtshof.

13 It should be borne in mind that the Second Directive seeks, pursuant to Article 54(3)(g) of the EC Treaty, to coordinate the safeguards which, for the protection of the interests of members and others, are required of companies within the meaning of the second paragraph of Article 58 of the Treaty with a view to making such safeguards equivalent. According to the second recital in the preamble thereto, the Second Directive is therefore intended to ensure minimum equivalent protection for both shareholders and creditors of public limited liability companies.

14 Article 29(1) of the Second Directive provides that whenever the capital is increased by consideration in cash, the shares must be offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares. Article 29(4) authorizes the general meeting in certain circumstances to decide to restrict or withdraw that right.

15 It appears from the very wording of that provision that it applies only to cases in which the capital is increased by consideration in cash.

16 The fact that that provision does not refer to increases in capital by consideration in kind does not mean that the conclusion can be drawn that the Community legislator elected to restrict the shareholders' right of pre-emption to increases in capital by consideration in cash, thereby precluding Member States from extending it also to increases in capital by consideration in kind.

17 Contrary to the arguments put forward by Siemens, neither does that conclusion follow from the fact that Article 27 of the Second Directive, which is among the provisions on increases in capital by consideration other than in cash, does not introduce a right of pre-emption for shareholders.

18 On the contrary, since the Second Directive merely prescribes a right of pre-emption in the event of increases in capital by consideration in cash, whilst refraining from laying down rules on the complex situation ° unknown in most Member States ° where the right of pre-emption is exercised in the event of increases in capital by consideration in kind, it left Member States at liberty to provide or not to provide for a right of pre-emption in the latter case.

19 In addition, a national rule extending the principle that shareholders should have a right of pre-emption to increases in capital by consideration in kind, while providing for the possibility of restricting or withdrawing that right in certain circumstances, is consistent with one of the aims of the Second Directive, namely that of ensuring more effective protection for shareholders. Indeed, such a rule enables shareholders to avoid the fraction of the capital represented by their shareholdings from being diluted also in such an event.

20 According to Siemens, however, a substantive review of decisions of the general meeting withdrawing the right of pre-emption on the occasion of an increase in capital by consideration in kind, such as the review laid down by the Bundesgerichtshof' s case-law, is not consistent with the aims of the Second Directive. It argues that that case-law protects the right of pre-emption disproportionately

in so far as it makes it possible for minority shareholders to challenge decisions of the general meeting in order to block increases in capital to the detriment of the company and its creditors.

21 It must be held in this regard that a substantive review, such as the one at issue, which ensures a high degree of protection for shareholders, does not run counter to the aims of the Second Directive, even if it might give rise to delays in carrying out increases in capital. Moreover, it is for the national courts to utilize such remedies as are available to them under their domestic law in order to penalize delaying or manifestly unfounded actions, whilst having due regard to the aims of the directive.

22 In the light of the foregoing considerations, the answer to be given to the national court is that the Second Directive, in particular Article 29(1) and (4) thereof, does not preclude a Member State' s domestic law from granting a right of pre-emption to shareholders in the event of an increase in capital by consideration in kind and from subjecting the legality of a decision withdrawing that right of pre-emption to a substantive review of the kind laid down by the Bundesgerichtshof.

Costs

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

On those grounds,

THE COURT,

in answer to the question referred to it by the Bundesgerichtshof, by order of 30 January 1995, hereby rules:

The Second Council Directive (77/91/EEC) of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, in particular Article 29(1) and (4) thereof, does not preclude a Member State' s domestic law from granting a right of pre-emption to shareholders in the event of an increase in capital by consideration in kind and from subjecting the legality of a decision withdrawing that right of pre-emption to a substantive review of the kind laid down by the Bundesgerichtshof.

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PROCEDU Reference for a preliminary ruling

ADVGEN Tesauro

JUDGRAP Kapteyn

DATES of document: 19/11/1996
of application: 23/02/1995

Judgment of the Court of 12 May 1998

Alexandros Kefalas and Others v Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE). Reference for a preliminary ruling: Efeteio Athina - Greece. Company law - Public limited liability company in financial difficulties - Increase in the capital of the company by administrative decision - Abusive exercise of a right arising from a provision of Community law. Case C-367/96.

1 Community law - Abusive exercise of a right arising from a provision of Community law - National rule prohibiting the abuse of rights - Application by national courts

2 Freedom of movement for persons - Freedom of establishment - Companies - Directive 77/91 - Alteration of the capital of a public limited liability company - National rules providing for an increase by administrative decision of the capital of a public limited liability company in financial difficulties - Frustration of the exercise of rights arising from the directive by recourse to a national rule prohibiting the abuse of rights

(Council Directive 77/91, Arts 25(1) and 29(1))

1 Community law cannot be relied on for abusive or fraudulent ends. Consequently, Community law does not preclude the application by national courts of a provision of national law in order to assess whether a right arising from a provision of Community law is being exercised abusively. However, the application of such a national rule must not prejudice the full effect and uniform application of Community law in the Member States. In particular, it is not open to national courts, when assessing the exercise of a right arising from a provision of Community law, to alter the scope of that provision or to compromise the objectives pursued by it.

2 A shareholder relying on Article 25(1) of the Second Directive 77/91 on company law cannot be deemed to be abusing the right conferred on him by that provision merely because the increase in capital by administrative decision which he contests resolved the financial difficulties threatening the existence of the company concerned and clearly enured to his economic benefit, or because he did not exercise his preferential right under Article 29(1) of that directive to acquire new shares issued on the increase of capital at issue.

First, the decision-making power of the general meeting provided for in Article 25(1) applies even where the company is experiencing serious financial difficulties. Second, by exercising his preferential right, the shareholder would have shown his willingness to assist in the implementation of the decision to increase the capital without the approval of the general meeting, whereas he is in fact contesting that very decision on the basis of Article 25(1) of the Second Directive.

In Case C-367/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Efetio Athinon for a preliminary ruling in the proceedings pending before that court between

Alexandros Kefalas and Others

and

Elliniko Dimosio (Greek State),

Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (OAE),

intervener: Athinaiki Khartopiia AE and Others,

on the interpretation of Article 25 of the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others,

are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1), and on the abusive exercise of a right arising from a provision of Community law,

THE COURT,

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

Advocate General: G. Tesauro,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Kefalas and others, by A. Tegopoulos and D. Livieratos, of the Athens Bar,

- the Greek Government, by M. Stathopoulos, of the Athens Bar, and V. Kontolaimos, Deputy Legal Adviser in the State Legal Department, acting as Agent,

- Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (OAE), by K. Kerameos and I. Soufleros, of the Athens Bar,

- Athinaiki Khartopiia AE and others, by S. Felios and M. Manolas, of the Athens Bar,

- the Commission of the European Communities, by D. Gouloussis, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Kefalas and others, represented by A. Tegopoulos and D. Livieratos, of the Greek Government, represented by M. Stathopoulos, V. Kontolaimos and P. Mylonopoulos, Legal Assistant in the Department for Community Matters of the Ministry of Foreign Affairs, acting as Agent, of Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (OAE), represented by K. Kerameos and I. Soufleros, of Athinaiki Khartopiia AE and others, represented by S. Felios and M. Manolas, and of the Commission, represented by D. Gouloussis, at the hearing on 18 November 1997,

after hearing the Opinion of the Advocate General at the sitting on 4 February 1998,

gives the following

Judgment

1 By judgment of 6 June 1996, received at the Court on 21 November 1996, the Efetio (Court of Appeal), Athens, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 25 of the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1), and on the abusive exercise of a right arising from a provision of Community law.

2 Those questions were raised in proceedings between, on the one hand, Mr Kefalas and others, shareholders in the public limited liability company Athinaiki Khartopiia AE (`Khartopiia'), and, on the other hand, the Greek State and Organismos Ikonomikis Anasinkrotisis Epikhiriseon

AE (Organisation for the Restructuring of Undertakings, hereinafter `the OAE'), in which the plaintiffs are contesting the validity of the increase in the capital of Khartopiia effected under the scheme provided for by Greek Law No 1386/1983 of 5 August 1983 (Official Journal of the Hellenic Republic, 107, of 8 August 1983, p. 14), which was applied to Khartopiia by decision of the Minister for the National Economy of 30 March 1984.

3 The OAE is a public body set up by Law No 1386/1983. Its legal form is that of a public limited liability company and it acts in the public interest under the control of the State. According to Article 2(2) of that Law, the object of the OAE is to contribute to the economic and social development of the country by means of the financial reorganisation of undertakings, the importation and application of foreign know-how, the development of national know-how and the formation and operation of nationalised and mixed-investment undertakings.

4 Article 2(3) of Law No 1386/1983 lists the powers conferred on the OAE for the purposes of attaining those objectives. These include the power to assume the administration and day-to-day management of undertakings undergoing reorganisation or nationalised undertakings, participate in the capital of undertakings, grant, issue or take out certain loans, acquire bonds and transfer shares, particularly to workers or to organisations representing them, to local authorities or to other legal persons constituted under public law, charitable institutions, social organisations or individuals.

5 According to Article 5(1) of Law No 1386/1983, the Minister for the National Economy may decide to apply the scheme set up by that law to undertakings in serious financial difficulties.

6 Article 7 of Law No 1386/1983 provides that the competent Minister may decide to transfer to the OAE the administration of an undertaking subject to the scheme established by that law, to reschedule its debts in such a way as to ensure its viability or to take steps to place it in liquidation.

7 Article 8 of Law No 1386/1983 contains provisions relating to the transfer of the administration of the undertaking to the OAE. Article 8(1), as amended by Law No 1472/1984 (Official Journal of the Hellenic Republic A, 112, of 6 August 1984, p. 1273), lays down the detailed rules governing such transfers and regulates the relationship between the persons appointed by the OAE to administer the undertaking and its organs. Thus it provides that the powers of the administrative organs of the undertaking are to cease upon publication of the ministerial decision placing the undertaking within the scheme established by that law, and that the general meeting of the company is to subsist but that it may not remove members of the board of directors who have been appointed by the OAE.

8 Article 8(8) of Law No 1386/1983 provides that the OAE may decide, in the course of its provisional administration of the company concerned, to increase the capital of that company by way of derogation from the legislation in force relating to public limited liability companies. The increase must be approved by the competent minister. The former shareholders retain their preferential right and may exercise it within a period prescribed in the ministerial decision approving the increase.

9 Following the application to Khartopiia of the scheme provided for by Law No 1386/1983, the OAE took over the management of that company and decided on 28 May 1986 to increase its capital by DR 940 million. That increase was approved, in accordance with Article 8(8) of Law No 1386/1983, by Decision No 153 of 6 June 1986 of the Minister for Industry, Research and Technology.

10 That decision shows that the former shareholders retained an unlimited preferential right to acquire the new shares which was to be exercised by them within one month from publication of the decision in the Official Journal of the Hellenic Republic. The plaintiffs in the main proceedings did not avail themselves of that right.

11 In the plaintiffs' view, the increase in capital decided upon by the OAE is contrary to Article

25(1) of the Second Directive, which provides that `Any increase in capital must be decided upon by the general meeting'. Consequently, they brought an action before the Polimeles Protodikio (Court of First Instance), Athens, which dismissed their application.

12 The plaintiffs in the main proceedings therefore appealed against that judgment to the Efetio Athinon. The Greek State considered that the plaintiffs' application for a declaration of invalidity was abusive, and raised an objection of abuse of rights based on Article 281 of the Civil Code, which provides that `the exercise of a right is prohibited where it manifestly exceeds the bounds of good faith, morality or the economic or social purpose of that right'.

13 In its judgment making the reference, the national court considers that Article 281 of the Civil Code may be applied in order to preclude the exercise of rights arising from provisions of Community law where such exercise would be abusive. In the present case, the national court considers that to allow the plaintiffs' claim under Article 25(1) of the Second Directive for a declaration that the OAE's decision authorising an increase in capital was invalid would manifestly exceed the bounds of good faith, morality and the economic or social purpose of the right.

14 The national court based its conclusion in that regard on various findings of fact.

15 First, at the time when it was made subject to the scheme provided for by Law No 1386/1983, Khartopiia was heavily indebted to banks and other creditors, it had an acute liquidity problem and it no longer possessed its own capital resources, so that its assets were no longer sufficient to cover its liabilities and its shares were worthless.

16 In addition, the increase in capital effected by the OAE and the subsequent conversion of debt into equity led to the financial recovery of Khartopiia. The economic value of the shareholders' equity was secured, the risk of job losses for thousands of workers was averted and trading with numerous suppliers could continue, all with beneficial effects on the national economy. If, by contrast, the increase in capital had not been effected, Khartopiia would have been declared insolvent and its assets would have been liquidated at the request of the creditors, with the result that all the company's assets would have been lost to the detriment of the shareholders, the workers would have been laid off and the national economy would have been deprived of an important undertaking.

17 Lastly, when the capital was increased, the shareholders were given a preferential right to acquire shares, but declined to avail themselves of that right.

18 The national court decided, with reference to the judgment in Case C-441/93 Pafitis and Others v TKE and Others [1996] ECR I-1347, paragraphs 67 to 70, to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

`1. Can the national court apply a provision of national law (in this case Article 281 of the Greek Civil Code) in order to assess whether a right granted by the Community provisions at issue is being exercised abusively by the party possessing it, or are there other Community law principles, and if so which, to be found in legislation or settled case-law, on which the national court may, if need be, base itself?

2. If the reply to Question 1 is in the negative, if, that is, the Court of Justice reserves such competence for itself, for reasons relating, for instance, to the uniform application of Community provisions, may the specific circumstances as formulated by the defendant-respondent State as an objection, which constituted the issue of proof in judgment No 5943/1994 of this court, and which were set out succinctly in the previous paragraph of this judgment, or certain of them and if so which, prevent an action founded on infringement of Article 25(1) of the Second Council Directive 77/91/EEC from succeeding?'

19 By those questions, which it is appropriate to examine together, the referring court essentially

seeks to ascertain, first, whether a national court may apply a provision of domestic law in order to assess whether the exercise of a right arising from a provision of Community law is abusive, or alternatively whether that assessment must be made on the basis of Community law and, second, whether, in the light of the facts of the case as established in the main proceedings, the right arising from Article 25(1) of the Second Directive must be regarded as having been exercised in an abusive manner.

20 According to the case-law of the Court, Community law cannot be relied on for abusive or fraudulent ends (see, in particular, regarding freedom to supply services, Case 33/74 Van Binsbergen v Bedrijfsvereniging Metaalnijverheid [1974] ECR 1299, paragraph 13, and Case C-23/93 TV 10 v Commissariaat voor de Media [1994] ECR I-4795, paragraph 21; regarding the free movement of goods, Case 229/83 Leclerc and Others v `Au Blé Vert' and Others [1985] ECR 1, paragraph 27; 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 social security, Case C-206/94 Brennet v Paletta [1996] ECR I-2357, paragraph 24).

21 Consequently, the application by national courts of domestic rules such as Article 281 of the Greek Civil Code for the purposes of assessing whether the exercise of a right arising from a provision of Community law is abusive cannot be regarded as contrary to the Community legal order.

22 Although the Court cannot substitute its assessment for that of a national court, which is the only forum competent to establish the facts of the case before it, it must be pointed out that the application of such a national rule must not prejudice the full effect and uniform application of Community law in the Member States (Case C-441/93 Pafitis and Others, cited above, paragraph 68). In particular, it is not open to national courts, when assessing the exercise of a right arising from a provision of Community law, to alter the scope of that provision or to compromise the objectives pursued by it.

23 In the present case, the uniform application and full effect of Community law would be prejudiced if a shareholder relying on Article 25(1) of the Second Directive were deemed to be abusing his right on the ground that the increase in capital contested by him resolved the financial difficulties threatening the existence of the company concerned and clearly enured to his economic benefit.

24 It is settled case-law that the decision-making power of the general meeting provided for in Article 25(1) applies even where the company in question is experiencing serious financial difficulties (see, in particular, Joined Cases C-19/90 and C-20/90 Karella and Karellas [1991] ECR I-2691, paragraph 28, and Case C-381/89 Sindesmos Melon tis Eleftheras Evangelikis Ekklisias and Others [1992] ECR I-2111, paragraph 35). Since an increase in capital is, by its very nature, designed to improve the economic situation of the company, to characterise an action based on Article 25(1) as abusive on the ground mentioned in paragraph 23 of this judgment would be tantamount to a declaration that the mere exercise of the right arising from that provision is improper.

25 It would mean that, in the event that the company found itself in a financial crisis, a shareholder could never rely on Article 25(1) of the Second Directive. Consequently, the scope of that provision would be altered, whereas, according to the case-law cited above, the provision must remain applicable in such a situation.

26 Similarly, the uniform application and full effect of Community law would be prejudiced if a shareholder relying on Article 25(1) of the Second Directive were deemed to be abusing the right conferred on him by that provision because he did not exercise his preferential right under Article 29(1) of the Second Directive to acquire new shares issued on the increase of capital at issue.

27 By exercising his preferential right, the shareholder would have shown his willingness to assist

in the implementation of the decision to increase the capital without the approval of the general meeting, whereas he is in fact contesting that very decision on the basis of Article 25(1) of the Second Directive. Consequently, to require a shareholder, as a condition of his being able to rely on that provision, to participate in an increase in capital adopted without the approval of the general meeting would be to alter the scope of Article 25(1).

28 However, Community law does not preclude a national court, on the basis of sufficient telling evidence, from examining whether, by bringing an action under Article 25(1) of the Second Directive for a declaration that an increase in capital is invalid, a shareholder is seeking to derive, to the detriment of the company, an improper advantage, manifestly contrary to the objective of that provision, which is to ensure, for the benefit of shareholders, that a decision increasing the capital of the company and, consequently, affecting the share of equity held by them, is not taken without their participation in the exercise of the decision-making powers of the company.

29 In the light of the foregoing, the reply to the questions referred must be that Community law does not preclude national courts from applying a provision of national law in order to assess whether a right arising from a provision of Community law is being exercised abusively. However, where such an assessment is made, a shareholder relying on Article 25(1) of the Second Directive cannot be deemed to be abusing the right arising from that provision merely because the increase in capital contested by him has resolved the financial difficulties threatening the existence of the company concerned and has clearly enured to his economic benefit, or because he has not exercised his preferential right under Article 29(1) of the Second Directive to acquire new shares issued on the increase in capital at issue.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the Efetio Athinon by judgment of 6 June 1996, hereby rules:

Community law does not preclude national courts from applying a provision of national law in order to assess whether a right arising from a provision of Community law is being exercised abusively. However, where such an assessment is made, a shareholder relying on Article 25(1) of the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, cannot be deemed to be abusing the right arising from that provision merely because the increase in capital contested by him has resolved the financial difficulties threatening the existence of the company concerned and has clearly enured to his economic benefit, or because he has not exercised his preferential right under Article 29(1) of that directive to acquire new shares issued on the increase in capital at issue.

DOCNUM	61996J0367
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1998 Page I-02843
DOC	1998/05/12
LODGED	1996/11/21
JURCIT	31977L0091-A25 : N 1 31977L0091-A25P1 : N 18 - 19 23 - 29 31977L0091-A29P1 : N 26 29 61974J0033 : N 20 61993J0023 : N 20 61983J0229 : N 20 61986J0039 : N 20 61992J0008 : N 20 61994J0206 : N 20 61993J0441 : N 22 61990J0019 : N 24 61989J0381 : N 24
CONCERNS	Interprets 31977L0091 -A25P1 Interprets 31977L0091 -A29P1
SUB	Freedom of establishment and services ; Right of establishment
AUTLANG	Greek
OBSERV	Greece ; Commission ; Member States ; Institutions
NATIONA	Greece
NATCOUR	*A8* Efeteio Athinon, Tmima 2, apofasis tis 09/05/1990 (5308/1990) ; - Elliniki Dikaiosyni 1994 p.466-467 (résumé) ; - Cahiers de droit européen 1999 p.626-628 (résumé) ; *A9* Efeteio Athinon, Tmima 1, apofasis tis 06/06/1996 (5778/1996) ; - Dikaio Epicheiriseon & Etairion 1996 p.1170-1172 ; - Cahiers de droit européen 1999 p.626-628 (résumé) ; - Soufleros, Ilias Evr.: Dikaio Epicheiriseon & Etairion 1996 p.1133-1142 ; *I1* Efeteio Athinon, Tmima 1, apofasis tis 22/04/1999 (3249/1999) ; *P1* Efeteio Athinon, Tmima 1, apofasis tis 09/05/2000 (3841/2000) ; - Epitheorisis tou Emporikou Dikaiou 2000 p.511-516 ; - Soufleros, Ilias Evr.: Epitheorisis tou Emporikou Dikaiou 2000 p.607-638 ; *P2* Areios Pagos, Olomeleia, apofasis tis 10/07/2001 (13/2001) ; - Epitheorisis tou Emporikou Dikaiou 2001 p.695-698 ; - Soufleros, Ilias Evr.: Epitheorisis tou Emporikou Dikaiou 2001 p.698-712
NOTES	Boutard-Labarde, Marie-Chantal: Droit communautaire, La Semaine juridique - édition générale 1998 I 189 ; Beeser, Simone: Missbräuchliche Ausübung von Gemeinschaftsrecht kann nach nationalem Recht überprüft werden, European

Law Reporter 1998 p.290-291 ; Lagondet, F.: Europe 1998 Juillet Comm. no 225 p.9 + Comm. no 247 p.16 ; Mok, M.R.: TVVS ondernemingsrecht en rechtspersonen 1998 p.213 ; Soufleros, Ilias Evr.: I katachrisi dikaiomatos sto koinotiko dikaio, Epitheorisis tou Emporikou Dikaiou 1998 p.412-421 ; De Kluiver, H.J.: Misbruik, goede trouw en Europees privaatrecht - Een vennootschapsrechtelijke illustratie en het recente Kefalas-arrest, Weekblad voor privaatrecht, notariaat en registratie 1998 p.535-536 ; Pampoukis, Konstantinos G.: Enstasi katachristikis askiseos tou dikaiomatos pou aporreei apo to arthro 25 º 1 ed. 1 tis defteris odigias, Episkopisi Emporikou Dikaiou 1998 p.389-391 ; Roth, Günter H.: Entscheidungen zum Wirtschaftsrecht 1998 p.907-908 ; Tserkezis, Giorgos: Armenopoulos 1998 p.1124-1125 ; Luby, Monique: Droit européen des affaires, Revue trimestrielle de droit commercial et de droit économique 1998 p.1000-1001 ; Dana-Démaret, Sabine: Peut-on commettre un abus de droit en demandant à une juridiction nationale d'assurer l'application et le respect d'une règle communautaire?, Revue des sociétés 1998 p.798-802 ; Triantafyllou, Dimitris: Common Market Law Review 1999 p.157-164 ; Karayannis, Vassilios: L'abus de droits découlant de l'ordre juridique communautaire, Cahiers de droit européen 1999 p.521-535 ; Schmidt-Kessel, Martin: Rechtsmißbrauch im Gemeinschaftsprivatrecht - Folgerungen aus den Rechtssachen Kefalas und Diamantis, Prinzipien des Privatrechts und Rechtsvereinheitlichung 2000 p.61-83 ; Ranieri, Filippo: Verbot des Rechtsmissbrauchs und Europäisches Gemeinschaftsprivatrecht, Zeitschrift für europäisches Privatrecht 2001 p.169-177

PROCEDU Reference for a preliminary ruling

ADVGEN Tesauro

JUDGRAP Kapteyn

DATES of document: 12/05/1998
of application: 21/11/1996

Judgment of the Court of 6 June 1996 Commission of the European Communities v Italian Republic. Dealing in transferable securities. Case C-101/94.

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Freedom of movement for persons ° Freedom of establishment ° Freedom to provide services ° Dealing in transferable securities ° Activity restricted by a Member State to companies or firms whose registered office is on its territory ° Not permitted

(EC Treaty, Arts 52 and 59)

Articles 52 and 59 of the Treaty preclude a Member State from restricting the activity of dealing in transferable securities (apart from by banks) to companies or firms whose registered office is on its territory, thus preventing dealers from other Member States who wish to exercise an activity on its territory from using certain forms of establishment, such as a branch or agency, so that they are obliged to incur additional costs compared with its own nationals, and making it altogether impossible for them to make use of their freedom to provide services.

By so doing the State applies a difference in treatment which is not objectively justified, since although the above requirement facilitates the supervision and control of operators in the market, it is neither the only means of nor an indispensable condition for, firstly, making sure that operators comply with its rules for pursuing the activity of dealer in transferable securities and, secondly, imposing effective sanctions on dealers who breach those rules. Nothing prevents the State from requiring dealers from other Member States to supply information and documents relating specifically to the activities of their secondary establishments on its territory, from making their activity subject to the provision of financial guarantees or from concluding cooperation agreements with the supervisory authorities of other Member States regarding supervision of markets and agents; furthermore, it cannot argue that it is not possible to compare the rules on access to the profession of securities dealer in the various Member States, in particular the rules on guarantees regarding companies' own funds, where its legislation expressly provides for the possibility of concluding such agreements and the different methods used by Member States to determine own funds requirements ensure equivalent protection overall.

In Case C-101/94,

Commission of the European Communities, represented by Antonino Abate, Principal Legal Adviser, and Ben Smulders, of its Legal Service, acting as Agents, assisted by Luca G. Radicati di Brozolo, of the Milan Bar, with an address for service at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Umberto Leanza, Head of the Department for Legal Affairs of the Ministry of Foreign Affairs, acting as Agent, assisted by Ivo Maria Braguglia, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adelaïde,

defendant,

APPLICATION for a declaration that, by restricting the activity of dealing in transferable securities (apart from by banks) to companies or firms whose registered office is in Italy, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EC Treaty,

THE COURT,

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

Advocate General: C.O. Lenz,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 16 January 1996,

after hearing the Opinion of the Advocate General at the sitting on 19 March 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 22 March 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by restricting the activity of dealing in transferable securities (apart from by banks) to companies or firms whose registered office (sede legale) is in Italy, the Italian Republic had failed to fulfil its obligations under Articles 52 and 59 of the EC Treaty.

2 Law No 1 of 2 January 1991, regulating the activity of dealing in securities and the organization of the securities market (Gazzetta Ufficiale della Repubblica Italiana No 3, 4 January 1991, p. 3, hereinafter "the Law"), applies in accordance with Article 1(1) thereof to the following activities, which it designates as "activities of dealing in transferable securities":

> "(a) dealing, for one' s own account or the account of others, or both for one' s own account and that of others, in transferable securities;

(b) investment and distribution of transferable securities with or without prior subscription or purchase at a fixed date, or acceptance of guarantees with respect to the issuer;

(c) management of assets by means of operations relating to transferable securities;

(d) collection of orders for the purchase or sale of transferable securities;

(e) giving advice in relation to transferable securities;

(f) soliciting savings from the public by actions of a promotional nature carried out elsewhere than at the registered office or principal administrative office of the issuer, investor or person implementing the investment...".

3 Under Article 2(1) of the Law, the profession of dealing in transferable securities may be carried on in Italy with respect to the public (apart from by banks) only by securities firms (società di intermediazione mobiliare, hereinafter "SIM") which have been authorized to do so by the Commissione Nazionale per le Società e la Borsa (National Commission for Companies and the Stock Exchange, hereinafter "Consob").

4 To obtain such authorization, the SIM must satisfy certain conditions relating inter alia to their legal form, the amount of their initial capital, and the probity of their managers and shareholders.

5 Article 3(2)(a) of the Law prescribes:

> "The [dealer in securities] must be constituted in the form of a limited company (società per azioni) or partnership limited by shares (società in accomandita per azioni), must include in

its company name the words 'società di intermediazione mobiliare' and have its registered office on Italian territory...".

6 The Commission notified the Italian authorities, by a formal letter of 20 December 1991, that certain provisions of the Law, in particular Article 3(2)(a), were contrary to the provisions of Articles 52 and 59 of the Treaty. In their reply of 6 February 1992 the Italian authorities rejected that view. The Commission issued a reasoned opinion on 19 October 1992, in which it claimed that, by restricting dealing in transferable securities to companies and firms which had their registered office in Italy and satisfied conditions which could not be fulfilled by dealers from other Member States, the Italian Republic had failed to fulfil its obligations under Articles 52 and 59 of the Treaty. The Italian authorities responded by letter of 8 January 1993, in which they maintained that the legislation was consistent with the Treaty.

7 In those circumstances the Commission brought the present action. As can be seen from the pre-litigation procedure and from the pleadings submitted to the Court, the application concerns essentially if not exclusively the provisions in Article 3(2)(a) of the Law.

The complaint of breach of Article 52 of the Treaty

8 The Commission submits that the obligation to carry on the activity of a dealer in transferable securities in the form of a company or firm whose registered office is in Italy is contrary to Article 52 of the Treaty. It argues that such a rule prevents dealers from other Member States from making use of certain forms of establishment, such as a branch or agency, and discriminates against them by obliging them to bear the expense of setting up a new company. It submits that such an obligation is not necessary for attaining the legitimate aims pursued by the Italian legislation. Thus it would be possible to provide for a procedure, such as an authorization or recognition procedure, for the purpose of ascertaining whether dealers from other Member States are subject in their Member State of origin to rules equivalent to those laid down by the Italian legislation.

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

10 Access to and the exercise of certain self-employed activities may thus be conditional on compliance with provisions laid down by law, regulation or administrative action justified by the general interest, such as rules relating to organization, qualifications, professional ethics, supervision and liability (judgments in Case 71/76 Thieffry v Conseil de l' Ordre des Avocats à la Cour de Paris [1977] ECR 765, paragraph 12, and Case C-55/94 Gebhard v Consiglio dell' Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, paragraph 35). Those provisions may stipulate in particular that the exercise of a specific activity is restricted to persons presenting certain guarantees and subject to particular rules or supervision.

11 Where access to or the exercise of a specific activity is subject to such conditions in the host Member State, a national of another Member State who wishes to exercise that activity must in principle comply with them (Gebhard, paragraph 36).

12 However, as the Court has already held, Article 52 of the Treaty, which embodies one of the fundamental principles of the Community, is intended inter alia to ensure, with respect to establishment, that all nationals of Member States who wish to establish themselves in another Member State, even if that establishment is only secondary, for the purpose of pursuing activities there as self-employed persons receive the same treatment as nationals of that State.

13 That article prohibits any discrimination against nationals of other Member States resulting from national legislation, regulations or practices (see to that effect the judgments in Case 270/83 Commission v France [1986] ECR 273, paragraphs 13 and 14, and Case C-168/91 Konstantinidis [1993]

ECR I-1191, paragraph 12). It prohibits in particular all national rules which are liable to place nationals of other Member States in a legal or factual situation which is less favourable than the situation, in the same circumstances, of a national of the Member State of establishment (Konstantinidis, paragraph 13).

14 The Italian Government does not deny that its legislation prevents dealers from other Member States from using certain forms of secondary establishment or that it causes them to incur additional costs which Italian dealers do not have to bear. It simply argues that that difference in treatment is objectively justified.

15 The Italian Government considers that it is not possible to compare the conditions laid down by the Italian legislation with those laid down by the other Member States, as the Commission suggests. It submits that that is the case in particular with guarantees regarding companies' own funds, which are determined by a method different from that used in the other Member States.

16 However, as the Commission observes, the Italian legislation itself admits the possibility of comparing the national and foreign rules. In particular, under Article 20(8) of the Law, Consob is empowered to conclude with the supervisory authorities of other countries agreements for the mutual recognition of regulated securities markets, and it is for Consob to satisfy itself that certain standards, including the rules for supervision of markets and dealers, have an effect "equivalent to that of the Italian rules in force".

17 Moreover, according to the Commission, which was not contradicted on this point, the different methods used by Member States to determine own funds requirements ensure equivalent protection overall, even if one method may prove more protective, case by case, than another.

18 The argument that it is not possible to compare the rules on access to the profession of securities dealer in the various Member States, in particular with regard to companies' own funds, must therefore be rejected.

19 The Italian Government also considers that dealers cannot be supervised and effectively sanctioned unless they have their principal establishment in Italy. It considers that only if the principal establishment, and in particular the registered office, is located on the national territory is it possible to have all the information available which is necessary for supervision and all the factors which ensure that sanctions are effective.

20 Such an argument cannot be accepted either. The Italian Government has not shown that the location of the dealer' s principal establishment on Italian territory is the only means of supervising and effectively sanctioning the dealer in question if he wishes to operate in Italy.

21 While the obligation to have the registered office in Italy facilitates the supervision and control of the operators in the market, such an obligation is not the only means of making sure that they comply with the rules for pursuing the activity of dealer in transferable securities laid down by the Italian legislature and of imposing effective sanctions on dealers who breach those rules.

22 As the Commission observes, it is possible to require dealers who wish to operate in Italy to agree to be subject to checks or to supply the Italian authorities with the necessary documents and information to ensure that they satisfy the conditions imposed by Italian law. In particular, they could be required to supply information and documents relating specifically to the activities of their secondary establishments in Italy.

23 With respect to the solvency of operators, activity in Italy can be made subject to the provision of financial guarantees on Italian territory to cover the operations carried out on that territory.

24 Furthermore, the Italian authorities might conclude cooperation agreements regarding supervision

of markets and agents, as is the case with non-member countries. Such a possibility is, moreover, as stated above, expressly provided for in Article 20(8) of the Law.

25 The Italian Government cannot rely on Article 56 of the EC Treaty, either, to argue that its legislation is consistent with Community law.

26 Even if the aims pursued by the Italian legislation may be regarded as aims of "public policy" within the meaning of those provisions, it follows a fortiori from what has been said above that the obligations at issue are not indispensable for achieving those aims and thus cannot be regarded as justified from the point of view of those provisions (see the judgment in Case C-3/88 Commission v Italy [1989] ECR 4035, paragraph 15).

27 Finally, the Italian Government cannot plead failure to respect the principle of reciprocity or rely on a possible infringement of the Treaty by another Member State to justify its own default (see the judgments in Case 232/78 Commission v France [1979] ECR 2729, paragraph 9, and Case 325/82 Commission v Germany [1984] ECR 777, paragraph 11).

28 Accordingly, the complaint of breach of Article 52 of the Treaty must be upheld.

The complaint of breach of Article 59 of the Treaty

29 The Commission submits that the obligation to pursue the activity of dealing in transferable securities in the form of a company or firm whose seat is in Italy is contrary to Article 59 of the Treaty, since it absolutely precludes the provision of services in Italy by dealers from other Member States. It considers that such an obligation is not indispensable or even necessary in any case for achieving the legitimate aims of investor protection and market stability pursued by the Italian legislation.

30 The Italian Government submits that, for the reasons stated in paragraphs 15 and 19 above, such an obligation is not merely necessary but also indispensable for achieving those aims.

31 The obligation for operators from other Member States to set up their principal establishment in Italy is the very negation of the freedom to provide services and, as can be seen from paragraphs 20 to 24 above, does not constitute a condition which is indispensable for attaining the aim pursued. It therefore infringes Article 59 of the Treaty (see the judgment in Case 205/84 Commission v Germany [1986] ECR 3755, paragraph 52).

32 Nor can the Italian Government rely on the provisions of Article 66 of the EC Treaty, for the same reasons as those stated at paragraph 26 above. It also cannot rely on failures by other Member States to fulfil their obligations to justify its own failure.

33 Accordingly, the complaint of breach of Article 59 of the Treaty must also be upheld.

34 In those circumstances, it must be held that, by restricting the activity of dealing in transferable securities (apart from by banks) to companies or firms whose registered office is in Italy, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the Treaty.

Costs

35 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Italian Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by restricting the activity of dealing in transferable securities (apart from by banks) to companies or firms whose registered office is in Italy, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EC Treaty;

2. Orders the Italian Republic to pay the costs.

DOCNUM	61994J0101
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1996 Page I-02691
DOC	1996/06/06
LODGED	1994/03/22
JURCIT	11992E052 : N 9 12 - 13 28 34 11992E056 : N 25 26 11992E059 : N 31 33 34 11992E066 : N 32 61976J0071-N12 : N 10 61994J0055-N35 : N 10 61994J0055-N36 : N 11 61983J0270-NB : N 13 61983J0270-N14 : N 13 61991J0168-N12 : N 13 61991J0168-N13 : N 13 61988J0003-N15 : N 26 61978J0232-N09 : N 27 61982J0325-N11 : N 27 61984J0205-N52 : N 31
CONCERNS	Failure concerning 11992E052 - Failure concerning 11992E059 -
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States

NATIONA	Italy
NOTES	X: Il Foro italiano 1996 IV Col.353 ; Schlesinger, Piero: Il decreto Eurosim, Il Corriere giuridico 1996 p.1291-1293 ; Klauer, Irene: St. Galler Europarechtsbriefe 1996 p.253-255 ; Dassesse, Marc: Les services financiers (banques et assurances), Journal des tribunaux / droit européen 1997 p.10-13 ; Dios, José María de: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1997 p.271-272 ; Luby, Monique: Journal du droit international 1997 p.561-563 ; Gavalda, Christian ; Parléani, Gilbert: La Semaine juridique - édition entreprise 1997 I 653 no 21 ; Caranta, Roberto: La cooperazione tra amministrazioni nazionali nell'ambito del mercato unico, Giurisprudenza italiana 1997 I Sez.I ; Bochicchio, Francesco: Adeguamento alle direttive comunitarie e ordine pubblico in materia di disciplina dei mercati mobiliari, Giurisprudenza commerciale 1999 II p.296-301
PROCEDU	Action for failure to fulfil obligations - successful
ADVGEN	Lenz
JUDGRAP	Puissochet
DATES	of document: 06/06/1996 of application: 22/03/1994

Judgment of the Court of 10 March 1992

Powell Duffryn plc v Wolfgang Petereit. Reference for a preliminary ruling: Oberlandesgericht Koblenz - Germany. Brussels Convention - Agreement conferring jurisdiction - Clause in the statutes of a company limited by shares. Case C-214/89.

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1. Convention on Jurisdiction and the Enforcement of Judgments - Prorogation of jurisdiction - Agreement conferring jurisdiction - Concept - Independent interpretation - Clause conferring jurisdiction contained in the statutes of a company limited by shares - Included - Validity as against shareholders - Conditions

(Convention of 27 September 1968, Art. 17, as amended by the 1978 Accession Convention)

2. Convention on Jurisdiction and the Enforcement of Judgments - Prorogation of jurisdiction - Agreement conferring jurisdiction - Scope - Disputes arising from a given legal relationship - Dispute between a company and its shareholders as such

(Convention of 27 September 1968, Art. 17, as amended by the 1978 Accession Convention)

1. The concept of "agreement conferring jurisdiction" in Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be regarded as an independent concept.

A clause contained in the statutes of a company limited by shares and adopted in accordance with the provisions of the applicable national law and those statutes themselves conferring jurisdiction on a court of a Contracting State to settle disputes between that company and its shareholders constitutes an agreement conferring jurisdiction.

The formal requirements laid down in Article 17 of the Convention must be considered to be complied with in regard to any shareholder, irrespective of how the shares were acquired, if the clause conferring jurisdiction is contained in the statutes of the company and those statutes are lodged in a place to which the shareholder may have access or are contained in a public register.

2. The requirement that a dispute arise in connection with a particular legal relationship, for the solution of which Article 17 of the Convention permits the assignment of jurisdiction by agreement, is satisfied if the clause conferring jurisdiction contained in the statutes of a company may be interpreted by the national court, which has exclusive competence in that regard, as referring to the disputes between the company and its shareholders as such.

In Case C-214/89,

REFERENCE to the Court pursuant to the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the Oberlandesgericht Koblenz for a preliminary ruling in the proceedings pending before that court between

Powell Duffryn plc

and

Wolfgang Petereit

on the interpretation of Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the 1978 Accession Convention,

THE COURT,

composed of: O. Due, President, Sir Gordon Slynn, R. Joliet, F.A. Schockweiler, F. Grévisse, and P.J.G. Kapteyn (Presidents of Chambers), G.F. Mancini, C.N. Kakouris, J.C. Moitinho de Almeida, G.C. Rodríguez Iglesias, M. Diez de Velasco, M. Zuleeg and J.L. Murray, Judges,

Advocate General: G. Tesauro,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Powell Duffryn plc, by Eckart Wilcke, Rechtsanwalt of Frankfurt am Main;

- Wolfgang Petereit, by Karl Otto Armbruester, Rechtsanwalt of Mainz;

- the German Government, by Professor Christof Boehmer, acting as Agent;

- the Commission of the European Communities, by Friedrich-Wilhelm Albrecht, Legal Adviser, acting as Agent, assisted by Wolf-Dietrich Krause-Ablass, Rechtsanwalt of Duesseldorf;

having regard to the Report for the Hearing,

after hearing the oral observations of Powell Duffryn plc, Wolfgang Petereit and the Commission, represented by Henri Etienne, Principal Legal Adviser, acting as Agent, assisted by Wolf-Dietrich Krause-Ablass, at the hearing on 15 October 1991,

after hearing the Opinion of the Advocate General at the sitting on 20 November 1991,

gives the following

Judgment

1 By order of 1 June 1989, which was received at the Court on 10 July 1989, the Oberlandesgericht (Higher Regional Court) Koblenz referred to the Court for a preliminary ruling pursuant to the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters a number of questions on the interpretation of Article 17 of that convention, as amended by the 1978 Accession Convention (Official Journal 1978 L 304, p. 1, hereinafter referred to as the "Brussels Convention").

2 The questions arose in proceedings between W. Petereit, acting as liquidator of the company IBH-Holding AG, in liquidation, and Powell Duffryn plc (hereinafter referred to as "Powell Duffryn"). It appears from the papers in the case that Powell Duffryn, a company under English law, had subscribed for registered shares in IBH-Holding AG (hereinafter referred to as "IBH-Holding"), a company limited by shares under German law, when the latter' s capital was increased in September 1979. On 28 July 1980 Powell Duffryn participated in the proceedings of a general meeting of IBH-Holding during which, by a show of hands, the shareholders adopted resolutions amending the statutes of IBH, in particular by inserting into them the following clause:

> "By subscribing for or acquiring shares or interim certificates the shareholder submits, with regard to all disputes between himself and the company or its organs, to the jurisdiction of the courts ordinarily competent to entertain suits concerning the company."

3 In 1981 and 1982 Powell Duffryn subscribed for further shares on successive increases in the capital of IBH-Holding and also received dividends. In 1983 IBH-Holding was put into liquidation and Mr Petereit, acting as liquidator, brought an action before the Landgericht Mainz claiming that Powell Duffryn had not fulfilled its obligations to IBH-Holding to make the cash payments

due in respect of the increases in capital. He also sought to recover dividends which he maintained had been wrongly paid to Powell Duffryn.

4 The Landgericht dismissed the plea of lack of jurisdiction raised by Powell Duffryn whereupon the latter appealed to the Oberlandesgericht Koblenz. That court considered that the dispute raised a question of interpretation of Article 17 of the Brussels Convention, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

> "1. Does the rule contained in the statutes of a company limited by shares on the basis of which the shareholder by subscribing for or acquiring shares submits, with regard to all disputes with the company or its organs, to the jurisdiction of the courts ordinarily competent to entertain suits concerning the company constitute an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention which is concluded between the shareholder and the company?

(Must this question be answered differently depending on whether the shareholder himself subscribes for shares on the occasion of an increase in the company' s capital or acquires existing shares?)

2. If Question (1) is answered in the affirmative:

(a) Does subscription for and acceptance of shares, by means of a written declaration of subscription, on the occasion of an increase in the capital of a company limited by shares comply with the requirement for writing laid down in the first paragraph of Article 17 of the Brussels Convention as regards a jurisdiction clause contained in the statutes of the company?

(b) Does the jurisdiction clause satisfy the requirement that the dispute must arise in connection with a particular legal relationship within the meaning of Article 17 of the Brussels Convention?

(c) Does the jurisdiction clause in the statutes also cover claims for payment arising out of a contract relating to the subscription of shares and claims for repayment of wrongly paid dividends?"

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.

The first question

6 Article 17 of the Brussels Convention provides that if the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court of a Contracting State is to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court is to have exclusive jurisdiction.

7 It is necessary to examine whether a clause conferring jurisdiction inserted in the statutes of a company limited by shares constitutes an agreement within the meaning of Article 17 between the company and its shareholders.

8 Powell Duffryn maintains that a clause conferring jurisdiction contained in the statutes of a company limited by shares cannot constitute an agreement because the statutes are normative by nature and thus the contents are not open to discussion by shareholders; shareholders even face the risk of clauses being introduced against their express wishes if such a possibility is provided for in the statutes or the applicable national law.

9 In contrast, Mr Petereit and the Commission argue, on the basis of German law and in particular the provisions of the German Aktiengesetz (Law on share companies), that the statutes are contractual by nature and therefore a clause conferring jurisdiction contained therein constitutes an agreement within the meaning of Article 17 of the Brussels Convention.

10 In that regard, it appears from a comparative examination of the different legal systems of the Contracting States that the characterization of the nature of the relationship between a company limited by shares and its shareholders is not always the same. In some legal systems the relationship is characterized as contractual and in others it is regarded as institutional, normative or sui generis.

11 The question therefore arises whether the concept of "agreement conferring jurisdiction" in Article 17 of the Brussels Convention must be given an independent interpretation or be construed as referring to the national law of one or other of the States concerned.

12 It must be emphasized that, as the Court held in its judgment in Case 12/76 Tessili v Dunlop [1976] ECR 1473, neither of those two options rules out the other since the appropriate choice can only be made in respect of each of the provisions of the Convention to ensure that it is fully effective having regard to the objectives of Article 220 of the EEC Treaty.

13 The concept of "agreement conferring jurisdiction" is decisive for the assignment, in derogation from the general rules on jurisdiction, of exclusive jurisdiction to the court of the Contracting State designated by the parties. Having regard to the objectives and general scheme of the Brussels Convention, and in order to ensure as far as possible the equality and uniformity of the rights and obligations arising out of the Convention for the Contracting States and persons concerned, therefore, it is important that the concept of "agreement conferring jurisdiction" should not be interpreted simply as referring to the national law of one or other of the States concerned.

14 Accordingly, as the Court has held for similar reasons as regards, in particular, the concept of "matters relating to a contract" and other concepts, referred to in Article 5 of the Convention, which serve as criteria for determining special jurisdiction (see the judgment in Case 34/82 Peters v ZNAV [1983] ECR 987, paragraphs 9 and 10), the concept of "agreement conferring jurisdiction" in Article 17 must be regarded as an independent concept.

15 In that connection, it must be recalled that, when it was requested to interpret the concept of "matters relating to a contract", referred to in Article 5 of the Convention, the Court held that the obligations imposed on a person in his capacity as member of an association were to be considered to be contractual obligations, on the ground that membership of an association created between the members close links of the same kind as those which are created between the parties to a contract (see the judgment in Case 34/82 Peters v ZNAV, referred to above, paragraph 13).

16 Similarly, the links between the shareholders of a company are comparable to those between the parties to a contract. The setting up of a company is the expression of the existence of a community of interests between the shareholders in the pursuit of a common objective. In order to achieve that objective each shareholder is assigned, as regards other shareholders and the organs of the company, rights and obligations set out in the company' s statutes. It follows that, for the purposes of the application of the Brussels Convention, the company' s statutes must be regarded as a contract covering both the relations between the shareholders and also the relations between them and the company they set up.

17 It follows that a clause conferring jurisdiction in the statutes of a company limited by shares is an agreement, within the meaning of Article 17 of the Brussels Convention, which is binding on all the shareholders.

18 It is immaterial that the shareholder against whom the clause conferring jurisdiction is invoked opposed the adoption of the clause or that he became a shareholder after the clause was adopted.

19 By becoming and by remaining a shareholder in a company, the shareholder agrees to be subject to all the provisions appearing in the statutes of the company and to the decisions adopted by the

organs of the company, in accordance with the provisions of the applicable national law and the statutes, even if he does not agree with some of those provisions or decisions.

20 Any other interpretation of Article 17 of the Brussels Convention would lead to a multiplication of the heads of jurisdiction for disputes arising from the same legal and factual relationship between the company and its shareholders and would run counter to the principle of legal certainty.

21 Consequently, the reply to the national court' s first question must be that a clause contained in the statutes of a company limited by shares and adopted in accordance with the provisions of the applicable national law and those statutes themselves conferring jurisdiction on a court of a Contracting State to settle disputes between that company and its shareholders constitutes an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention.

The first part of the second question

22 In the first part of the second question the national court seeks essentially to ascertain the circumstances in which a clause conferring jurisdiction contained in a company' s statutes satisfies the formal requirements laid down in Article 17 of the Brussels Convention.

23 Pursuant to Article 17 of the Brussels Convention an agreement conferring jurisdiction must be either in writing or evidenced in writing or, in international trade or commerce, in a form which accords with usage in that area and of which the parties are or ought to be aware.

24 As the Court held in Case 24/76 Estasis Salotti v Ruewa [1976] ECR 1831, paragraph 7, the purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established.

25 It must nevertheless be emphasized that the situation of shareholders as regards the statutes of a company - which are the expression of the existence of a community of interests between the shareholders in the pursuit of a common objective - is different from that, referred to in the abovementioned judgment, of a party to a contract of sale as regards general conditions of sale.

26 First of all, in the legal systems of all the Contracting States the statutes of a company are in writing. Moreover, in the company law of all the Contracting States it is acknowledged that the statutes of companies play a particular role in so far as they constitute the basic instrument governing the relations between a shareholder and the company.

27 Furthermore, irrespective of how shares are acquired, every person who becomes a shareholder of a company knows, or ought to know, that he is bound by the company' s statutes and by the amendments made to them by the company' s organs in accordance with the provisions of the applicable national law and the statutes.

28 Consequently, when the company' s statutes contain a clause conferring jurisdiction, every shareholder is deemed to be aware of that clause and actually to consent to the assignment of jurisdiction for which it provides if the statutes are lodged in a place to which the shareholder may have access, such as the seat of the company, or are contained in a public register.

29 Having regard to the foregoing, the reply to the first part of the national court' s second question must be that, irrespective of how shares are acquired, the formal requirements laid down in Article 17 must be considered to be complied with in regard to any shareholder if the clause conferring jurisdiction is contained in the statutes of the company and those statutes are lodged in a place to which the shareholder may have access or are contained in a public register.

The second part of the second question

30 Pursuant to Article 17 of the Brussels Convention, jurisdiction is conferred for the purpose of settling disputes which have arisen or which may arise "in connection with a particular legal

relationship".

31 That requirement is intended to limit the scope of an agreement conferring jurisdiction solely to disputes which arise from the legal relationship in connection with which the agreement was entered into. Its purpose is to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum as regards all disputes which may arise out of its relationship with the other party to the contract and stem from a relationship other than that in connection with which the agreement conferring jurisdiction was made.

32 In that regard, a clause conferring jurisdiction contained in a company' s statutes satisfies that requirement if it relates to disputes which have arisen or which may arise in connection with the relationship between the company and its shareholders as such.

33 The question whether in the present case the clause conferring jurisdiction is to be regarded as having such an effect is a question of interpretation which is a matter for the national court to resolve.

34 Consequently, the reply to the second part of the national court' s second question must be that the requirement that a dispute arise in connection with a particular legal relationship within the meaning of Article 17 is satisfied if the clause conferring jurisdiction contained in the statutes of a company may be interpreted as referring to the disputes between the company and its shareholders as such.

The third part of the second question

35 In the third part of the second question the national court is essentially seeking to ascertain whether the clause conferring jurisdiction raised before it applies to the disputes brought before it.

36 In that regard, it should be observed that it is for the national court to interpret the clause conferring jurisdiction invoked before it.

37 Consequently, the reply to the third part of the national court' s second question must be that it is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the Oberlandesgericht Koblenz, by order of 1 June 1989, hereby rules:

1. A clause contained in the statutes of a company limited by shares and adopted in accordance with the provisions of the applicable national law and those statutes themselves conferring jurisdiction on a court of a Contracting State to settle disputes between that company and its shareholders constitutes an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention;

2. Irrespective of how shares are acquired, the formal requirements laid down in Article 17 must

be considered to be complied with in regard to any shareholder if the clause conferring jurisdiction is contained in the statutes of the company and those statutes are lodged in a place to which the shareholder may have access or are contained in a public register;

3. The requirement that a dispute arise in connection with a particular legal relationship within the meaning of Article 17 is satisfied if the clause conferring jurisdiction contained in the statutes of a company may be interpreted as referring to the disputes between the company and its shareholders as such;

4 It is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope.

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PROCEDU Reference for a preliminary ruling

ADVGEN Tesauro

JUDGRAP Sir Gordon Slynn

DATES of document: 10/03/1992
of application: 10/07/1989

**Judgment of the Court
of 6 June 2000
Roman Angonese v Cassa di Risparmio di Bolzano SpA. Reference for a preliminary ruling: Pretore di Bolzano - Italy. Freedom of movement for persons - Access to employment - Certificate of bilingualism issued by a local authority - Article 48 of the EC Treaty (now, after amendment, Article 39 EC) - Council Regulation (EEC) No 1612/68. Case C-281/98.**

1. Preliminary rulings - Jurisdiction of the Court - Limits - Manifestly irrelevant question

(EC Treaty, Art. 177 (now Art. 234 EC)

2. Freedom of movement for persons - Workers - Treaty provisions - Prohibition of discrimination on grounds of nationality - Scope - Conditions of employment fixed by private persons - Inclusion

(EC Treaty, Art. 48 (now, after amendment, Art. 39 EC)

3. Freedom of movement for persons - Workers - Access to employment - Requirement for linguistic knowledge - Employer requiring those applying to take part in a recruitment competition to obtain a certificate of bilingualism issued by a local authority - Not permissible

(EC Treaty, Art. 48 (now, after amendment, Art. 39 EC)

1. Under the preliminary ruling procedure provided for by Article 177 of the Treaty (now, after amendment, Article 234 EC), it is for the national courts alone, which are seised 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 judgment and the relevance of the questions which they refer to the Court. A request 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 para. 18)

2. The prohibition of discrimination on grounds of nationality laid down in Article 48 of the Treaty (now, after amendment Article 39 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.

(see paras. 30, 36)

3. 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.

That requirement puts nationals of the other Member States at a disadvantage, since persons not resident in that province have little chance of acquiring the diploma, a certificate of bilingualism, and it will be difficult, or even impossible, for them to gain access to the employment in question. The requirement is not justified by any objective factors unrelated to the nationality of the persons concerned and in proportion to the aim legitimately pursued. In that regard, 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. Therefore, the requirement constitutes discrimination on grounds of nationality contrary to Article 48 of the Treaty.

(see paras. 39-40, 44-46 and operative part)

In Case C-281/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Pretura Circondariale di Bolzano (District Magistrates' Court, Bolzano), Italy, for a preliminary ruling in the proceedings pending before that court between

Roman Angonese

and

Cassa di Risparmio di Bolzano SpA,

on the interpretation of Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and 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 COURT,

composed of: G.C. Rodríguez Iglesias, President, D.A.O. Edward, L. Sevon and R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm (Rapporteur) and M. Wathelet, Judges,

Advocate General: N. Fennelly,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- R. Angonese, by G. Lanzinger, of the Bolzano Bar,

- the Cassa di Risparmio di Bolzano SpA, by K. Zeller and T. Dipoli, of the Bolzano Bar,

- the Italian Government, by Professor U. Leanza, Head of Legal Affairs Department, Ministry of Foreign Affairs, acting as Agent, assisted by D. Del Gaizo, Avvocato dello Stato,

- the Commission of the European Communities, by P.J. Kuijper, Legal Adviser, and A. Aresu, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Angonese, the Cassa di Risparmio di Bolzano SpA, the Italian Government and the Commission at the hearing on 28 September 1999,

after hearing the Opinion of the Advocate General at the sitting on 25 November 1999,

gives the following

Judgment

Costs

47 The costs incurred by the Italian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the 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.

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 seised 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.

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SUB	Free movement of workers
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NATIONA	Italy
NATCOUR	*P1* Pretore di Bolzano, sentenza del 23/05/2001 ; *P2* Corte d'Appello di Trento, sentenza del 31/12/2001 ; *P3* Corte di Cassazione, Sezione lavoro, sentenza del 11/10/2004 (20116) ; - Il Foro amministrativo 2004 p.3089 (résumé) ; - Il massimario del Foro italiano 2004 Col.1506 (résumé) ; - Il Consiglio di Stato 2005 II p.131 (résumé) ; *A9* Pretore di Bolzano, ordinanza del 08/07/1998 (RG 1519/97 L)
NOTES	Toggenburg, Gabriel: Horizontale Drittwirkung der Personenfreizügigkeit vor dem Hintergrund der Südtiroler Autonomie, European Law Reporter 2000 p.244-247 ; Streinz, Rudolf ; Leible, Stefan: Die unmittelbare Drittwirkung der Grundfreiheiten, Europäische Zeitschrift für Wirtschaftsrecht 2000 p.459-467 ; Rigaux, Anne: Europe 2000 Août-Septembre Comm. no 252 p.15 ; Idot, Laurence: Europe 2000 Août-Septembre Comm. no 258 p.18 ; Luijendijk, J. ; Mortelmans, K.J.M.: Taaleis in provincie Bolzano vormt discriminerend obstakel voor het vrije verkeer van werknemers., Ars aequi 2000 p.804-810 ; Lane, Robert ; Nic Shuibhne, Niamh: Common Market Law Review 2000 p.1237-1247 ; Forsthoff, Ulrich: Drittwirkung der Grundfreiheiten: Das EuGH-Urteil Angonese, Europäisches Wirtschafts- & Steuerrecht - EWS 2000 p.389-397 ; Obwexer, Walter: EuGH: Neue Pflichten für Unionsbürger, Europäisches Wirtschafts- & Steuerrecht - EWS 2000 p.I ; Gaja, Giorgio: Puo un cittadino italiano utilmente imparare il tedesco in Austria?, Rivista di diritto internazionale 2000 p.1051-1053 ; Palermo, Francesco: Diritto comunitario e tutela delle minoranze: alla ricerca di un punto di equilibrio, Diritto pubblico comparato ed europeo 2000 p.969-974 ;

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PROCEDU Reference for a preliminary ruling

ADVGEN Fennelly

JUDGRAP Ragnemalm

DATES of document: 06/06/2000
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Judgment of the Court of 12 March 1996

Panagis Pafitis and others v Trapeza Kentrikis Ellados A.E. and others. Reference for a preliminary ruling: Polymeles Protodikeio Athinon - Greece. Company law - Directive 77/91/EEC - Alteration of capital of a bank constituted in the form of a public limited liability company - Direct effect of Articles 25(1) and 29(3) of the directive - Abuse of rights. Case C-441/93.

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Freedom of movement for persons ° Freedom of establishment ° Companies ° Directive 77/91 ° Scope ° Inclusion of banks constituted in the form of public limited liability companies ° National rules providing for an increase by administrative measure of the capital of a bank which is in financial difficulties ° Not permissible ° Prevention, by recourse to a national rule prohibiting the abuse of rights, of the exercise of rights conferred on shareholders by the directive ° Not permissible ° Obligation to give notice in writing to the holders of registered shares in the event of an increase in capital ° Information limited to publication of the invitation to subscribe in daily newspapers ° Not permissible

(Council Directive 77/91, Arts 25 and 29)

The Second Directive (77/91), on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, and in particular Articles 25 and 29 thereof, must be interpreted as applying to banks constituted in the form of limited liability companies. The criterion adopted by the Community legislature to define the scope of the Second Directive is that of the legal form of the company, irrespective of its business.

Article 25 of the directive, pursuant to which any increase in capital must be decided on by the general meeting, precludes national legislation under which the capital of a bank constituted in the form of a public limited liability company which, as a result of its debt burden, is in exceptional circumstances may be increased by an administrative measure, without a resolution of the general meeting. Although the directive does not preclude the taking of execution measures intended to put an end to the company' s existence and, in particular, does not preclude liquidation measures placing the company under compulsory administration with a view to safeguarding the rights of creditors, it continues to apply where ordinary reorganization measures are taken in order to ensure the survival of the company, even if those measures mean that the shareholders and the normal organs of the company are temporarily divested of their powers.

Since the application of a rule of national law such as that prohibiting the abusive exercise of rights must not detract from the full effect and uniform application of Community law in the Member States, an action by a shareholder on the basis of Article 25 cannot, without the scope of that provision being changed, be deemed to be abusive merely because he is a minority shareholder of a company subject to reorganization measures or has benefited from the reorganization of the company.

Publication in daily newspapers of an offer of subscription in connection with an increase of capital does not constitute information given in writing to the holders of registered shares within the meaning of the third sentence of Article 29(3) of the directive where the national legislation does not provide for publication in the national gazette appointed for that purpose.

In Case C-441/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Polimeles Protodikio Athinon for a preliminary ruling in the proceedings pending before that court between

Panagis Pafitis and Others,

supported by

Investment and Shipping Enterprises Est and Others

and

Trapeza Kentrikis Ellados AE and Others,

supported by

Trapeza tis Ellados AE and Others

on the interpretation of Article 25 et seq. and Article 29 of the Second Council Directive, Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1),

THE COURT,

composed of: C.N. Kakouris, President of Chamber, acting for the President, D.A.O. Edward and G. Hirsch (Presidents of Chambers), G.F. Mancini, F.A. Schockweiler, J.C. Moitinho de Almeida, P.J.G. Kapteyn (Rapporteur), C. Gulmann, J.L. Murray, H. Ragnemalm and L. Sevon, Judges,

Advocate General: G. Tesauro,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

° Panagis Pafitis and Others, by Sofia Koukouli-Spiliotopoulou, Ioannis Stamoulis, Feidias Doukaris and Georgios Kampitsis, of the Athens Bar,

° Investment and Shipping Enterprises Est and Others, by Nikolaos Skandamis, Georgios Kampitsis, Ioannis Stamoulis and Feidias Doukaris, of the Athens Bar,

° Trapeza Kentrikis Ellados AE and Others, by Marios Bachas, Fotis Chatzis, Alexandros Markopoulos and Konstantinos Marvrias, of the Athens Bar,

° Trapeza tis Ellados AE and Others, by Ilias Soufleros and Marios Armaos, of the Athens Bar, and Vasileios Kontolaimos, Deputy Legal Adviser in the State Legal Department, acting as Agent,

° the Greek Government, by Vasilios Kondolaimos, Deputy Legal Adviser in the State Legal Department, acting as Agent,

° the Portuguese Government, by Jorge Santos, of the Legal Department of the Bank of Portugal, and Luis Fernandes, Director of the Legal Department of the Directorate-General for the European Communities, Ministry of Foreign Affairs, acting as Agents,

° the Commission of the European Communities, by Antonio Caeiro and Dimitrios Gouloussis, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Panagis Pafitis and Others, represented by Sofia Koukouli-Spiliotopoulou, Ioannis Stamoulis and Feidias Doukaris, Investment and Shipping Enterprises Est and Others, represented by Feidias Doukaris, Trapeza Kentrikis Ellados AE and Others, represented by Marios Bachas, Konstantinos Mavrias and Krateros Ioannou, of the Athens Bar, Trapeza tis Ellados AE

and Others, represented by Ilias Soufleros and Vasileios Kontolaimos, the Greek Government, represented by Panagiotis Mylonopoulos, Special Legal Assistant in the Department for Community Matters of the Ministry of Foreign Affairs, and Dimitrios Leontokianakos, Legal Assistant in the Independent Office for European Community Affairs of the Ministry of the National Economy, acting as Agents, and the Commission, represented by Dimitrios Gouloussis, at the hearing on 6 June 1995,

after hearing the Opinion of the Advocate General at the sitting on 9 November 1995,

gives the following

Judgment

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the Polimeles Protodikio Athinon, by decision of 3 August 1993, hereby rules:

1. Article 25 of the Second Council Directive (77/91/EEC) of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent precludes national legislation under which the capital of a bank constituted in the form of a public limited liability company which, as a result of its debt burden, is in exceptional circumstances may be increased by an administrative measure, without a resolution of the general meeting.

2. Publication of an offer of subscription in daily newspapers does not constitute information given in writing to the holders of registered shares within the meaning of the third sentence of Article 29(3) of Directive 77/91.

1 By decision of 3 August 1993, received at the Court on 16 November 1993, the Polimeles Protodikio Athinon (Court of First Instance, Athens) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 25 et seq. and Article 29 of the Second Council Directive, Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1, hereinafter "the Second Directive").

2 Those questions were raised in the course of proceedings brought against Trapeza Kentrikis Ellados AE, a public limited liability company (hereinafter "TKE Bank"), and its new shareholders, by its old shareholders, Panagis Pafitis and others, who object to the increases in the capital of TKE Bank by Decision No 826 of the Governor of the Bank of Greece of 28 July 1986 (Official Journal of the Hellenic Republic, *EK Edition A 117 of 29 July 1986) and Measure No 71 of the temporary administrator of TKE Bank of 24 September 1986, subsequently ratified by Law No 1682/1987

(Official Journal of the Hellenic Republic, *EK Edition A 14 of 16 February 1987). Those measures were taken pursuant to Presidential Decree No 861/1975.

3 Special Law No 1665/1951 (Official Journal of the Hellenic Republic, *EK Edition A 31 of 27 January 1951), as in force at the material time, provided, in Article 6, that where the capital of a bank was eroded as a result of losses or where the Monetary Commission considered that, for any other reason, a bank' s capital was not commensurate with its needs, that Commission would call on the bank to reinstate the capital lost or to increase the capital within a period of not less than 60 days set by it.

4 Pursuant to Article 8(1) of the abovementioned special law, where a bank is unable, or refuses, to increase its capital, in any way obstructs supervision or infringes any provisions of laws, or of decisions or regulations of the Monetary Commission, the latter may either withdraw the bank' s licence to trade, thereby putting it into liquidation, or appoint an administrator.

5 By Measure No 397 (Official Journal of the Hellenic Republic, *EK Edition A 133 of 13 September 1984), the Governor of the Bank of Greece placed TKE Bank under the supervision of a temporary administrator.

6 Article 1(3) of Presidential Decree No 861/1975 concerning the supervision of banks by temporary administrators ° the text of which is repeated in its entirety in Article 1 of Law No 236/1975 (Official Journal of the Hellenic Republic, *EK Edition A 275 of 5 December 1975) ° provides that, upon publication of the decision appointing a temporary administrator in the Official Journal of the Hellenic Republic, all the powers and competencies of the organs of the bank are to lapse automatically and are to be vested, together with the management of the bank, in the temporary administrator or the temporary administrators acting jointly.

7 The plaintiffs in the main proceedings have been shareholders of TKE Bank since before 1984, at which time its capital was DR 670 000 000.

8 By the abovementioned Decision No 826 of 28 July 1986, the Governor of the Bank of Greece called on TKE Bank, pursuant to Article 6 of Special Law No 1665/1951, to increase its capital to DR 1 500 000 000 in order to stabilize the conduct of its business. Acting in the stead of the general meeting, the temporary administrator decided, by Measure No 71 of 24 September 1986, to amend Article 6 of the statutes of TKE Bank to show its capital as DR 1 700 000 000.

9 In order to give effect to that increase, the temporary administrator invited the shareholders of TKE Bank, by notice published in the political and financial press, to exercise their pre-emptive rights in relation to the increase within a period of 30 days and invited any interested third parties to participate in the increase on the expiry of that period. Since the plaintiffs had not exercised their pre-emptive rights by the end of that period, the new shares were ultimately allotted to third parties. Subsequently, the capital was increased on three further occasions in 1987, 1989 and 1990 by the general meeting of TKE Bank, with its new shareholders, the appropriate amendments being made to its statutes.

10 Article 24(2) of Greek Law No 1682/1987 ratified, with effect from the dates of their adoption, the decision to appoint a temporary administrator to manage TKE Bank and the measure by which the latter ordered that the shares representing the increase in the capital of TKE Bank should be allotted to the shareholders.

11 The plaintiffs in the main proceedings first challenged, before the national court, the amendment to the statutes of TKE Bank, whereby the capital was increased to DR 1 700 000 000 on the ground that that amendment gave effect to a decision taken by the temporary administrator without the general meeting of shareholders having been convened to decide upon any increase of capital, and that the

mandate of the temporary administrator had lapsed automatically upon the expiry of a reasonable period. They also objected to the allotment of the shares and sought a declaration that the other defendants in the main proceedings, purporting to be new shareholders of the bank following the increase of capital, had acquired neither the status of shareholders nor the right to participate in the general meeting of shareholders of TKE Bank. Finally, they sought the annulment of the decisions concerning the three subsequent increases of capital and the corresponding amendments to the statutes.

12 In its decision, the national court questions whether the case-law of the Court which, in relation to ordinary public limited liability companies, upholds the principle that the general meeting of shareholders has the authority to decide upon increases of capital, extends also to banks constituted in the form of public limited companies since, under Greek law, there is banking legislation (the abovementioned Law No 236/1975) which applies specifically to such banks. The aim of that legislation is to provide for the reorganization of banks, by reason of their particular importance in relation to credit facilities, the guarantee of deposits and the proper operation of the national economy, such matters constituting objectives relating to the public interest.

13 In those circumstances, the national court stayed the proceedings pending a preliminary ruling from the Court of Justice on the following questions:

> "(1) Does the direct effect within the Hellenic Republic of the Second Council Directive of 13 December 1976 (77/91/EEC) and in particular of the provisions concerning the maintenance and alteration of the capital of public limited liability companies (Articles 25 et seq. and 29) extend so far as to mean that the Greek courts are automatically obliged to apply those provisions to banks which take the form of public limited liability companies?

(2) Are the above provisions incompatible with the contrary provisions of Presidential Decree No 861/1975, confirmed by Law No 236/1975, and of Article 24 of Law No 1682/1987, which derogate from the other provisions governing the general functioning of public limited liability companies in order more effectively to achieve reform of banks constituted in the form of public limited liability companies on the ground of the special social-economic purpose which they fulfil, which constitutes an aim of general interest, so that application of those contrary provisions is precluded?

(3) May publication of the invitation in the daily newspapers be deemed to satisfy the requirement laid down in the third sentence of Article 29(3) of the directive in question that the holders of registered shares must be informed in writing?"

The first and second questions

14 By its first and second questions, which it is appropriate to consider together, the national court raises three problems concerning the scope of the Second Directive, in particular Articles 25 and 29 thereof.

15 The first is whether banks constituted in the form of public limited liability companies fall, as such, within the scope of the Second Directive, in particular Articles 25 and 29 thereof.

16 The second concerns the applicability of the directive, having regard to the specific nature of the national rules at issue which, in pursuit of the public interest and by way of derogation from the rules of the general law on public limited liability companies, seek to secure more effective recovery of banks constituted in the form of public limited liability companies which, as a result of their burden of debt, find themselves in exceptional circumstances. The national court asks essentially whether, taking account of that special feature, Article 25 of the Second Directive precludes national legislation which provides that the capital of a bank which is constituted in the form of a public limited liability company and finds itself in the exceptional circumstances referred to above may be increased by administrative measure and without discussion by the general

meeting.

17 The third problem is concerned more particularly with the conditions for the application of Article 25.

The applicability of the Second Directive to banks constituted in the form of public limited liability companies

18 It is clear from the title and Article 1 of the Second Directive that it applies to the companies referred to in the second paragraph of Article 58 of the EC Treaty constituted in the form of public limited liability companies.

19 The criterion adopted by the Community legislature to define the scope of the Second Directive is therefore that of the legal form of the company, irrespective of its business.

20 There is only one exception to that general rule, namely that provided for in Article 1(2) which authorizes the Member States not to apply the directive to investment companies with variable capital or cooperatives in the form of public limited liability companies.

21 Since banks constituted in the form of public limited liability companies do not come within that exception they are covered by the Second Directive.

22 That conclusion is also borne out by the fact that the Second Directive, in for example Articles 20(1)(c), 23(2) and 24(2), expressly takes account of the particular features of banking by providing that certain provisions do not apply, or need not be applied by the Member States, to banks and other financial institutions constituted in the form of public limited liability companies.

23 Articles 25 and 29 of the Second Directive allow for no such derogation.

24 It must therefore be held that the Second Directive, and in particular Articles 25 and 29 thereof, apply to banks constituted in the form of public limited liability companies.

The applicability of Article 25 of the Second Directive to measures for the reorganization of banks

25 The defendants in the main proceedings contend that the increase in capital at issue constitutes a measure for the reorganization of a credit institution which falls outside the scope of Article 25 of the Second Directive.

26 In support of that contention, they put forward a number of arguments to show that rules on the reorganization of credit institutions are, at both Community and national level, in the nature of a lex specialis as compared with ordinary company law.

27 They maintain, first, that the Second Directive is not concerned with the reorganization, liquidation and dissolution of public limited liability companies or, a fortiori, of credit institutions. Those are matters covered by other legislative measures adopted or envisaged by the Community.

28 They refer in particular to the amended proposal for a Council Directive concerning the reorganization and the winding-up of credit institutions and deposit-guarantee schemes (OJ 1988 C 36, p. 1, hereinafter "the amended proposal for a directive").

29 The defendants in the main proceedings submit that the main purpose of that amended proposal for a directive was specifically to avoid the winding-up and dissolution of credit institutions, because of the importance attached to maintaining their ability to operate on a sound basis. Even though it is intended to deal with their liquidation, it was inspired by the need for rigorous application of the supervisory rules and by the concept of the public interest.

30 They state that all the contested rules on reorganization, with the exception of certain provisions

concerned simply with interpretation of the measures adopted, are included in the list of national measures appended to the amended proposal for a directive, which sets out the measures that would be reciprocally recognized by the Member States as being intended to maintain or restore the financial stability of a credit institution.

31 According to the defendants in the main proceedings, the fact that, according to the amended proposal for a directive, the application of those measures is not dependent on compliance with the provisions of the Second Directive and, in particular, with Article 25 thereof, shows that the objective of reorganization, even by means of a compulsory increase of capital, as provided for in the Greek rules, takes precedence over the more specific conditions for such increases which are necessarily accorded secondary importance and are subordinate to that primary objective.

32 They thus consider that the amended proposal for a directive shows that the matter of increasing the capital of a credit institution falls within the ambit of the wider, overriding objective of reorganizing a credit institution and is ultimately subsumed into that objective.

33 That conclusion is supported, in their view, by the existence, not only nationally but in the Community as a whole, of a set of special rules applicable to credit institutions, a fact which brings to the fore the wholly exceptional nature of credit institutions. It is very revealing in that connection that the directives concerning financial institutions are more numerous than those concerning companies in general.

34 The Portuguese Government also considers that, in the event of a financial crisis, the situation of a bank differs fundamentally from that of a public limited liability company in general in that, first, the liabilities of banks are essentially represented by their depositors' funds and, secondly, the care and management of public savings are an essential function of banks. When a bank is in financial crisis, it is necessary both to protect the interests of its depositors by taking all possible action to make certain that their assets will be returned to them and to ensure that the depositors are not seized by panic, which would spread to the public at large, precipitating widespread withdrawals of funds throughout the banking system.

35 That is why, according to the Portuguese Government, the legislation both of the Member States and of the Community recognizes the special nature of banks by adopting provisions which depart from those applicable to companies in general.

36 As far as Community legislation is concerned, the Portuguese Government refers not only to the amended proposal for a directive but, as do the plaintiffs in the main proceedings, also to the Second Directive, Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ 1977 L 386, p. 1).

37 Derogating from Article 17 of the Second Directive, Article 10(1) of Directive 89/646 lays down the rule that a credit institution' s own funds may not fall below the amount of initial capital required and Article 10(5) provides that the competent authorities may, where the circumstances so justify, allow an institution a limited period in which to rectify its situation.

38 In response to those arguments, it must be pointed out, first, that the Second Directive is intended, in accordance with Article 54(3)(g) of the EC Treaty, to coordinate the safeguards which are required by Member States of companies or firms within the meaning of the second paragraph of Article 58 of the Treaty with a view to making such safeguards equivalent and protecting the interests of members and others. The Second Directive thus seeks to ensure a minimum level of protection for shareholders in all the Member States.

39 That objective would be seriously frustrated if the Member States were entitled to derogate

from the provisions of the directive by maintaining in force rules ° even rules categorized as special or exceptional ° under which it is possible to decide by administrative measure, separately from any decision by the general meeting of shareholders, to effect an increase in the company' s capital (see the judgments in Joined Cases C-19/90 and C-20/90 Karella and Karellas [1991] ECR I-2691, paragraphs 25 and 26, and Case C-381/89 Syndesmos Melon tis Eleftheras Evangelikis Ekklisias and Others [1992] ECR I-2111, paragraphs 32 and 33).

40 For those reasons, the Court has thus already held that Article 25(1) of the Second Directive precludes the application of rules which, being designed to ensure the reorganization and continued trading of undertakings that are of particular importance to the national economy and are in an exceptional situation by reason of their debt burden, allow an increase in capital to be decided upon by administrative measure, without any resolution being passed by the general meeting (judgments in Karella and Karellas, paragraph 31, Syndesmos Melon tis Eleftheras Evangelikis Ekklisias and Others, paragraph 37, and Joined Cases C-134/91 and C-135/91 Kerafina-Keramische und Finanz-Holding and Vioktimatiki [1992] ECR I-5699, paragraph 18, hereinafter "the Karella and Syndesmos Melon line of cases").

41 Although the Second Directive does not specifically refer to the reorganization of credit institutions or to public limited liability companies in general and although those matters have not yet been the subject of Community harmonization, it does not follow that it is open to the Member States to adopt reorganization measures in that field which run counter to the provisions of the Second Directive, which, as stated in paragraph 24, apply to banks.

42 As far as reorganization measures are concerned, Article 25, which, in accordance with the objective of the Second Directive, provides a minimum level of protection for shareholders in all the Member States, applies, in the absence of any express exception, to credit institutions under the same conditions as to any other undertaking which is of special importance to the national economy and, by reason of its debt burden, is in exceptional circumstances.

43 As regards the arguments based on the amended proposal for a directive, it must be pointed out that that proposal does not form part of positive Community law and, in any event, the mere fact that the legislation at issue in the main proceedings appears on the list annexed to that proposal, which, as the Commission correctly pointed out at the hearing, identifies those national measures which, according to the information provided by each of the Member States at its request, should be regarded as reorganization measures, in no way prejudges the question whether such legislation is in conformity with the Second Directive.

44 As regards the Community legislation on the banking sector, it should be observed, as has been pointed out by the Advocate General in point 19 of his Opinion, that the majority of those directives seek to uphold and extend the right of establishment and the freedom to provide services in the banking sector, by means of specific provisions applicable to banks. Moreover, the numerous provisions concerning supervision, which confer on the competent authorities, in certain circumstances, the power to require a credit institution to remedy within a specified period an insufficiency of assets, do not affect the powers of the organs of the credit institution in question to make their own arrangements to rectify matters.

45 The arguments which the defendants in the main proceedings and the Portuguese Government deduce from the amended proposal for a directive and the Community legislation in the banking sector cannot therefore be accepted.

46 The defendants in the main proceedings contend, secondly, that the lex specialis status of banking legislation is closely linked to the fact that supervisory rules are provisions dictated by the public interest. The rules on the supervision of credit institutions, they maintain, constitute

a closed system of provisions designed, first, to protect the financial structure and preserve public confidence in it, and, secondly, to protect depositors. They consider that measures for the reorganization of credit institutions, which form an integral part of the supervisory rules, pursue the same objectives. Under the Greek legislation in force, those measures include increases in company capital by decision of a temporary administrator.

47 They maintain in that connection that the Court has already recognized that the cohesion of such a closed system is such that it must not be upset by the operation of other provisions of national law or Community law (see Case C-204/90 Bachmann v Belgium [1992] ECR I-249 and Case C-300/90 Commission v Belgium [1992] ECR I-305). In their view, the fundamental reasons which prompted the Court so to hold should also apply to the present case, which displays considerable similarities to Bachmann.

48 That argument likewise cannot be upheld.

49 It is true that considerations concerning the need to protect the interests of savers and, more generally, the equilibrium of the savings system, require strict supervisory rules in order to ensure the continuing stability of the banking system.

50 However, it does not follow that national rules of that kind must necessarily provide for measures which deprive the organs of a credit institution of the powers vested in them, as organs of a public limited liability company, by Article 25 of the Second Directive.

51 The interests at issue can, as the Advocate General has rightly pointed out in point 18 of his Opinion, be given equal and appropriate protection by other means, such as for example the creation of a generalized system to guarantee deposits, which seek to achieve the same result but do not impede attainment of the objective pursued by the Second Directive of providing a minimum level of protection for shareholders in all the Member States.

52 Accordingly, the Member States could, in the event of their supervisory rules for credit institutions not meeting the requirements laid down by the Second Directive, adopt the measures needed to bring them into line with those requirements within the prescribed period and establish a system which, whilst observing the provisions of the directive, protects the interests concerned.

53 It is also apparent from the documents before the Court that the Hellenic Republic has in the meantime adopted legislative measures which introduce a system of deposit guarantees and dispense with the office of temporary administrator provided for by the legislation at issue in this case, thereby eliminating the powers attached to that office, including that of deciding, in the stead of the general meeting, to increase a bank' s capital.

The conditions for the application of Article 25 of the Second Directive

54 The defendants in the main proceedings contend that, in any event, the conditions for the application of Article 25(1) of the Second Directive are not satisfied. They refer in that connection to Karella (paragraph 30) and Syndesmos Melon (paragraph 27).

55 They maintain that, unlike the national provisions at issue in the Karella and Syndesmos Melon line of cases, which merely brought to an end the powers of the management of the undertaking, whilst the general meeting continued to exist, the legislation at issue in this case provides for a temporary administrator whose appointment causes all the powers and competencies of the organs of the company, including the general meeting, to lapse and to become vested in him. Appointments of that kind constitute measures wholly analogous to execution measures, in particular rules on liquidation of the kind in point in Karella and Syndesmos Melon, and, in addition, mean that, owing to the removal of powers from the shareholders and the normal organs of the company, the company does not continue to exist within its own structures, within the meaning of those judgments.

56 That argument cannot be upheld.

57 In Karella (paragraph 30) and Syndesmos Melon (paragraph 27), the Court pointed out that the Second Directive is intended to ensure that members' and third parties' rights are safeguarded, in particular in the operations for setting up companies and increasing and reducing their capital. The directive does not, admittedly, preclude the taking of execution measures intended to put an end to the company' s existence and, in particular, does not preclude liquidation measures placing the company under compulsory administration with a view to safeguarding the rights of creditors. However, the directive continues to apply where ordinary reorganization measures are taken in order to ensure the survival of the company, even if those measures mean that the shareholders and the normal organs of the company are temporarily divested of their powers.

58 In this case, the appointment of a temporary administrator does not resemble an execution measure, or, in particular, a liquidation measure, even though all the powers and competencies of the organs of the company are transferred to that administrator. As the defendants in the main proceedings themselves have stated, Article 8(1) of Special Law No 1665/1951 draws a distinction, as regards the measures to be taken by the Monetary Commission, between the withdrawal of the bank' s licence to trade, entailing its liquidation, and the appointment of an administrator. Moreover, as the defendants in the main proceedings have also emphasized, the specific purpose of the appointment of the temporary administrator is to ensure the survival of the company concerned, so that it is clearly a reorganization measure.

59 It cannot therefore be considered that the company does not continue to exist, and in this case that is borne out by the fact that the organs of the company have been divested of their powers and competencies only temporarily and that all the increases in capital subsequent to that decided on by the temporary administrator were, once again, the subject of a resolution of the general meeting of shareholders.

60 Accordingly, the answer to the first and second questions must be that Article 25 of the Second Directive precludes national legislation under which the capital of a bank constituted in the form of a public limited liability company which, as a result of its debt burden, is in exceptional circumstances may be increased by an administrative measure, without a resolution of the general meeting.

The third question

61 Article 29(3) of the Second Directive concerns the procedures for an offer of subscription on a pre-emptive basis which, by virtue of Article 29(1), must be made to the shareholders of a public limited liability company whenever the capital is increased by consideration in cash.

62 It follows from that provision that the legislation of a Member State need not provide for publication of such offers of subscription in the national gazette appointed in accordance with Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41), where all the shares in the company are registered shares. In such cases, pursuant to the third sentence of Article 29(3) of the Second Directive, the "shareholders must be informed in writing".

63 It is common ground that, at the material time, the Greek legislation did not provide, in accordance with the requirements of that provision, for the publication of information in the national gazette appointed for that purpose.

64 It is in that context that the national court asks whether publishing a notice in daily newspapers is to be regarded, for the purposes of the third sentence of Article 29(3) of the Second Directive,

as informing the shareholders in writing.

65 In order to answer that question, it must be borne in mind that Article 29(3) seeks to ensure that, in the absence of publication in the national gazette appointed for that purpose, all owners of registered shares are given information addressed to them individually by name concerning the procedures for exercising their pre-emptive rights.

66 The answer to that question must therefore be that publication of an offer of subscription in daily newspapers does not constitute information given in writing to the holders of registered shares within the meaning of the third sentence of Article 29(3) of the Second Directive.

Abuse of rights

67 It is apparent from the decision of the national court that the defendants and the interveners in the main proceedings put forward, before that court, an argument based on Article 281 of the Greek Civil Code, pursuant to which "the exercise of a right is prohibited where it manifestly exceeds the bounds of good faith or morality or the economic or social purpose of that right". The national court emphasizes that that provision allows objection to be made against the exercise of rights conferred by Community law if, in a particular case, those rights are exercised abusively.

68 Although, since the national court has submitted no question on the matter, it is unnecessary to rule as to whether it is permissible, under the Community legal order, to apply a national rule in determining whether a right conferred by the provisions of Community law at issue is being exercised abusively, the fact remains that, in any event, the application of such a rule must not detract from the full effect and uniform application of Community law in the Member States.

69 It must be borne in mind in that connection that it is settled case-law that it is for the Court of Justice, in relation to rights relied on by an individual on the basis of Community provisions, to verify whether the judicial protection available under national law is appropriate.

70 In this case, the uniform application and full effect of Community law would be undermined if a shareholder relying on Article 25(1) of the Second Directive were deemed to be abusing his rights merely because he was a minority shareholder of a company subject to reorganization measures or had benefited from the reorganization of the company. Since Article 25(1) applies without distinction to all shareholders, regardless of the outcome of any reorganization procedure, to treat an action based on Article 25(1) as abusive for such reasons would be tantamount to altering the scope of that provision.

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31977L0091-A25 : N 23 24 42 60
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61990J0019 : N55
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61989J0381-N32 : N 39
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SUB

Freedom of establishment and services ; Right of establishment

AUTLANG

Greek

OBSERV

Greece ; Portugal ; Commission ; Member States ; Institutions

NATIONA

Greece

NATCOUR

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PROCEDU Reference for a preliminary ruling

ADVGEN Tesauro

JUDGRAP Kapteyn

DATES of document: 12/03/1996
of application: 16/11/1993

Judgment of the Court of 23 May 2000
Commission of the European Communities v Italian Republic. Privatisation of public undertakings - Grant of special powers. Case C-58/99.

Actions for failure to fulfil obligations - Examination of merits by the Court - Situation to be taken into consideration - Situation at the end of the period laid down in the reasoned opinion

(EC Treaty, Art. 169 (now Art. 226 EC))

$$In the context of an action brought under Article 169 of the Treaty (now Article 226 EC), the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State as it stood at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes.

(see para. 17)

In Case C-58/99,

Commission of the European Communities, represented by A. Aresu and M. Patakia, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor U. Leanza, Head of the Legal Department in the Ministry of Foreign Affairs, acting as Agent, and I.M. Braguglia, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that, by adopting Articles 1(5) and 2 of the consolidated text of Decree Law No 332 of 31 May 1994 (GURI No 126 of 1 June 1994), converted, after amendment, into Law No 474 of 30 July 1994, providing for acceleration of the procedures for the sale of shareholdings held by the State and public bodies in joint stock companies (GURI No 177 of 30 July 1994), and the decrees concerning the special powers laid down in the case of the privatisation of ENI SpA and Telecom Italia SpA, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC) and Article 73b of the EC Treaty (now Article 56 EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, D.A.O. Edward, L. Sevon and R. Schintgen, Presidents of Chambers, P.J.G. Kapteyn (Rapporteur), A. La Pergola, J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: J. Mischo,

Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 1 February 2000, at which the Italian Republic was represented by I.M. Braguglia and the Commission by E. Traversa, Legal Adviser, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 22 February 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 19 February 1999, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by adopting Articles 1(5) and 2 of the consolidated text of Decree Law No 332 of 31 May 1994 (GURI No 126 of 1 June 1994), converted, after amendment, into Law No 474 of 30 July 1994, providing for acceleration of the procedures for the sale of shareholdings held by the State and public bodies in joint stock companies (GURI No 177 of 30 July 1994, hereinafter the consolidated legislation), and the decrees concerning the special powers laid down in the case of the privatisation of ENI SpA and Telecom Italia SpA, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC) and Article 73b of the EC Treaty (now Article 56 EC).

2 Article 1 of the consolidated legislation sets out the detailed rules for the sale of shares held by the State and public bodies. Article 1(5) states that the competent ministerial authorities may - for the purpose of preparation and implementation of the transactions under which capital is subscribed - entrust certain tasks (studies, advice, appraisal, assistance, administration and management) to national or foreign companies of proven experience and operational ability and professional persons who have been registered as provided for by law for at least five years.

3 Article 2 of the consolidated legislation is concerned with the special powers reserved for the State and public bodies. Article 2(1) provides that the President of the Council of Ministers is to determine by decree which companies controlled directly or indirectly by the State and operating in the defence, transport, telecommunications, energy resources and other public service sectors in whose statutes, before the adoption of any measure resulting in the loss of control, a provision must be inserted, by decision taken at an extraordinary general meeting, conferring on the Minister for the Treasury one or more special powers. Those powers, which are set out in Article 2(1), include a power to grant express approvals, a power to appoint a minimum of one or several directors and an auditor, and a right to veto certain decisions.

4 It is apparent from the documents before the Court that the special powers must be exercised having regard to national economic and industrial policy objectives. The content of the clause conferring special powers is defined by a decree of the Minister for the Treasury (Article 2(1a)). Article 2 of that decree also applies to companies controlled, directly or indirectly, by public bodies operating in the transport and other public service sectors; in that case, those bodies assume the role of the Minister for the Treasury in determining which companies are covered by special powers, the extent of the powers and the manner in which they are exercised (Article 2(3)).

5 On 5 October 1995, by decree of the President of the Council of Ministers, the Italian Government inserted in the statutes of ENI SpA (which operates in the energy and petrochemical sectors) the special powers provided for in Article 2 of the consolidated legislation.

6 On 21 March 1997 a decree of the President of the Council of Ministers established that STET SpA and Telecom Italia SpA (respectively holding and operating company in the telecommunications sector) should have included the special powers in their statutes before they were privatised. STET SpA and Telecom Italia SpA subsequently merged. On 24 March 1997 two decrees of the Minister for the Treasury were published; one laid down the content of the special powers, while the other set the relevant percentage for the purposes of the exercise of the special power of approval conferred on the Minister for the Treasury at 3% of the voting rights.

7 By letter of formal notice of 3 February 1998, the Commission informed the Italian Government

pursuant to Article 169 of the Treaty that the national provisions referred to above were incompatible with Articles 52, 59 and 73b of the Treaty.

8 The Italian Government replied by letter of 13 May 1998. Since the Commission was not convinced by the arguments put forward, on 10 August 1998 it sent the Italian Government a reasoned opinion requiring the Italian Republic to comply therewith within two months from its notification.

9 By note of 22 October 1998 the Italian Government replied to the reasoned opinion and undertook to comply with it by the enactment of a draft law amending the provisions in question.

10 While the Commission took note of the Italian Government's undertaking, it found that the delay in giving effect to it was becoming a cause for concern because the draft law still had not been submitted to the Italian Parliament.

11 In those circumstances the Commission decided, in accordance with the procedure set out in the second paragraph of Article 169 of the Treaty, to bring the present application before the Court.

12 The Commission observes that Article 1(5) of the consolidated legislation prohibits all professional persons who are lawfully pursuing their activities in other Member States or are recently established in Italy from performing certain tasks, contrary to Articles 52 and 59 of the Treaty.

13 With regard to the special powers conferred on the Treasury Ministry under Article 2 of the consolidated legislation, the Commission essentially argues that powers of that kind, which are liable to hinder or render less attractive the exercise of the fundamental freedoms guaranteed by the Treaty, must satisfy four conditions: they must apply in a non-discriminatory manner, be justified by overriding considerations in the general interest, be appropriate for ensuring that the objective which they pursue is achieved and not go beyond what is necessary in order to achieve that objective. Since there is no indication whatever that those conditions are satisfied in the present case and the special powers thus confer on the Italian authorities a potential to discriminate which may be used in an arbitrary manner, the Commission considers that those special powers are incompatible with Articles 52 and 73b of the Treaty.

14 In its defence, the Italian Government did not deny that the national provisions at issue are incompatible with Community law. It merely confirmed its intention to comply with the reasoned opinion of 10 August 1998 and added that the draft law prepared by it for that purpose had been approved by the Council of Ministers on 18 December 1998 and submitted to Parliament.

15 At the hearing, the Italian Government set out the aims of the legislation relating to the exercise of the special powers, which had been adopted by decree of the President of the Council of Ministers of 4 May 1999 (GURI 1999, No 109) and communicated to the Commission.

16 The Italian Government also stated at the hearing that the decree of 4 May 1999 had been transposed in Article 66 of Finance Law No 488 of 23 December 1999 relating to the year 2000 (GURI No 302 of 27 December 1999) so as to satisfy the requirements of law and of legal certainty pleaded by the Commission.

17 It is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State as it stood at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes (see, in particular, Case C-289/94 Commission v Italy [1996] ECR I-4405, paragraph 20, and Case C-302/95 Commission v Italy [1996] ECR I-6765, paragraph 13).

18 In the present case, that period came to an end two months after notification of the reasoned opinion of 10 August 1998.

19 It follows that the laws or regulations adopted after that period cannot be taken into account.

20 Accordingly, by adopting Articles 1(5) and 2 of the consolidated legislation and the decrees concerning the special powers laid down in the case of the privatisation of ENI SpA and Telecom Italia SpA, the Italian Republic has failed to fulfil its obligations under Articles 52, 59 and 73b of the Treaty.

Costs

21 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Italian Republic has been unsuccessful, the Italian Republic must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by adopting Articles 1(5) and 2 of the consolidated text of Decree Law No 332 of 31 May 1994, converted, after amendment, into Law No 474 of 30 July 1994, providing for acceleration of the procedures for the sale of shareholdings held by the State and public bodies in joint stock companies, and the decrees concerning the special powers laid down in the case of the privatisation of ENI SpA and Telecom Italia SpA, the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC) and Article 73b of the EC Treaty (now Article 56 EC);

2. Orders the Italian Republic to pay the costs.

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LODGED	1999/02/19
JURCIT	11992E052 : N 1 11992E059 : N 1 11992E073B : N 1
CONCERNS	Failure concerning 11992E052 - Failure concerning 11992E059 - Failure concerning 11992E073B -

SUB	Freedom of establishment and services ; Right of establishment ; Free movement of services ; Free movement of capital
AUTLANG	Italian
APPLICA	Commission ; Institutions
DEFENDA	Italy ; Member States
NATIONA	Italy
NOTES	Ventura, Riccardo: Giurisprudenza italiana 2000 p.1657-1658 ; De Pasquale, Patrizia: "Golden share" all'italiana, Diritto pubblico comparato ed europeo 2000 p.1233-1236 ; Merusi, Fabio: La Corte di giustizia condanna la "golden share" all'italiana e il ritardo del legislatore, Diritto pubblico comparato ed europeo 2000 p.1236-1238 ; Muñiz, P.: Revue du droit de l'Union européenne 2000 no3 p.676-678 ; Freni, Elisabetta: L'incompatibilità con le norme comunitarie della disciplina sulla golden share, Giornale di diritto amministrativo 2001 p.1145-1149 ; Ballarino, Tito ; Bellodi, Leonardo: La Golden Share nel diritto comunitario. A proposito delle recenti sentenze della Corte comunitaria, Rivista delle società 2004 p.2-42
PROCEDU	Action for failure to fulfil obligations - successful
ADVGEN	Mischo
JUDGRAP	Kapteyn
DATES	of document: 23/05/2000 of application: 19/02/1999

Judgment of the Court (Sixth Chamber)
of 23 March 2000
Dionysios Diamantis v Elliniko Dimosio (Greek State) and Organismos Ikonomikis Anasygkrotisis Epicheiriseon AE (OAE). Reference for a preliminary ruling: Polimeles Protodikio Athinon - Greece. Company law - Second Directive 77/91/EEC - Public limited liability company in financial difficulties - Increase in the capital of the company by administrative decision - Abuse of a right arising from a provision of Community law. Case C-373/97.

1. Community law - Abusive exercise of a right arising from a provision of Community law - National rule prohibiting the abuse of rights - Application by national courts

2. Freedom of movement for persons - Freedom of establishment - Companies - Directive 77/91 - Alteration of the capital of a public limited liability company - National rules providing for an increase by administrative decision of the capital of a public limited liability company in financial difficulties - Frustration of the exercise of rights arising from the directive by recourse to a national rule prohibiting the abuse of rights

(Council Directive 77/91, Art. 25(1))

1. Community law cannot be relied on for abusive or fraudulent ends. Consequently, Community law does not preclude the application by national courts of a provision of national law in order to assess whether a right arising from a provision of Community law is being exercised abusively. However, the application of such a national rule must not prejudice the full effect and uniform application of Community law in the Member States.

(see paras 33-34, 44 and operative part)

2. A shareholder relying on Article 25(1) of the Second Directive 77/91 on company law cannot be deemed to be abusing his rights under that provision on the ground that he is a minority shareholder, or has benefited from the reorganisation of the company subject to a reorganisation scheme, or has not exercised his right of preemption, or that he was one of the shareholders who asked that the company be placed under the scheme applicable to companies in serious difficulties, or has allowed a certain period of time to elapse before bringing his action. However, Community law does not preclude national courts from applying a provision of national law which enables them to determine whether a right deriving from a Community law provision is being abused if, of the remedies available for a situation that has arisen in breach of that provision, a shareholder has chosen a remedy that will cause such serious damage to the legitimate interests of others that it appears manifestly disproportionate.

(see paras 36-37, 43-44 and operative part)

In Case C-373/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Polimeles Protodikio Athinon, Greece, for a preliminary ruling in the proceedings pending before that court between

Dionisios Diamantis

and

Elliniko Dimosio (Greek State),

Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (OAE),

on the interpretation of Articles 25 and 29 of the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members

and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1) and on the abuse of a right arising from those provisions,

THE COURT (Sixth Chamber),

composed of: R. Schintgen, President of the Second Chamber, acting for the President of the Sixth Chamber, P.J.G. Kapteyn (Rapporteur), G. Hirsch, H. Ragnemalm and V. Skouris, Judges,

Advocate General: A. Saggio,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Mr Diamantis, by S. Andronikos, of the Athens Bar,

- the Greek Government, by P. Milonopoulos, Deputy Legal Adviser in the Special Legal Service - European Community Law Section of the Ministry of Foreign Affairs, and V. Kiriazopoulos, Authorised Legal Agent of the State Legal Service, acting as Agents,

- Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (OAE), by I. Soufleros and S. Felios, of the Athens Bar,

- the Commission of the European Communities, by D. Gouloussis, Legal Adviser, and M. Patakia, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Diamantis, of the Greek Government, of Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (OAE) and of the Commission at the hearing on 16 September 1999,

after hearing the Opinion of the Advocate General at the sitting on 28 October 1999,

gives the following

Judgment

Costs

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

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Polimeles Protodikio Athinon by order of 24 June 1997, hereby rules:

Community law does not preclude national courts from applying a provision of national law which enables them to determine whether a right deriving from a Community law provision is being abused. However, in making that determination, it is not permissible to deem a shareholder relying on Article 25(1) of the Second Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with

a view to making such safeguards equivalent, to be abusing his rights under that provision merely because he is a minority shareholder of a company subject to reorganisation measures, or has benefited from reorganisation of the company, or has not exercised his right of pre-emption, or was among the shareholders who asked for the company to be placed under the scheme applicable to companies in serious difficulties, or has allowed a certain period of time to elapse before bringing his action. In contrast, Community law does not preclude national courts from applying the provision of national law concerned if, of the remedies available for a situation that has arisen in breach of that provision, a shareholder has chosen a remedy that will cause such serious damage to the legitimate interests of others that it appears manifestly disproportionate.

1 By order of 24 June 1997, received at the Court on 31 October 1997, the Polimeles Protodikio Athinon (Court of First Instance, Athens) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 25 and 29 of the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1) and on the abuse of a right arising from those provisions.

2 Those questions were raised in proceedings between, on the one hand, Mr Diamantis and, on the other hand, the Greek State and Organismos Ikonomikos Anasinkrotisis Epikhiriseon AE (Organisation for the Restructuring of Undertakings, hereinafter the OAE).

Legal Background

Community law

3 Under Article 25(1) of the Second Directive:

Any increase in capital must be decided upon by the general meeting. Both this decision and the increase in the subscribed capital shall be published in the manner laid down by the laws of each Member State, in accordance with Article 3 of Directive 68/151/EEC.

4 Article 29(1) of the Second Directive provides that whenever the capital is increased by consideration in cash, the shares must be offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares.

5 It should be noted that the Second Directive does not provide for any penalty in the event of breach of any of its provisions. Furthermore, it does not require the Member States to introduce such penalties in the rules which they are to implement.

National law

6 Law No 1386/1983 of 5 August 1983 (FEK A' 107/8.8.1983, p. 14) applies to companies that are experiencing serious difficulties; it established the OAE, the object of which is to contribute to the financial and social development of the country (Article 2(2)). To that end, the OAE may, inter alia, take over the administration and day-to-day management of undertakings undergoing reorganisation or nationalised undertakings, take shares in the capital of undertakings, grant, issue or take out certain loans, acquire bonds and transfer shares, in particular to workers or to organisations representing them, to local authorities or to other legal persons constituted under public law, charitable institutions, social organisations or individuals (Article 2(3)).

7 Under Article 5(1) of Law No 1386/1983, the Minister for the National Economy may decide to place undertakings in serious financial difficulties under the scheme established by that Law.

8 Article 7 of Law No 1386/1983 provides that the competent Minister may decide to transfer to the OAE the administration of an undertaking subject to the scheme established by that Law, to reschedule its debts in such a way as to ensure its viability by way of a compulsory increase in its capital by way of subscriptions of capital or capitalisation of existing debts or by restructuring the debts, or to take steps to place the undertaking in liquidation in accordance with Article 9.

9 Under Article 8(8) of Law No 1386/1983, the OAE may decide, in the course of its provisional administration, to increase the capital of the company concerned by way of derogation from the legislation in force relating to public limited liability companies, which provides that the general meeting of shareholders is to have exclusive competence. The increase must be approved by the competent Minister. The former shareholders nevertheless retain their right of pre-emption and may exercise it within a period prescribed in the ministerial decision approving the increase.

10 On 7 March 1989, that is to say subsequent to the facts that gave rise to the main proceedings but prior to the order for reference, the Commission instituted proceedings for a declaration pursuant to Article 169 of the EC Treaty (now Article 226 EC) that the Hellenic Republic had failed to fulfil its obligations under the Second Directive. On 10 March 1990 the Greek Parliament adopted Law No 1882/1990 (FEK A' 43/23.3.1990). Since then, even during the provisional administration of a company pursuant to Law No 1386/1983, any alteration in its capital must be decided upon by the general meeting of shareholders.

11 Like the Second Directive itself, Law No 1882/1990 does not provide for any specific penalty for breach of any of its provisions, so that the normal penalties under private law could be applicable.

12 However, Law No 2685/1999 of 11 January 1999 (FEK A' 35/18.2.1999), which entered into force on the date of its publication, provides for a single remedy where an increase in capital has been decided upon in breach of the provisions of the Second Directive and, in particular, of Article 25(1), namely the right to full compensation for the damage suffered following such an increase. Under Article 28(2) of that Law, the action for compensation is directed exclusively against the Greek State rather than against the company concerned.

13 Lastly, mention must be made of Article 281 of the Greek Civil Code, according to which the exercise of a right is prohibited where it manifestly exceeds the bounds of good faith, morality or the social or economic purpose of that right.

Facts of the case and main proceedings

14 Mr Diamantis was a shareholder in the public limited liability company Plastika Kavalas AE (hereinafter Plastika Kavalas), holding 1 000 shares with a nominal value of GRD 1 000 each, out of the initial capital of GRD 87 000 000, divided into 87 000 shares (or 1.15%).

15 At the beginning of the 1980s that company, which had been founded in 1973, was facing serious financial difficulties. In September 1982 its factory operations were suspended and in 1983, as a result of its over-indebtedness, it was close to bankruptcy. On 24 August 1983, 32 shareholders of Plastika Kavalas asked that it be placed under the scheme provided for by Law No 1386/1983. That request was repeated on 20 December 1983.

16 Following that request, the Advisory Committee provided for in Article 11 of Law No 1386/1983, having noted the extremely difficult situation in which Plastika Kavalas found itself, on 22 December 1983 issued an opinion recommending that the company be made subject to the special liquidation scheme provided for in Articles 7 and 9 of the Law.

17 The consequence of that scheme would have been the immediate liquidation of the assets of Plastika Kavalas and payment of its debts, which is what happened to a number of other over-indebted undertakings in difficulty.

18 Despite the opinion recommending and giving reasons for liquidation, by Decision No 212 of 3 February 1984 (FEK B' 60/8.2.1984) the Minister for the National Economy decided to place Plastika Kavalas under the scheme for provisional OAE administration provided for in Article 7 of Law No 1386/1983. That scheme was maintained until the beginning of January 1987.

19 On 28 May 1986, under that provisional administration, the OAE decided to increase the capital of Plastika Kavalas by GRD 177 000 000 by the issue of 1 770 000 new shares with a nominal value of GRD 100 each. The capital of the company was thus increased to GRD 264 000 000. That decision was approved by the Minister for Industry by Decision No 155 of 6 June 1986 (FEK B' 414/11.6.1986).

20 Since the former shareholders did not exercise their right of pre-emption within the prescribed period of 45 days from publication of that ministerial decision, all the new shares were issued to the OAE, which accordingly held approximately 67% of the capital of Plastika Kavalas.

21 On 11 December 1986, by resolution of the general meeting of the shareholders, where the OAE held a majority of the votes, the capital of the company was reduced to GRD 5 000 000, the minimum allowed by law. That reduction was prompted by the negative nature of the net situation of Plastika Kavalas and was effected by the cancellation of all the former shares and the issue of 5 000 new shares with a nominal value of GRD 1 000 each, which were allocated between those who had held shares in the company until that date in proportion to their shareholding. That resolution of the general meeting was approved by the Prefect of Kavala by Decision No 882 of 4 March 1987 (FEK 262/19.3.1987).

22 By Decision No 14 of 9 January 1987, the Second Minister for Industry, Energy and Technology (FEK B' 25/16.1.1987) approved a further increase in the capital of the company. The increase amounted to GRD 1 262 200 000 and was the result of, first, the compulsory conversion into shares of debts amounting to GRD 972 000 000 and, secondly, a contribution of GRD 290 000 000 in cash from the OAE for the repayment of creditors.

23 Following those alterations, the capital of Plastika Kavalas amounted to GRD 1 267 200 000, divided into 1 267 200 shares. From that time Plastika Kavalas operated normally for more than four years. Pursuant to Ministerial Decision No 14, the provisions of Law No 1386/1983 ceased to apply. The administration and operation of Plastika Kavalas were governed from then on by the decisions of the general meeting of shareholders and its administrative board.

24 In 1991 the majority of shares in Plastika Kavalas were transferred to Plastika Makedonias AE at a price of GRD 860 000 000. Lastly, in February 1994, Plastika Kavalas was taken over by the Petzetakis Group.

25 On 22 February 1991 Mr Diamantis brought an action in the national court seeking a declaration that the alterations in the capital of the company (two increases and one reduction) were invalid, on the ground that they were contrary to Article 25 of the Second Directive. The Greek Government and the OAE pleaded abuse of rights by Mr Diamantis and asked that the action be dismissed.

26 In its order for reference the national court cited, first, the Court's previous case-law on the direct effect of Article 25 of the Second Directive (Joined Cases C-19/90 and C-20/90 Karella and Karellas v Minister of Industry, Energy and Technology and Another [1991] ECR I-2691 and Case C-381/89 Sindesmos Melon tis Eleftheras Evangelikis Ekklisias and Others v Greek State and Others [1992] ECR I-2111) and concluded that it was clear from that case-law that Articles 8 and 10 of Law No 1386/1983 were contrary to the provisions of the Second Directive.

27 The national court accordingly held that the action was well founded in law, but also considered that the plea of abuse of rights as provided for in Article 281 of the Civil Code was well founded in law and on the facts.

28 The facts on which that plea was based were as follows:

- Mr Diamantis and 32 other shareholders asked for Plastika Kavalas to be made subject to the scheme under Law No 1386/1983,

- because of the difficult financial situation in which Plastika Kavalas found itself, Mr Diamantis had not been in favour of increasing the capital of the company and therefore did not exercise the right of pre-emption granted to him at the time of the first increase,

- Plastika Kavalas was reorganised by means of capitalisation of its debts and the payment of its creditors, which had substantial and irreversible consequences as far as shareholdings in its capital were concerned, in view of the fact that periods of five years and four years elapsed after the above-mentioned increases and the intervening reduction.

29 The national court therefore accepted that Article 281 of the Civil Code could be applied to defeat rights arising under Community law when there was an abuse of rights within the meaning of that provision. However, in view of the attitude taken by the Court of Justice in Case C-441/93 Pafitis and Others v TKE and Others [1996] ECR I-1347, paragraphs 68 to 70 in relation to the same plea raised pursuant to Article 281 of the Civil Code, the national court considered that it was faced with a problem of interpretation of Articles 25(1) and 29(1) of the Second Directive with regard to the plea of abuse of rights.

30 In the circumstances the Polimeles Protodikio Athinon decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

1. In the specific factual circumstances set out in the grounds of this order, does a question arise as to the application, in law and in substance, of Article 281 of the Greek Civil Code concerning abuse of rights by a plaintiff in relation to Articles 25(1) and 29(1) of the Second Directive?

2. Should the Court of Justice of the European Communities find the above plea well founded in law and in substance, how will that affect the validity of the ministerial decisions increasing and reducing the capital of the company in question, of which the plaintiff happens to be a shareholder, and, by extension, are Articles 8(8) and 10(1) of Law No 1386/1983 compatible with Community law, in view of the fact that, where Article 281 of the Civil Code does not come into play, it has been held in accordance with the above that those provisions are contrary to the Second Directive?

Question 1

31 By its first question the national court is asking, essentially, whether, in the light of the circumstances at issue in the main proceedings, a national provision which penalises abuse of rights may validly be relied on to defeat an action for a declaration that social measures are invalid brought by a shareholder on the basis of breach of a right conferred by Article 25 of the Second Directive.

32 The preliminary point must be made that, as the Court has already held in Case C-367/96 Kefalas and Others v Greek State and Others [1998] ECR I-2843, paragraph 28, the objective of Article 25(1) of the Second Directive is to ensure, for the benefit of shareholders, that a decision increasing the capital of the company and, consequently, affecting the share of equity held by them, is not taken without their participation in the exercise of the decision-making powers of the company. According to the case-law, that objective would be seriously frustrated if the Member States were entitled to derogate from the provisions of the directive by maintaining in force rules - even rules categorised as special or exceptional - under which it was possible to decide by administrative measure, outside any decision by the general meeting of shareholders, to effect an increase in the company's capital (Karella and Karellas, cited above, paragraph 26).

33 However, Community law cannot be relied on for abusive or fraudulent ends (see Kefalas and

Others, cited above, paragraph 20, and the case-law cited there). That would be the case if a shareholder, in reliance on Article 25(1) of the Second Directive, brought an action for the purpose of deriving, to the detriment of the company, an improper advantage, manifestly contrary to the objective of that provision (Kefalas and Others, cited above, paragraph 28).

34 Although national courts may, therefore, take account - on the basis of objective evidence - of abuse on the part of the person concerned in order, where appropriate, to deny him the benefit of the provisions of Community law on which he seeks to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions (Case C-206/94 Paletta [1996] ECR I-2357, paragraph 25). The application of a national rule such as Article 281 of the Civil Code must not, therefore, detract from the full effect and uniform application of Community law in the Member States (Pafitis and Others, cited above, paragraph 68).

35 It is for the national court to determine whether, in the case before it, application of Article 281 of the Civil Code is compatible with that requirement. However, the Court has jurisdiction to provide the national court with guidance on interpretation to enable it to assess that issue of compatibility.

36 In that connection, it is clear from the above judgments in Pafitis and Others, paragraph 70, and Kefalas and Others, paragraph 29, that a shareholder relying on Article 25(1) of the Second Directive cannot be deemed to be abusing his rights merely because he is a minority shareholder of a company subject to reorganisation measures, or has benefited from the reorganisation of the company, or has not exercised his right of pre-emption. Similarly, the fact that the plaintiff in the main proceedings asked that Plastika Kavalas be made subject to the scheme under Law No. 1386/1983 does not indicate an abuse of rights.

37 As the Advocate General observed in point 29 of his Opinion, once a company is placed under the scheme provided for under Law No 1386/1983, a wide range of solutions regarding the treatment to be applied to it is available, so that a request for that Law to be applied cannot be treated as agreement to the power to take decisions with regard to increases in capital being transferred to a body external to the general meeting. A shareholder relying on Article 25(1) of the Second Directive cannot, therefore, be said to be abusing his rights under that provision on the ground that he was one of the shareholders who asked that the company be placed under the scheme of Law No 1386/1983.

38 It must next be determined whether Community law precludes the national court from verifying whether, in choosing to bring an action for a declaration that the alterations in capital were invalid, after periods of five years and four years had elapsed, the plaintiff in the main proceedings was seeking to derive, to the detriment of Plastika Kavalas, an improper advantage manifestly contrary to the objective of Article 25(1) of the Second Directive, thus constituting an abuse of his rights under that provision.

39 On that point it must be observed that the fact of having instituted proceedings, even after a certain lapse of time, within the limitation period provided for under national law for such actions cannot, as such, be described as sufficient telling evidence of abuse of rights.

40 However, it appears from the order for reference that if the action brought by the plaintiff in the main proceedings for a declaration of invalidity in respect of the alterations in the capital of Plastika Kavalas when it was under provisional administration were upheld, several operations that took place during that period could be affected, in particular purchases, sales, enforcement measures, acquisitions of businesses and the merger of Plastika Kavalas with another company. Moreover, it is indisputable that the invalidity of those alterations would inevitably affect the rights of bona fide third parties.

41 In this connection it must be borne in mind that the Second Directive does not provide for any specific penalty for breach of any of its provisions, so that the normal penalties under private law could be applicable. When he instituted proceedings the plaintiff in the main proceedings was thus entitled to elect, as he did, from among the remedies in national law available for penalising a breach of Article 25 of the Second Directive, an action for a declaration that the alterations in the capital of the company that took place were invalid.

42 It must therefore be ascertained whether Community law precludes the national court from verifying whether, in view of all that has taken place, in law and in fact, since the alterations in the capital of the company, the type of reparation sought constitutes sufficient telling evidence, in the sense indicated above, of abuse of the shareholder's rights under Article 25(1) of the Second Directive.

43 In this case it would not appear that the uniform application and full effect of Community law would be compromised if it were to be held an abuse of rights for a shareholder to rely on Article 25(1) of the Second Directive on the ground that, of the remedies available for a situation that has arisen in breach of that provision, he has chosen a remedy that will cause such serious damage to the legitimate interests of others that it appears manifestly disproportionate. Such a determination would not alter the scope of that provision and would not compromise its objectives.

44 The reply to the first question must therefore be that Community law does not preclude national courts from applying a provision of national law which enables them to determine whether a right deriving from a Community law provision is being abused. However, in making that determination, it is not permissible to deem a shareholder relying on Article 25(1) of the Second Directive to be abusing his rights under that provision merely because he is a minority shareholder of a company subject to reorganisation measures, or has benefited from reorganisation of the company, or has not exercised his right of pre-emption, or was among the shareholders who asked for the company to be placed under the scheme applicable to companies in serious difficulties, or has allowed a certain period of time to elapse before bringing his action. In contrast, Community law does not preclude national courts from applying the provision of national law concerned if, of the remedies available for a situation that has arisen in breach of that provision, a shareholder has chosen a remedy that will cause such serious damage to the legitimate interests of others that it appears manifestly disproportionate.

Question 2

45 In view of the foregoing considerations there is no need to reply to the second question.

DOCNUM	61997J0373
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2000 Page I-01705
DOC	2000/03/23
LODGED	1997/10/31

JURCIT	31977L0091-A25 : N 1 31 41 31977L0091-A25P1 : N 3 30 32 33 36 - 38 42 - 44 31977L0091-A29 : N 1 31977L0091-A29P1 : N 3 30 61996J0367-N20 : N 33 61996J0367-N28 : N 32 33 61996J0367-N29 : N 36 61990J0019 : N 26 61990J0019-N26 : N 32 61989J0381 : N 26 61994J0206-N25 : N 34 61993J0441-N68 : N 29 34 61993J0441-N69 : N 29 61993J0441-N70 : N 29 36
CONCERNS	Interprets 31977L0091 -A25P1
SUB	Freedom of establishment and services ; Right of establishment
AUTLANG	Greek
OBSERV	Greece ; Commission ; Member States ; Institutions
NATIONA	Greece
NATCOUR	*A9* Polymeles Protodikeio Athinon, Politiko Tmima, apofasis tis 24/07/1997 (6940/1997) ; - Nomiko Vima 1998 p.241-246 ; *P1* Polymeles Protodikeio Athinon, Taktiki Diadikasia, apofasis tis 05/01/2001 (95/2001) ; - Epitheorisis tou Emporikou Dikaiou 2001 p.713 ; - Soufleros, Ilias Evr.: Epitheorisis tou Emporikou Dikaiou 2001 p.713-714
NOTES	Idot, Laurence: Europe 2000 Mai Comm. no 141 p.15 ; Schutte-Veenstra, J.N.: Ondernemingsrecht 2000 p.263-264 ; Luby, Monique: Droit européen des affaires, Revue trimestrielle de droit commercial et de droit économique 2000 p.777-779 ; X: Il Foro italiano 2000 IV Col.382-383 ; Soufleros, Ilias Evr.: I apagorefsi tis katachrisis dikaiomatos kai i schesi tis me tis arches tis asfaleias dikaiou, tis prostasias tis dikaiologimenis empistosynis kai tis analogikotitas sto koinotiko etairiko dikaio, Epitheorisis tou Emporikou Dikaiou 2000 p.607-638 ; Papasteriadou, Natalia A.: Elliniki Epitheorisi Evropaïkou Dikaiou 2000 p.452-453 ; Giupponi, Tommaso F.: "In (simulato) medio stat virtus"; l'abuso del diritto comunitario tra giudice nazionale e Corte di giustizia, Diritto pubblico comparato ed europeo 2000 p.1295-1300 ; Schmidt-Kessel, Martin: Rechtsmißbrauch im Gemeinschaftsprivatrecht - Folgerungen aus den Rechtssachen Kefalas und Diamantis, Prinzipien des Privatrechts und Rechtsvereinheitlichung 2000 p.61-83 ; Anagnostopoulou, Despoina: Common Market Law Review 2001 p.767-780 ; Kessler, Alexander ; Legeais, Dominique: Casebook Europäisches Gesellschafts- und Unternehmensrecht, Casebooks Entscheidungen des EuGH 2002 Bd.3 p.139-147
PROCEDU	Reference for a preliminary ruling
ADVGEN	Saggio

JUDGRAP Kapteyn

DATES of document: 23/03/2000
of application: 31/10/1997

Judgment of the Court (Sixth Chamber)
of 16 December 1997
Coöperatieve Rabobank "Vecht en Plassengebied" BA v Erik Aarnoud Minderhoud. Reference for a preliminary ruling: Hoge Raad - Netherlands. Company law - First Directive 68/151/EEC - Scope - Representation of a company - Conflict of interests - Lack of authority of a director to enter into a binding transaction on behalf of the company. Case C-104/96.

In Case C-104/96,

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

Coöperatieve Rabobank `Vecht en Plassengebied' BA

and

Erik Aarnoud Minderhoud (receiver in bankruptcy of Mediasafe BV),

on the interpretation of Article 9(1) of the First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41),

THE COURT

(Sixth Chamber),

composed of: H. Ragnemalm (Rapporteur), President of the Chamber, G.F. Mancini and P.J.G. Kapteyn, Judges,

Advocate General: A. La Pergola,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Coöperatieve Rabobank `Vecht en Plassengebied' BA, by J.C. van Oven and A.P. Schoonbrood-Wessels, of the Hague Bar,

- the Spanish Government, by R. Silva de Lapuerta, Abogado del Estado, acting as Agent,

- the Finnish Government, by H. Rotkirch, Head of the Legal Department in the Ministry of Foreign Affairs, acting as Agent,

- the Swedish Government, by L. Nordling, Rättschef in the Department of Foreign Trade of the Ministry of Foreign Affairs, acting as Agent, and

- the Commission of the European Communities, by A. Caeiro, Legal Adviser, and B.J. Drijber, of its Legal Department, acting as Agents,$

having regard to the Report for the Hearing,

after hearing the oral observations of Coöperatieve Rabobank `Vecht en Plassengebied' BA, represented by J.C. van Oven; of Mr Minderhoud, receiver in bankruptcy of Mediasafe BV, represented by J.J. Feenstra, of the Rotterdam Bar; of the Spanish Government, represented by R. Silva de Lapuerta; and of the Commission, represented by B.J. Drijber at the hearing on 8 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 12 March 1997,

gives the following

Judgment

1 By judgment of 22 March 1996, received at the Court on 1 April 1996, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred three questions to the Court for a preliminary ruling pursuant to Article 177 of the EC Treaty concerning the interpretation of Article 9(1) of the First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41, hereinafter `the First Directive').

2 Those questions were raised in proceedings brought by the Coöperatieve Rabobank `Vecht en Plassengebied' BA (hereinafter `Rabobank'), financier of the holding company Holland Data Groep BV (hereinafter `HDG'), of five of its operating companies and of Mediasafe BV (hereinafter `Mediasafe'), against the receiver of Mediasafe on the subject of his challenge to the validity of an agreement to offset debit balances against credit balances, entered into between HDG, the five companies and Mediasafe on the one hand, and Rabobank on the other.

3 It appears from the order for reference that on 23 October 1989 Rabobank concluded an agreement with HDG and the five operating companies concerning the calculation of interest on joint accounts and the offsetting of debit balances against credit balances under which the companies were to be jointly and severally liable to Rabobank.

4 On 21 November 1989, HDG and Stichting Nieuwegein (Nieuwegein Foundation) set up Mediasafe, in which HDG held 99 shares and Stichting Nieuwegein 1 share. HDG was appointed sole director and two commissioners were appointed, on a proposal from Stichting Nieuwegein, to oversee the management and the general course of business of Mediasafe on behalf of Stichting Nieuwegein.

5 On 11 December 1989, Rabobank concluded another agreement concerning the offsetting of debit balances against credit balances, the substance and scope of which was the same as that of 23 October 1989. Mediasafe was represented by HDG, its sole director. Under that agreement all the companies in the HDG group, including Mediasafe, declared themselves jointly and severally liable for their debts to Rabobank.

6 On 22 May 1990, Mediasafe was declared bankrupt. Mr Minderhoud was appointed receiver of the company. At the time Mediasafe's account with Rabobank showed a credit balance of HFL 447 117.60.

7 By letter of 5 June 1990, Rabobank informed the receiver that, in accordance with the agreement of 11 December 1989 and Article 53 of the Faillessementswet (Bankruptcy Law), it proposed to offset credit balances against debit balances of the current accounts of the other companies in HDG in respect of which Mediasafe was joint and several co-debtor. Rabobank stated that, once the balances had been offset in this way, Mediasafe's credit balance with Rabobank at the date of the bankruptcy stood at HFL 67 337.36.

8 By judgment of 31 July 1990, HDG and its five other operating companies were declared bankrupt.

9 The receiver sought payment from Rabobank of the difference between Mediasafe's credit balance before and after this offsetting operation, which amounted to HFL 379 780.24. He argued that the agreement to offset balances of 11 December 1989 could not be given effect because there was a conflict of interests within the meaning of Articles 12(3) and (4) of Mediasafe's statutes and Article 2:256 of the Netherlands Civil Code between Mediasafe and HDG - which concluded the agreements, inter alia, on behalf of Mediasafe in its capacity as sole director. Consequently, HDG had no authority to represent Mediasafe when the agreement was concluded.

10 Article 2:146 of the Netherlands Civil Code, which applies to `naamloze vennootschappen' (public

limited liability companies), and Article 2:256, which applies to `besloten vennootschappen met beperkte aansprakelijkheid' (private limited liability companies), provide that where there is a conflict of interests between a company and the directors authorized to represent it when a legal instrument is being concluded, that instrument can only be concluded by the commissioners of that company.

11 That statutory provision was also incorporated in Article 12(3) and (4) of Mediasafe's statutes, under which:

`3. In the event of a conflict of interests between the company and one or more of its directors, the remaining director(s) shall be empowered to bind the company.

4. If there is only one director or if there is a conflict of interest involving all its directors, the company shall be represented by the board of commissioners.'

12 By judgment of 4 August 1993, the Arrondissementsrechtbank (District Court), Utrecht, held that, by reason of a conflict of interests within the meaning of Article 2:256 of the Civil Code, HDG had no authority to conclude, on behalf of Mediasafe, the agreement to offset balances with Rabobank and took the view that the latter, as a professional organization, had constructive notice of that conflict of interest. The Arrondissementsrechtbank accordingly upheld the receiver's claim.

13 That judgment was upheld by the Gerechtshof (Regional Court of Appeal), Amsterdam, on the same grounds.

14 Before the Hoge Raad der Nederlanden, Rabobank argued that a conflict of interests within the meaning of Article 2:256 of the Civil Code could only exist in the case of an instrument concluded between a company and its director. The Hoge Raad rejected that argument, thus recognizing the applicability of that provision to situations in which there was an indirect conflict of interests. However, it questions whether for a company to rely on Article 2:256 of the Civil Code as against a third party might not be incompatible with Article 9 of the First Directive, under which:$

`1. Acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company, unless such acts exceed the powers that the law confers or allows to be conferred on those organs.

However, Member States may provide that the company shall not be bound where such acts are outside the objects of the company, if it proves that the third party knew that the act was outside those objects or could not in view of the circumstances have been unaware of it; disclosure of the statutes shall not of itself be sufficient proof thereof.

2. The limits on the powers of the organs of the company, arising under the statutes or from a decision of the competent organs, may never be relied on as against third parties, even if they have been disclosed.

3. If the national law provides that authority to represent a company may, in derogation from the legal rules governing the subject, be conferred by the statutes on a single person or on several persons acting jointly, that law may provide that such a provision in the statutes may be relied on as against third parties on condition that it relates to the general power of representation; the question whether such a provision in the statutes can be relied on as against third parties shall be governed by article 3.'

15 Taking the view that Article 2:256 of the Civil Code should be interpreted in the light of the provisions of the First Directive, the Hoge Raad der Nederlanden referred the following questions to the Court for a preliminary ruling:

`(1) Is it consistent with the First Directive for a company to be allowed to rely, as against a third party with whom a director generally authorized to represent the company has entered into

a transaction on its behalf, on the fact that the director lacked authority on the ground that the transaction involved a conflict of interests between him and the company?

(2) Is Question 1 to be answered in the affirmative only if the third party had knowledge of the conflict of interests at the time when the transaction took place, or could reasonably have been expected to have knowledge of that conflict of interests on the basis of the information available to him at the time?

(3) Is Question 1 to be answered in the affirmative only if the conflict of interests at the time when the transaction took place was so plain that no reasonable third party could have believed that no such conflict existed?'

16 Mr Minderhoud and the Swedish Government argue that Community law is not applicable to the situation described in the question put by the Hoge Raad der Nederlanden and that neither Article 9 nor any other provision of the First Directive concerns the question whether a company may be bound in the event of breach of a rule, such as that applicable in the main proceedings, limiting authority to enter into binding obligations.

17 Rabobank, the Spanish Government and the Commission consider that Article 9(1) of the First Directive prevents a company from relying, as against a third party with whom the director has concluded a legal instrument which binds the company on the fact that the director lacked authority because he had an interest which conflicted with that of the company, where that lack of authority was not the result of a mandatory legal provision. In that respect, they claim, it is of no relevance whether the third party was aware of the conflict of interests or whether the existence of that conflict of interest was obvious.

18 The Finnish Government and, in an alternative submission, the Swedish Government consider that the First Directive does not preclude a national provision to the effect that a company can plead nullity on the basis of a conflict of interests if the third party was aware or could not have been unaware of the existence of a conflict of interests. A fair balance could thus be maintained between the certainty of commercial transactions, on the one hand, and the need to protect the company, on the other.

19 The purpose of the First Directive, it must be noted, is to coordinate the safeguards required by Member States of the types of limited liability company listed in Article 1, for the purpose of protecting the interests of, inter alia, third parties.

20 To that end, Section II of the First Directive lays down provisions which restrict to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid, as is clear from the fifth recital in the preamble.

21 The first paragraph of Article 9(1) of the First Directive provides that acts done by the organs of the company are to be binding upon it even if those acts are not within the objects of the company, unless such acts exceed the powers that the law confers or allows to be conferred on those organs.

22 However, it is clear from both the wording and the subject-matter of that article that it concerns the limits on a company's powers as allocated by law to the various organs of the company and is not intended to coordinate the national laws applicable where a member of an organ finds himself in a conflict of interests with the company represented because of his personal circumstances.

23 Moreover, the rules governing enforceability to be derived from this provision relate to the powers which the law, to which third parties can refer, grants or allows to be granted to the company organ, and not to the question whether a third party was aware of a conflict of interests or could not have been unaware of it in the circumstances of the case.

24 It follows that the rules governing the enforceability as against third parties of acts done

by members of company organs in such situations fall outside the normative framework of the First Directive and are matters for the national legislature.

25 This conclusion is, moreover, confirmed by the proposal for a Fifth Directive to coordinate the safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the EEC Treaty, as regards the structure of sociétés anonymes and the powers and obligations of their organs (Journal Officiel 1972 C 131, p. 49; OJ 1983 C 240, p. 2).

26 Article 10(1) of that proposal for a Fifth Directive provided that every agreement to which the company was party and in which a member of the management organ or of the supervisory organ, was to have an interest, even if only indirect, must be authorized by the supervisory organ at least.

27 Article 10(4) of the proposal for a Fifth Directive provided, further:

`Want of authorization by the supervisory organ or irregularity in the decision giving authorization shall not be adduced as against third parties save where the company proves that the third party was aware of the want of authorization or of the irregularity in the decision, or that in view of the circumstances he could not have been unaware thereof.'

28 Accordingly the answer to the question referred to the Court must be that the rules governing the enforceability as against third parties of acts done by members of company organs in circumstances where there is a conflict of interests with the company fall outside the normative framework of the First Directive and are matters for the national legislature.

Costs

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

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 22 March 1996, hereby rules:$

The rules governing the enforceability as against third parties of acts done by members of company organs in circumstances where there is a conflict of interests with the company fall outside the normative framework of the First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, and are matters for the national legislature

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AUTLANG	Dutch
OBSERV	Spain ; Finland ; Sweden ; Commission ; Member States ; Institutions
NATIONA	Netherlands
NATCOUR	*A9* Hoge Raad, 1e kamer, arrest van 22/03/1996 (15.915) ; - Arresten ondernemingsrecht (Ed. W.E.J. Tjeenk Willink - Deventer) 1996 p.1192-1205 ; - Nederlands juristenblad 1996 p.566 ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1996 no 568 ; - Rechtspraak van de week 1996 no 76 ; - TVVS ondernemingsrecht en rechtspersonen 1996 p.144-145 ; - Arresten ondernemingsrecht (Ed. Kluwer - Deventer) 2005 p.724-733 ; - European Current Law 1997 Part 1 no 8 (résumé) ; - Timmerman, L.: TVVS ondernemingsrecht en rechtspersonen 1996 p.145-146 ; - Van Achterberg, M.P.: De naamlooze vennootschap 1996 p.167-172 ; - Dortmond, P.J.: De naamlooze vennootschap 1996 p.172-174 ; - Meilicke, Wienand: Recht der internationalen Wirtschaft 1996 p.713-719 ; - Maeijer, J.M.M.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1996 no 568 ; *P1* Hoge Raad, 1e kamer, arrest van 11/09/1998 (15.915) ; - Nederlands juristenblad 1998 p.1605-1606 ; - TVVS ondernemingsrecht en rechtspersonen 1998 p.305 ; - Ars aequi 1999 p.116-117 ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1999 no 171 ; - Timmerman, L.: TVVS ondernemingsrecht en rechtspersonen 1998 p.305 ; - Raaijmakers, M.J.G.C.: Ars aequi 1999 p.117-121 ; - Maeijer, J.M.M.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1999 no 171 ; - Schutte-Veenstra, J.N.: Ondernemingsrecht 2000 p.410-415
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PROCEDU Reference for a preliminary ruling

ADVGEN La Pergola

JUDGRAP Ragnemalm

DATES of document: 16/12/1997
of application: 01/04/1996

Judgment of the Court (Sixth Chamber) of 3 May 2001

Criminal proceedings against Jean Verdonck, Ronald Everaert and Edith de Baedts. Reference for a preliminary ruling: Rechtbank van eerste aanleg te Gent - Belgium. Directive 89/592/EEC - National rules on insider dealing - Power of Member States to adopt more stringent provisions - Definition of national provisions applied generally. Case C-28/99.

Approximation of laws - Insider dealing - Directive 89/592 - Prohibition on the use of inside information - Member States' option to extend the scope of the prohibition, provided that it applies generally - Breach - Consequences

(Council Directive 89/592, Art. 2 and 6)

$$Article 6 of Directive 89/592 coordinating regulations on insider dealing does not preclude the application of legislative provisions of a Member State which, as regards the prohibition of use of inside information, are more stringent than those laid down by the directive, provided that the scope of the definition of inside information used for applying that legislation is the same for all natural or legal persons subject to the legislation.

If provisions of national law run counter to Article 6 of Directive 89/592, by reason of the fact that certain natural or legal persons are specifically exempted from a more stringent prohibition of use of inside information than that laid down by the directive, the national court must disapply those more stringent provisions with regard to all persons to whom they might otherwise apply.

(see paras 35, 38 and operative part 1-2)

In Case C-28/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Rechtbank van Eerste Aanleg te Gent, Belgium, for a preliminary ruling in the criminal proceedings brought before that court against

Jean Verdonck,

Ronald Everaert

and

Edith de Baedts,

on the interpretation of Article 6 of Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing (OJ 1989 L 334, p. 30),

THE COURT (Sixth Chamber),

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

Advocate General: P. Léger,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Verdonck, Mr Everaert and Mrs De Baedts, by K. Geens, H. Gilliams, J.-M. Nelissen Grade and R. Verstringhe, advocaten,

- the Belgian Government, by A. Snoecx, acting as Agent,

- the Netherlands Government, by M.A. Fierstra, acting as Agent,

- the Portuguese Government, by J.A. Texeira Santos do Rio and L. Fernandes, acting as Agents,

- the Commission of the European Communities, by C. Tufvesson and T. van Rijn, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Verdonck, Mr Everaert and Mrs De Baedts, and of the Belgian Government and the Commission at the hearing on 13 July 2000,

after hearing the Opinion of the Advocate General at the sitting on 12 October 2000,

gives the following

Judgment

Costs

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

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Rechtbank van Eerste Aanleg te Gent by judgment of 27 January 1999, hereby rules:

1. Article 6 of Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing does not preclude the application of legislative provisions of a Member State which, as regards the prohibition of use of inside information, are more stringent than those laid down by the directive, provided that the scope of the definition of inside information used for applying that legislation is the same for all natural or legal persons subject to the legislation.

2. If provisions of national law run counter to Article 6 of Directive 89/592, by reason of the fact that certain natural or legal persons are specifically exempted from a more stringent prohibition of use of inside information than that laid down by the directive, the national court must disapply those more stringent provisions with regard to all persons to whom they might otherwise apply.

1 By judgment of 27 January 1999, received at the Court on 5 February 1999, the Rechtbank van Eerste Aanleg te Gent (Court of First Instance, Ghent) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Article 6 of Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing (OJ 1989 L 334, p. 30).

2 Those questions were raised in the course of criminal proceedings brought against Mr Verdonck, Mr Everaert and Mrs De Baedts (hereinafter the defendants in the main proceedings or the defendants), who are charged under Articles 181, 182, 183 and 189 of the Law of 4 December 1990 on financial transactions and financial markets (Belgisch Staatsblad of 22 December 1990, p. 23800, hereinafter the 1990 Law). Those provisions define and punish insider crime.

The relevant Community legislation

3 Article 1 of Directive 89/592 provides as follows:

For the purposes of this Directive:

1. "inside information" shall mean information which has not been made public of a precise nature

relating to one or several issuers of transferable securities or to one or several transferable securities, which, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities in question;

....

4 Article 2 of Directive 89/592 provides as follows:

1. Each Member State shall prohibit any person who:

- by virtue of his membership of the administrative, management or supervisory bodies of the issuer,

- by virtue of his holding in the capital of the issuer, or

- because he has access to such information by virtue of the exercise of his employment, profession or duties,

possesses inside information from taking advantage of that information with full knowledge of the facts by acquiring or disposing of for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer or issuers to which that information relates.

2. Where the person referred to in paragraph 1 is a company or other type of legal person, the prohibition laid down in that paragraph shall apply to the natural persons who take part in the decision to carry out the transaction for the account of the legal person concerned.

...

5 Article 6 of Directive 89/592 provides as follows:

Each Member State may adopt provisions more stringent than those laid down by this Directive or additional provisions, provided that such provisions are applied generally....

The relevant Belgian legislation

6 Directive 89/592 was transposed into Belgian law by Articles 181 to 189 of the 1990 Law.

7 Article 181 of the 1990 Law defines inside information as follows:

Inside information, for the purposes of this Code, shall mean information which has not been made public, of a sufficiently precise nature, relating to one or several issuers of transferable securities or other financial instruments or to one or several transferable securities or other financial instruments, which, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities or the other financial instrument or instruments in question.

Inside information does not include information which holding companies possess because of their role in the management of companies in which they have a shareholding, unless it is information which must be made public pursuant to the statutory and regulatory provisions concerning the obligations arising from admission to the official listing of transferable securities on a stock exchange.

8 Under Article 182(1) of the 1990 Law:

Any person who:

(i) by virtue of his membership of the administrative, management or supervisory bodies of the issuer,

(ii) by virtue of his holding in the capital of the issuer,

(iii) or because he has access to such information by virtue of the exercise of his employment, profession or duties,

possesses information that he knows, or ought reasonably to know, is inside information, shall be

prohibited from acquiring or disposing of, for his own account or for the account or a third party, either directly or indirectly, transferable securities or other financial instruments to which that information relates.

9 The definition of a holding company appears in Article 1 of Royal Decree No 64 of 10 November 1967 regulating the statutes of holding companies (Belgisch Staatsblad of 14 November 1967, p. 11815).

10 Under that provision, holding companies are defined as:

1 Companies incorporated under Belgian law that have shareholdings in one or more Belgian or foreign subsidiaries, conferring on them, in law or in fact, power to direct the activities of those subsidiaries, in so far as:

(a) those companies or all or some of their subsidiaries, or subsidiaries of their subsidiaries, have made an offer to the public in Belgium in connection with the issue or placing of their stocks or shares;

(b) the value of their shareholdings is at least five hundred million francs in aggregate or represents at least half of their own capital;

2 Companies incorporated under Belgian law that have, or whose subsidiaries or subsidiaries of their subsidiaries have, made an offer to the public in Belgium in connection with the issue or placing of their stocks or shares and which are subsidiaries or subsidiaries of subsidiaries of foreign companies or institutions having, in companies incorporated under Belgian law, direct or indirect shareholdings the value of which is at least five hundred million francs in aggregate or represents at least half of their own capital.

The main proceedings and the questions referred for a preliminary ruling

11 At its meetings of 22 August and 10 October 1995, the board of directors of Ter Beke NV (hereinafter Ter Beke) considered the possibility of taking over Chilled Food Business, a division of Unilever Belgium NV (hereinafter Unilever). On 14 September 1995, a tentative offer was made and, on 19 December 1995, the board of directors of Ter Beke approved a bid to take over Chilled Food Business.

12 On 5 March 1996, Ter Beke and Unilever signed a letter of intent, made public on the same day, in which they expressed their wish to continue their existing discussions on an exclusive basis. Between 5 March 1996 and 18 March 1996, following the publication of the letter of intent, the price of shares in Ter Beke rose from BEF 2 800 to BEF 3 230, an increase of 15.3%.

13 On 14 May 1996, Ter Beke and Unilever signed an acquisition agreement relating to Chilled Food Business.

14 It is apparent from the judgment of the national court that the defendants are directors of the board of Ter Beke and that Mr Verdonck is also a member of the company's management committee. Between 6 and 8 February 1996, the defendants placed orders on the stock exchange which resulted in the acquisition of shares in Ter Beke at a price of BEF 2 590.

15 The Openbaar Ministerie (the Public Prosecutor) brought proceedings against the defendants before the Rechtbank van Eerste Aanleg te Gent on the ground that, by purchasing shares in Ter Beke before the letter of intent between itself and Unilever was made public, they made unlawful use of inside information, contrary to Articles 181, 182, 183 and 189 of the 1990 Law.

16 In their defence, the defendants argued, inter alia, that the 1990 Law is inconsistent with Directive 89/592 in that, by laying down a more stringent definition of insider dealing than the directive, whilst at the same time providing that information in the possession of holding companies does not amount to inside information for the purposes of the offence of insider dealing, the 1990

Law contravenes Article 6 of Directive 89/592, which authorises the Member States to adopt more stringent provisions than those laid down in the directive only if such provisions are applied generally.

17 Taking the view that judgment in the case depended on the interpretation of Article 6 of Directive 89/592, the Rechtbank van Eerste Aanleg te Gent stayed the proceedings and referred the following three questions to the Court of Justice for a preliminary ruling:

1 Does Article 6 of Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, which reads: "Each Member State may adopt provisions more stringent than those laid down by this directive or additional provisions, provided that such provisions are applied generally...", allow a Member State to provide for a more stringent definition in its legislation, whilst granting a given category, namely holding companies, specific exemption from that more stringent definition?

2 Is the implementation of Directive 89/592, transposed in Belgium by Article 181 of the Law of 4 December 1990, compatible with Article 6 of the directive? Article 181 reads as follows:

> "Inside information, for the purposes of this Code, shall mean information which has not been made public, of a sufficiently precise nature, relating to one or several issuers of transferable securities or other financial instruments or to one or several transferable securities or other financial instruments, which, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities or the other financial instrument or instruments in question.

Inside information does not include information which holding companies possess because of their role in the management of companies in which they have a shareholding, unless it is information which must be made public pursuant to the statutory and regulatory provisions concerning the obligations arising from admission to the official listing of transferable securities on a stock exchange.

The provisions of this Code shall apply to the transferable securities and other financial instruments referred to in Article 1."

3 If the Member State has implemented Directive 89/592/EEC as the Belgian legislature has done in Article 181 of the Law of 4 December 1990, and such implementation is contrary to the directive, does this mean that the more stringent provisions are deemed not to form part of the national legislation, or that they remain fully applicable, and to holding companies as well?

The first two questions

18 By its first two questions, which can be considered together, the national court is asking essentially whether Article 6 of Directive 89/592 is to be interpreted as not precluding a Member State from applying legislative provisions on the prohibition of use of inside information which are more stringent than those laid down by that directive but which at the same time exclude a certain category of information in the possession of holding companies from the definition of inside information contained in that legislation.

19 The defendants in the main proceedings, the Belgian and Portuguese Governments and the Commission are agreed that, in so far as the 1990 Law does not require that an insider use inside information in his possession with full knowledge of the facts, and thus also covers unintentional use of inside information, its definition of the prohibited use of inside information is more stringent than that in Article 2(1) of Directive 89/592.

20 There are, however, differences of opinion over the question whether the 1990 Law complies with Article 6 of Directive 89/592, which permits provisions that are more stringent than those laid down in the directive only on condition that such provisions are applied generally.

21 The defendants and the Portuguese Government submit that that question should be answered in

the negative. They argue that the provisions of the 1990 Law at issue in the main proceedings, which they consider to be more stringent, do not apply to a specific category of companies and are not therefore applied generally, within the meaning of Article 6.

22 For its part, the Belgian Government submits, in essence, that the second paragraph of Article 181 of the 1990 Law merely makes clear, for holding companies, which confidential information in their possession, in particular information concerning their subsidiaries, constitutes inside information and which information is not inside information. By classifying as inside information any information in the possession of holding companies which must be made public pursuant to the statutory and regulatory provisions of national law concerning the obligations arising from admission of transferable securities to official listing on a stock exchange, Article 181 of the 1990 Law does no more than give a definition corresponding to the general definition of inside information set out in Article 1(1) of Directive 89/592. The information which must be made public pursuant to those provisions of national law is precisely the information which would be likely to have a significant effect on the price of the transferable securities in question, referred to in Article 1(1) of the directive.

23 In this connection, the Belgian Government argues that, in the version in force at the time of the offence with which the defendants in the main proceedings are charged, the first indent of Article 4(1) of Royal Decree No 2331 of 18 September 1990 on obligations arising from the listing of transferable securities on the primary market of a Belgian stock exchange (Belgisch Staatsblad of 22 September 1990, p. 18138) imposed an obligation on companies whose shares were admitted to official listing on a stock exchange to make public, without delay, any fact or decision within their knowledge which, if it were made public, would be likely to have a significant effect on the price of the shares on the exchange. The Belgian Government indicates that that provision has since been incorporated into Royal Decree No 1421 of 3 July 1996 on ad hoc reporting obligations of issuers whose financial instruments are listed on the primary market and the new market of a stock exchange (Belgisch Staatsblad of 6 July 1996, p. 18700).

24 The Belgian Government adds that certain specific attributes of holding companies led the legislature to define inside information more precisely where those companies are concerned, but points out that that definition merely renders explicit, in the case of a particular category of companies, the general definition.

25 Alternatively, it submits that, should the definition of inside information for holding companies be held to be different from that applicable to other companies, that would not detract from the general scope of application of Article 182 of the 1990 Law, since that provision prohibits use of any inside information for carrying out transactions relating to transferable securities or financial instruments.

26 In the further alternative, the Belgian Government submits that, if the combined provisions of the second paragraph of Article 181 and Article 182 of the 1990 Law were to be held to create an exception to a provision more stringent than those laid down by Directive 89/592, that exception is justified. Indeed, the directive itself takes account of certain specific situations and certain categories of participants in the financial markets so as to remove them from its ambit in order to avoid prohibiting perfectly routine transactions. In this connection, the Belgian Government refers to the 11th and 12th recitals in the preamble to Directive 89/592 and to Article 2(4) of that directive. It submits that, in the absence of provisions such as those contained in the second paragraph of Article 181 of the 1990 Law, holding companies would be unable to manage their shareholdings. The Netherlands Government shares that view. Both governments consider that holding companies are in a special position because, by virtue of their legal or de facto control over their subsidiaries, they necessarily possess confidential information. Thus, if all such information were to be regarded as inside information, such companies would be unable to conduct their business.

27 The Commission submits that the exception in favour of holding companies means that that category of companies is exempted not only from the prohibition of unintentional use of inside information but also from the prohibition of use of such information with full knowledge of the facts. In other words, the exception for holding companies derogates both from the more stringent prohibition in the 1990 Law and from the prohibition laid down in Directive 89/592. The exception in the second paragraph of Article 181 of the 1990 Law is, however, legally distinct from the more stringently formulated prohibition of use of inside information in Article 182 of the 1990 Law, so that that national provision remains a provision which is applied generally, within the meaning of Article 6 of the directive, despite the derogation in favour of holding companies.

28 It must be borne in mind at the outset that, although the Court may not, under Article 177 of the Treaty, rule upon the compatibility of a provision of domestic law with Community law or interpret domestic legislation or regulations, it may nevertheless provide the national court with an interpretation of Community law on all such points as may enable that court to determine the issue of compatibility for the purposes of the case before it (see, for example, Joined Cases 209/84 to 213/84 Asjes and Others [1986] ECR 1425, paragraph 12, and Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 Tombesi and Others [1997] ECR I-3561, paragraph 36).

29 Under Article 2(1) of Directive 89/592, the Member States must prohibit any person who, by virtue of his duties, profession or holding in the capital of an issuer, possesses inside information from taking advantage of that information with full knowledge of the facts by acquiring or disposing of, for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer or issuers to which that information relates.

30 Article 6 of Directive 89/592 permits the Member States to adopt provisions more stringent than those laid down by the directive, provided that such provisions are applied generally.

31 The Belgian Government accepts that, with regard to the prohibition contained in Article 2(1) of Directive 89/592, its national legislature availed itself of the possibility of laying down more stringent provisions by not adopting the condition of taking advantage of inside information with full knowledge of the facts. Article 182(1) of the 1990 Law in fact prohibits persons to whom it applies and who are in possession of information which they know, or ought reasonably to know, is inside information from acquiring or disposing of transferable securities whose market price is likely to be significantly affected by that information.

32 Furthermore, the Belgian legislature introduced into the definition of inside information, set out in Article 181 of the 1990 Law, additional elements in relation to the definition of inside information in Article 1 of Directive 89/592, which covers information not in the public domain, of a precise nature and relating to one or more issuers of transferable securities or to one or several transferable securities, which, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities in question. However, it is clear that the additional elements in Article 181 of the 1990 Law concern only information held by a particular category of participants in the financial markets, namely holding companies, and do not concern, in general, a specific kind of information that might have an influence on the price of transferable securities or other financial instruments, regardless of the status or position of the natural or legal person possessing that information.

33 Such a provision can therefore bring about a regime specific to a particular category of participants in the financial markets, contrary to Article 6 of Directive 89/592, unless the additional elements merely clarify the general definition of inside information for that category of participants without in any way altering the scope of that definition.

34 It is for the national court to determine whether or not the additional elements included by

the national legislature in Article 181 of the 1990 Law with regard to information in the possession of holding companies, read in conjunction with all the provisions of national law determining the application of that provision, result in making the information regarded as inside information in the case of holding companies more restricted than the information regarded as inside information for the purposes of the general definition contained in Article 181. In so doing, the national court will thus be able to determine whether or not holding companies and persons having access to information possessed by them are more favourably treated than other participants in the financial market in so far as concerns the prohibition on using inside information as defined by Directive 89/592 and, in particular, in so far as concerns the provisions of the 1990 Law that are more stringent than those set out in the directive.

35 The answer to be given to the first two questions must therefore be that Article 6 of Directive 89/592 does not preclude the application of legislative provisions of a Member State which, as regards the prohibition of use of inside information, are more stringent than those laid down by the directive, provided that the scope of the definition of inside information used for applying that legislation is the same for all natural or legal persons subject to the legislation.

The third question

36 In the event that the existence of provisions of national law more stringent than those laid down by Directive 89/592 is incompatible with Article 6 of that directive, by reason of the fact that they are not of general application, the national court asks essentially whether those more stringent provisions are to be regarded as not forming part of the national legislation or whether they must be applied to all participants in the financial markets, including those otherwise exempt from them under that national legislation.

37 Suffice it to observe in this connection that, if the provisions of the legislation of a Member State that are more stringent than those laid down by Directive 89/592 are incompatible with Article 6 of that directive, they are contrary to Community law and cannot therefore be applied to any participant in the financial markets.

38 The answer to the third question must therefore be that, if provisions of national law run counter to Article 6 of Directive 89/592, by reason of the fact that certain natural or legal persons are specifically exempted from a more stringent prohibition of use of inside information than that laid down by the directive, the national court must disapply those more stringent provisions with regard to all persons to whom they might otherwise apply.

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Judgment of the Court (Grand Chamber) of 22 November 2005

Criminal proceedings against Knud Grøngaard and Allan Bang. Reference for a preliminary ruling: Københavns Byret - Denmark. Directive 89/592/EEC - Insider dealing - Disclosure of inside information to third parties - Prohibition. Case C-384/02.

Approximation of laws - Insider dealing - Directive 89/592 - Prohibition on the disclosure of inside information to a third party - Exception - Disclosure of inside information in the normal course of employment - Definition - Member of the board of directors or member of the liaison committee of a group of undertakings disclosing such information to the general secretary of the organisation which organises the employees who appointed that person - Whether permissible - Conditions - General secretary disclosing such information to colleagues - Whether permissible - Conditions

(Council Directive 89/592, Art. 3(a))

Article 3(a) of Directive 89/592 coordinating regulations on insider dealing, which prohibits certain persons from disclosing inside information to any third party, unless such disclosure is made in the normal course of his employment, profession or duties, precludes a person who receives inside information in his capacity as an employees' representative on a company's board of directors or in his capacity as a member of the liaison committee of a group of undertakings, from disclosing such information to the general secretary of the professional organisation which organises those employees and which appointed that person as a member of the liaison committee, unless there is a close link between the disclosure and the exercise of his employment, profession or duties and that disclosure is strictly necessary for the exercise of that employment, profession or duties.

As part of its examination, the national court must, in the light of the applicable national rules, take particular account of the fact that that exception to the prohibition of disclosure of inside information must be interpreted strictly, the fact that each additional disclosure is liable to increase the risk of that information being exploited for a purpose contrary to Directive 89/592, and the sensitivity of the inside information.

Article 3(a) precludes disclosure of inside information by the general secretary of a professional organisation to colleagues, such as the deputy general secretaries of that organisation and the senior administrative manager of its secretariat, except under those same conditions. As part of its examination, the national court must, in the light of the applicable national rules, take particular account of those criteria.

(see paras 48, 54, operative part 1-2)

In Case C-384/02,

REFERENCE for a preliminary ruling under Article 234 EC from the Københavns Byret (Denmark), made by decision of 14 August 2002, received at the Court on 25 October 2002, in the criminal proceedings against

Knud Grøngaard,

Allan Bang,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, Presidents of Chambers, J.-P. Puissochet, R. Schintgen, S. von Bahr (Rapporteur), J.N. Cunha Rodrigues and R. Silva de Lapuerta, Judges,

Advocate General: M. Poiares Maduro,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 24 March 2004,

after considering the observations submitted on behalf of:

- Mr Grøngaard, by L. Kjeldsen, advokat,

- Mr Bang, by J. Juul, advokat,

- the Danish Government, by J. Bering Liisberg, and subsequently by J. Molde, acting as Agents,

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

- the Commission of the European Communities, by N.B. Rasmussen and G. Zavvos, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 May 2004,

gives the following

Judgment

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

1. Article 3(a) of Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing precludes a person, who receives inside information in his capacity as an employees' representative on a company's board of directors or in his capacity as a member of the liaison committee of a group of undertakings, from disclosing such information to the general secretary of the professional organisation which organises those employees and which appointed that person as a member of the liaison committee, unless:

- there is a close link between the disclosure and the exercise of his employment, profession or duties, and

- that disclosure is strictly necessary for the exercise of that employment, profession or duties.

As part of its examination, the national court must, in the light of the applicable national rules, take particular account of:

- the fact that that exception to the prohibition of disclosure of inside information must be interpreted strictly;

- the fact that each additional disclosure is liable to increase the risk of that information being exploited for a purpose contrary to Directive 89/592, and

- the sensitivity of the inside information.

2. Article 3(a) of Directive 89/592 precludes disclosure of inside information by the general secretary of a professional organisation to colleagues, such as those referred to in the third and fourth questions, except under the conditions set out in the reply to the first and second questions.

As part of its examination, the national court must, in the light of the applicable national rules, take particular account of the criteria also set out in that reply.

1. This reference for a preliminary ruling concerns the interpretation of Article 3(a) of Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing (OJ 1989 L 334, p. 30).

2. The reference has been made in the course of criminal proceedings brought against Mr Grøngaard and Mr Bang for offences under the Værdipapirhandelslov (Law on dealings in transferable securities) which transposed Directive 89/592 into Danish law.

Legal framework

Community legislation

3. Article 1 of Directive 89/592 provides:

For the purposes of this Directive:

1. inside information shall mean information which has not been made public of a precise nature relating to one or several issuers of transferable securities or to one or several transferable securities, which, if it were made public, would be likely to have a significant effect on the price of the transferable security or securities in question'.

4. Article 2(1) of that directive provides:

Each Member State shall prohibit any person who:

- by virtue of his membership of the administrative, management or supervisory bodies of the issuer,

- by virtue of his holding in the capital of the issuer, or

- because he has access to such information by virtue of the exercise of his employment, profession or duties,

possesses inside information from taking advantage of that information with full knowledge of the facts by acquiring or disposing of for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer or issuers to which that information relates.'

5. Under Article 3 of that directive:

Each Member State shall prohibit any person subject to the prohibition laid down in Article 2 who possesses inside information from:

(a) disclosing that inside information to any third party unless such disclosure is made in the normal course of the exercise of his employment, profession or duties;

(b) recommending or procuring a third party, on the basis of that inside information, to acquire or dispose of transferable securities admitted to trading on its securities markets as referred to in Article 1(2) in fine.'

6. Article 4 of Directive 89/592 provides:

Each Member State shall also impose the prohibition provided for in Article 2 on any person other than those referred to in that Article who with full knowledge of the facts possesses inside information, the direct or indirect source of which could not be other than a person referred to in Article 2.'

7. According to Article 6 of that directive:

Each Member State may adopt provisions more stringent than those laid down by this Directive or additional provisions, provided that such provisions are applied generally. In particular it may extend the scope of the prohibition laid down in Article 2 and impose on persons referred to in Article 4 the prohibitions laid down in Article 3.'

National legislation

8. Directive 89/592 was transposed into Danish law by Paragraphs 34 to 39 and 93 to 96 of the Law on dealings in transferable securities.

9. Paragraph 35(1) of that Law provides:

The purchase or sale, or incitement to the purchase or sale, of transferable securities may not be effected by anyone with inside information which may have a bearing on the transaction.'

10. Paragraph 36(1) of that Law is worded as follows:

Any person in possession of inside information may not disclose such information to any other person unless such disclosure is made in the normal course of the exercise of his employment, profession or duties.'

11. The prohibition on disclosure laid down in Paragraph 36(1) of the Law covers any person in possession of inside information, whether or not the person concerned belongs to the group covered by Article 2 of Directive 89/592 or has come into possession of the inside information in some other way.

12. Paragraph 94(1)(1) of the Law on dealings in transferable securities provides that any infringement of Paragraph 36(1) thereof is punishable by either a fine or imprisonment for up to 18 months.

The main proceedings and the questions referred for a preliminary ruling

13. Mr Bang is the General Secretary of Finansforbundet, the professional trade union of employees in the financial sector. Finansforbundet has approximately 50 000 members.

14. Mr Grøngaard was a member, elected by the staff, of the board of directors of the company RealDanmark, a major financial institution quoted on the stock exchange and having almost 7 000 employees. He had also been appointed by Finansforbundet as a member of the RealDanmark Group's Liaison Committee (hereinafter the Liaison Committee'). That committee had been set up under an agreement between Finansforbundet and RealDanmark. Mr Grøngaard represented the trade union on that committee. Finally, Mr Grøngaard was secretary of Kapitalkreds, one of the 11 sections of Finansforbundet, which, with about 6 500 members, brought together more than 90% of RealDanmark's staff.

15. Following an extraordinary meeting of RealDanmark's board of directors, Mr Grøngaard, on 23 August 2000, disclosed to Mr Bang information relating to a plan to enter into merger negotiations with Danske Bank, another important financial institution in Denmark.

16. Between 28 August and 4 September 2000, Mr Bang consulted his two deputy General Secretaries, Mrs Madsen and Mrs Nielsen, as well as Mr Christensen, one of his colleagues in Finansforbundet's secretariat, disclosing to them the same information as that which he had received from Mr Grøngaard. On 31 August 2000, Mr Christensen bought shares in RealDanmark for the sum of approximately EUR 48 000.

17. On 18 September 2000, Mr Grøngaard attended a meeting of RealDanmark's board, in the course of which the details of the merger were discussed. On 22 September 2000, he attended a special meeting of the Liaison Committee, in the course of which the details of the merger were also discussed. He again approached Mr Bang, on 26 September 2000, with the aim of helping the staff to deal with the consequences of the merger. They discussed, in particular, the timetable envisaged for the merger as well as the expected rise in the market price of RealDanmark's shares, understood to be between 60% and 70%.

18. On 27 and 28 September 2000 respectively, Mr Bang disclosed some information to Mr Larsen, the head of Finansforbundet's secretariat, and to his colleague Mr Christensen, concerning, in particular, the date envisaged for the announcement of the merger and the anticipated conversion rate. On 29 September 2000, Mr Christensen bought additional shares in RealDanmark for approximately EUR 214 000.

19. On 2 October 2000, the merger between RealDanmark and Danske Bank was made public and the market price of RealDanmark's shares rose by some 65%. Mr Christensen sold his shares in RealDanmark

on 2 and 3 October 2000, realising a total profit of about EUR 180 000. He was subsequently sentenced to six months' imprisonment for insider dealing, contrary to Paragraph 35(1) of the Law on dealings in transferable securities.

20. Mr Grøngaard and Mr Bang are being prosecuted before the Københavns Byret (Copenhagen District Court) for having disclosed inside information, contrary to Paragraph 36(1) of that Law.

21. In the case before it, the Københavns Byret decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Does Article 3(a) of Directive 89/592 preclude a person from disclosing inside information in the case where that person received the inside information in his capacity as an employeeelected member of the Board of the undertaking to which the inside information relates and that information is disclosed to the General Secretary of the trade union which organises the employees who elected the person concerned as a board member?

2. Does Article 3(a) of Directive 89/592 preclude a person from disclosing inside information in the case where that person received the inside information in his capacity as a member of the undertaking's liaison committee and that information is disclosed to the General Secretary of the trade union which appointed the person concerned to be a member of the liaison committee?

3. Does Article 3(a) of Directive 89/592 preclude the General Secretary of a trade union from disclosing inside information in the case where that general secretary received the inside information under the circumstances outlined in Question 1 and the information is passed on to:

(a) the General Secretary's two deputies;

(b) the senior administrative manager of the union's secretariat; and

(c) colleagues of the General Secretary within the union's secretariat?

4. Does Article 3(a) of Directive 89/592 preclude the General Secretary of a trade union from disclosing inside information in the case where that general secretary received the inside information under the circumstances outlined in Question 2 and the information is passed on to:

(a) the General Secretary's two deputies;

(b) the senior administrative manager of the union's secretariat; and

(c) colleagues of the General Secretary within the union's secretariat?

5. What bearing on the answers to Questions 1 to 4 has the fact that the inside information which is disclosed is

(a) information on the commencement of merger negotiations between two companies quoted on the stock exchange;

(b) information on the date of merger of two companies quoted on the stock exchange; or

(c) information on the level of the rise in the value of shares in a company quoted on the stock exchange which is anticipated by reason of the fact that the company is to merge with another quoted company?'

The questions referred

Preliminary observations

22. Directive 89/592 prohibits insider dealing with the aim of protecting investor confidence in the secondary market for transferable securities and, consequently, of ensuring the proper functioning of that market.

23. Thus, Article 2 of Directive 89/592 prohibits any person, who, by virtue, in particular, of his membership of administrative bodies or by virtue of the exercise of his employment, profession or duties, possesses inside information, that is, information of a precise nature which has not been made public and which would be likely to have a significant effect on the price of one or more transferable securities, from taking advantage of that information by acquiring or disposing of those transferable securities.

24. In order to limit the number of persons capable of taking advantage of such information by disposing of or acquiring the transferable securities concerned thereby, Article 3 of Directive 89/592 also lays down, for the persons listed in Article 2 of that directive, a prohibition on disclosing inside information to third parties.

25. That prohibition is not, however, absolute.

26. Under Article 3(a) of Directive 89/592, the prohibition of disclosing inside information does not apply to its disclosure by a person in the normal course of the exercise of his employment, profession or duties.

27. Even if that rule, having regard to the terms used, is capable of covering very different situations, it must, as an exception to a general prohibition and in the light of the objective pursued by Directive 89/592, be interpreted strictly.

28. The criminal nature of the proceedings brought against Mr Grøngaard and Mr Bang and the principle that penalties must have a proper legal basis applicable in such proceedings does not affect the strict interpretation to be given to Article 3(a) of Directive 89/592. As the Advocate General maintains in point 24 of his Opinion, the interpretation of a directive's scope cannot be dependent upon the civil, administrative or criminal nature of the proceedings in which it is invoked.

29. In addition, it is for the referring court to ensure compliance with the principle of legal certainty in the interpretation, in the light of a directive's wording and purpose, of the national law adopted in order to implement it (see Joined Cases C74/95 and C129/95 X [1996] ECR I6609, paragraph 26).

30. It is also appropriate to note that the obligation on the national court to refer to the content of the directive when interpreting the relevant rules of its national law is not unlimited, particularly where such interpretation would have the effect, on the basis of the directive and independently of legislation adopted for its implementation, of determining or aggravating the liability in criminal law of persons who act in contravention of its provisions (see, in particular, Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969, paragraph 13, and X , cited above, paragraph 24).

31. As regards the scope of the exception under Article 3(a) of Directive 89/592, it must be observed that, by requiring that the disclosure of inside information must take place in the normal course of a person's exercise of his employment, profession or duties, that exception requires a close link between that disclosure and the exercise of that employment, that profession or those duties in order to justify such disclosure.

32. The scope of the latter condition must be determined by taking into consideration the objectives pursued by Directive 89/592.

33. The second to the fifth recitals in the preamble to Directive 89/592 state that it is intended to ensure the proper functioning of the secondary market in transferable securities and to protect investors' confidence, which depends, in particular, on their being placed on an equal footing and protected against the improper use of inside information.

34. In the light of those objectives, and having regard to the fact that Article 3(a) of Directive 89/592 is an exception which must be interpreted strictly, the disclosure of such information is

justified only if it is strictly necessary for the exercise of an employment, profession or duties and complies with the principle of proportionality.

35. In the case of successive disclosures, each disclosure must satisfy those requirements in order to come within the exception under Article 3(a) of Directive 89/592.

36. Where it is necessary to appraise the need for a disclosure of inside information, it is appropriate, also, to take into consideration the fact that each additional disclosure is liable to increase the risk of that information being exploited for a purpose contrary to Directive 89/592.

37. In order to determine whether a disclosure is justified in a particular case, it is appropriate to take account also of the sensitivity of the inside information in question.

38. Particular care is required when the disclosure is of inside information manifestly capable of affecting significantly the price of the transferable securities in question. In that context, it is appropriate to observe that inside information relating to a merger between two companies quoted on the stock exchange is in general particularly sensitive.

39. It is also appropriate to point out that the exception under Article 3(a) of Directive 89/592 must be appraised taking into account the particular features of the applicable national law.

40. What is to be regarded as coming within the normal ambit of the exercise of an employment, profession or duties depends to a large extent, in the absence of harmonisation in that respect, on the rules governing those questions in the various national legal systems.

41. Finally, it must be observed that Directive 89/592 lays down minimum requirements as regards the prohibition of the exploitation and disclosure of inside information.

42. Under Article 6 of Directive 89/592, each Member State may adopt provisions of general application that are more stringent than those laid down by that directive.

The first and second questions

43. By its first two questions, which it is appropriate to consider together, the referring court is asking in essence whether Article 3(a) of Directive 89/592 precludes a person, who receives inside information in his capacity as the employees' representative on a company's board of directors or in his capacity as a member of the liaison committee of a group of undertakings, from disclosing such information to the general secretary of the professional organisation which organises those employees and which appointed that person as a member of the liaison committee.

44. In that regard, it is appropriate first of all to note that the rights and duties and the functioning of the administrative, managerial and supervisory bodies of capital companies, as well as the rights and duties and role of employees' representatives on those bodies are, in their essentials, regulated by the Member States' legal orders.

45. The same applies with regard to the rights and duties and functioning of the liaison committee.

46. It follows that, on the question whether the disclosure of inside information by such a person to the general secretary of that professional organisation comes within the normal exercise of his duties, the reply depends, to a large extent, on the rules governing those duties in the national legal system in question.

47. Even if such a disclosure is allowed by the applicable national legal order, it must also, in order to come within the exception under Article 3(a) of Directive 89/592, be made under the conditions specified in paragraphs 22 to 42 of this judgment.

48. In view of the foregoing, the reply to the first and second questions must be that Article 3(a) of Directive 89/592 precludes a person, who receives inside information in his capacity as

an employees' representative on a company's board of directors or in his capacity as a member of the liaison committee of a group of undertakings, from disclosing such information to the general secretary of the professional organisation which organises those employees and which appointed that person as a member of the liaison committee, unless:

- there is a close link between the disclosure and the exercise of his employment, profession or duties, and

- that disclosure is strictly necessary for the exercise of that employment, profession or duties.

As part of its examination, the national court must, in the light of the applicable national rules, take particular account of:

- the fact that that exception to the prohibition of disclosure of inside information must be interpreted strictly;

- the fact that each additional disclosure is liable to increase the risk of that information being exploited for a purpose contrary to Directive 89/592, and

- the sensitivity of the inside information.

The third and fourth questions

49. By its third and fourth questions, which it is appropriate to consider together, the referring court is in essence asking the Court whether and under what conditions Article 3(a) of Directive 89/592 allows the general secretary of a professional organisation, who receives inside information in the circumstances set out in the first and second questions, to disclose that information to his colleagues.

50. It should be pointed out in this regard that the activities of a professional organisation, such as that in issue in the main proceedings, and the role of its general secretary are subject, in their essentials, in the same way as the administrative bodies and liaison committee which form the subject-matter of the first two questions, to the national legal system in question.

51. It follows that the reply to the question whether the general secretary of such a professional organisation may disclose inside information to third parties in the course of his duties depends to a large extent on the applicable national law.

52. It should be recalled, as is stated in paragraph 47 of this judgment, that even if such a disclosure is allowed by the applicable national legal order, it must also, in order to come within the exception under Article 3(a) of Directive 89/592, be made under the conditions specified in paragraphs 22 to 42 of this judgment.

53. In that context, it must also be observed that, under Articles 2 and 3(a) of Directive 89/592, apart from the persons who possess inside information by virtue of their membership of administrative, managerial or supervisory bodies or by virtue of their holding in the capital of the issuing company, the prohibition of disclosure of inside information applies only to persons who possess such information by virtue of the exercise of their employment, profession or duties.

54. In view of the foregoing, the reply to the third and fourth questions must be that Article 3(a) of Directive 89/592 precludes disclosure of inside information by the general secretary of a professional organisation to colleagues, such as those referred to in those questions, except under the conditions set out in the reply to the first and second questions. As part of its examination, the national court must, in the light of the applicable national rules, take particular account of the criteria also set out in that reply.

The fifth question

55. Having regard to the replies given to the first four questions, there is no need to reply to the fifth question.

Costs

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

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Tidskrift vid Stockholms universitet 2005-06 p.905-911 ; Bouveresse, Aude: Marchés financiers - Un représentant du personnel peut être un initié, Europe 2006 Janvier Comm. no 15 p.17-18 ; Vatinet, Raymonde: La communication d'informations privilégiées par des représentants du personnel initiés, La semaine juridique - Social 2006 no 1119 p.27-31 ; Schwintek, Sebastian: Entscheidungen zum Wirtschaftsrecht 2006 p.155-156 ; ech, Petr: K zakazu zneuití vnitních (inside) informací, resp. k povinnosti mlenlivosti lena organu akciové spolenosti, EMP Jurisprudence 2006 p.38-41 ; Lafuma, Emmanuelle: L'actualité de la jurisprudence communautaire et internationale, Revue de jurisprudence sociale 2006 p.359-361 ; Mok, M.R.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2006 no 336 ; Daigre, Jean-Jacques: La communication d'une information privilégiée n'est pas répréhensible dès lors qu'elle est strictement nécessaire et proportionnée à l'exercice d'une fonction ou d'une profession, Revue des sociétés 2006 p.341-345 ; Carriero, G.: Il Foro italiano 2006 IV Col. 345-347 ; Chemin-Bomben, Delphine: Notion d'initié dans l'exercice de son travail, Revue Lamy droit des affaires 2006 no 3 p.33 ; Michalopoulos, G.N.: Oi ekprosopoi ton ergazomenon os "insiders", Dikaio Epicheiriseon & Etairion 2006 p.493-495

PROCEDU Reference for a preliminary ruling

ADVGEN Poiares Maduro

JUDGRAP von Bahr

DATES of document: 22/11/2005
of application: 25/10/2002

Judgment of the Court of 4 June 2002

Commission of the European Communities v Portuguese Republic. Failure by a Member State to fulfil its obligations - Articles 52 of the EC Treaty (now, after amendment, Article 43 EC) and 73b of the EC Treaty (now Article 56 EC) - System of administrative authorisation relating to privatised undertakings. Case C-367/98.

1. Free movement of capital - Restrictions - Obstacles resulting from a system of administrative authorisation relating to privatised undertakings - Justification - Systems of property ownership - None

(EC Treaty, Art. 222 (now Art. 295 EC))

2. Free movement of capital - Restrictions - National rules prohibiting the acquisition by investors from other Member States of more than a given number of shares and providing for a system of prior authorisation for the acquisition of a holding in certain national undertakings in excess of a specified level - Not permissible - Justification on economic grounds - None

(EC Treaty, Arts 73b and 73d(1) (now Arts 56 EC and 58(1) EC))

$$1. Depending on the circumstances, certain concerns may justify the retention by Member States of a degree of influence within undertakings that were initially public and subsequently privatised, where those undertakings are active in fields involving the provision of services in the public interest or strategic services. However, those concerns cannot entitle Member States to plead their own systems of property ownership, referred to in Article 222 of the Treaty (now Article 295 EC), by way of justification for obstacles, resulting from a system of administrative authorisation relating to privatised undertakings, to the exercise of the freedoms provided for by the Treaty. That article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty.

(see paras 47-48)

2. A Member State which adopts and maintains in force national rules (a) prohibiting the acquisition by investors from other Member States of more than a given number of shares in certain national undertakings and (b) requiring the grant by the State of prior authorisation for the acquisition of a holding in certain national undertakings in excess of a specified level fails to comply with its obligations under Article 73b of the Treaty (now Article 56 EC).

Such rules constitute a restriction on the movement of capital within the meaning of that article which cannot be justified. In that regard, restrictions on the fundamental freedom concerned cannot be justified either by the economic policy objectives reflected in such national rules or by the objectives of choosing a strategic partner, strengthening the competitive structure of the market concerned or modernising and increasing the efficiency of means of production, inasmuch as all those grounds fall outside the ambit of the reasons set out in Article 73d(1) of the Treaty (now Article 58(1) EC).

(see paras 46, 52, operative part 1)

In Case C-367/98,

Commission of the European Communities, represented initially by A. Caeiro, and subsequently by F. Benyon and F. de Sousa Fialho, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented initially by L. Fernandes and L. Bigotte Chorao, and subsequently by L. Fernandes and J. Vasconcelos, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by adopting and maintaining in force Law No 11/90 of 5 April 1990, being the framework law on privatisations (Diario da Republica I, Series A, No 80, of 5 April 1990, p. 1664), in particular Article 13(3) thereof, the decree-laws on the privatisation of undertakings subsequently adopted in application of that Law and also Decree-Laws Nos 380/93 of 15 November 1993 (Diario da Republica I, Series A, No 267, of 15 November 1993, p. 6362) and 65/94 of 28 February 1994 (Diario da Republica I, Series A, No 49, of 28 February 1994, p. 993), the Portuguese Republic has failed to comply with its obligations under the EC Treaty, in particular Articles 52 (now, after amendment, Article 43 EC), 56 (now, after amendment, Article 46 EC), 58 (now Article 48 EC), 73b (now Article 56 EC) et seq. and 221 (now, after amendment, Article 294 EC) thereof, and Articles 221 and 231 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann (Rapporteur), N. Colneric and S. von Bahr (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, J.-P. Puissochet, R. Schintgen, V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 2 May 2001, at which the Commission was represented by F. de Sousa Fialho and by M. Patakia, acting as Agent, and the Portuguese Republic by L. Fernandes and by C. Botelho Moniz, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 3 July 2001,

gives the following

Judgment

Costs

60 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Commission has applied for the Portuguese Republic to be ordered to pay the costs and the latter has, in essence, been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT,

hereby:

1. Declares that, by adopting and maintaining in force Law No 11/90 of 5 April 1990, being the framework law on privatisations, in particular Article 13(3) thereof, the decree-laws on the privatisation of undertakings subsequently adopted in application of that Law and also Decree-Laws Nos 380/93 of 15 November 1993 and 65/94 of 28 February 1994, the Portuguese Republic has failed to comply with its obligations under Article 73b of the EC Treaty (now Article 56 EC);

2. Dismisses the remainder of the action;

3. Orders the Portuguese Republic to pay the costs.

1 By application received at the Court Registry on 14 October 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by adopting and maintaining in force Law No 11/90 of 5 April 1990, being the framework law on privatisations (Diario da Republica I, Series A, No 80, of 5 April 1990, p. 1664, hereinafter Law No 11/90), in particular Article 13(3) thereof, the decree-laws on the privatisation of undertakings subsequently adopted in application of that Law and also Decree-Laws Nos 380/93 of 15 November 1993 (Diario da Republica I, Series A, No 267, of 15 November 1993, p. 6362, hereinafter Decree-Law No 380/93) and 65/94 of 28 February 1994 (Diario da Republica I, Series A, No 49, of 28 February 1994, p. 993, hereinafter Decree-Law No 65/94), the Portuguese Republic has failed to comply with its obligations under the EC Treaty, in particular Articles 52 (now, after amendment, Article 43 EC), 56 (now, after amendment, Article 46 EC), 58 (now Article 48 EC), 73b (now Article 56 EC) et seq. and 221 (now, after amendment, Article 294 EC) thereof, and Articles 221 and 231 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23, hereinafter the Act of Accession).

Legal framework

Community law

2 Article 73b(1) of the Treaty is in the following terms:

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.

3 Article 73d(1)(b) of the EC Treaty (now Article 58(1)(b) EC) provides:

The provisions of Article 73b shall be without prejudice to the right of Member States:

...

(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.

4 Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5) contains a nomenclature of the capital movements referred to in Article 1 of that directive. In particular, it lists the following movements:

I - Direct investments

1. Establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings.

2. Participation in new or existing undertakings with a view to establishing or maintaining lasting economic links.

...

5 According to the explanatory notes appearing at the end of Annex I to Directive 88/361, direct investments means:

Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense.

...

As regards those undertakings mentioned under I-2 of the Nomenclature which have the status of companies limited by shares, there is participation in the nature of direct investment where the block of shares held by a natural person or another undertaking or any other holder enables the shareholder, either pursuant to the provisions of national laws relating to companies limited by shares or otherwise, to participate effectively in the management of the company or in its control.

...

6 The nomenclature appearing in Annex I to Directive 88/361 also refers to the following movements:

III - Operations in securities normally dealt in on the capital market

...

A - Transactions in securities on the capital market

1. Acquisition by non-residents of domestic securities dealt in on a stock exchange

...

3. Acquisition by non-residents of domestic securities not dealt in on a stock exchange

...

7 Article 222 of the EC Treaty (now Article 295 EC) provides:

This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.

8 Article 222 of the Act of Accession is in the following terms:

1. Until 31 December 1989, the Portuguese Republic may maintain a system of advance authorisation for direct investments, within the meaning of the First Council Directive of 11 May 1960 for the implementation of Article 67 of the EEC Treaty, as amended and added to by Second Council Directive 63/21/EEC of 18 December 1962 and by the 1972 Act of Accession, carried out in Portugal by nationals of other Member States and connected with the exercise of the right of establishment and the freedom to provide services and whose overall value exceeds the following amounts:

...

2. The provisions of paragraph 1 shall not apply to direct investments concerning the credit institutions sector.

3. For every investment project subject to advance authorisation pursuant to paragraph 1, the Portuguese authorities must take a decision at the latest two months after the application has been made. If no decision is taken within this time-limit, the proposed investment shall be deemed to be authorised.

4. The investors covered by paragraph 1 may not be treated differently from one another nor be granted less favourable treatment than that granted to nationals of third countries.

9 Article 231 of the Act of Accession provides as follows:

The Portuguese Republic shall, circumstances permitting, carry out the liberalisation of capital

movements and invisible transactions referred to in Articles 224 to 230 before expiry of the time-limits laid down in those articles.

National law

10 Article 3 of Law No 11/90 provides:

Re-privatisations shall pursue the following main objectives:

(a) to modernise economic entities and make them more competitive, and to contribute to strategies for restructuring the sector or undertaking concerned;

(b) to strengthen national business capacity;

(c) to help reduce the role played by the State in the economy;

(d) to contribute to the development of the capital market;

(e) to permit widespread participation by Portuguese citizens in the share capital of undertakings, by means of an adequate capital spread, with particular attention being paid to workers in the undertakings concerned and small-scale shareholders;

(f) to preserve the property interests of the State and to develop other national interests;

(g) to help reduce the burden of public debt in the economy.

11 Article 13(3) of Law No 11/90 provides:

The legislation providing for transformation may also limit the overall amount of shares which may be acquired or subscribed for by foreign entities or entities the majority of the capital of which is held by foreign entities. It may also lay down rules fixing the maximum value of their respective participations in the capital of any company and the corresponding methods of control, non-compliance with which, in the circumstances to be prescribed, will be penalised by the forced sale of any shares exceeding those limits, loss of the voting rights conferred by those shares or the nullity of those acquisitions or subscriptions.

12 The possibility afforded by Article 13(3) of Law No 11/90 appears to have been used in many decree-laws regulating the privatisation of certain undertakings, specifying in each case the maximum authorised foreign participation. In its application, the Commission refers to 15 decree-laws providing for maximum foreign participations varying between 5% and 40%, in relation to undertakings operating in the banking, insurance, energy and transport sectors.

13 The single article of Decree-Law No 65/94 provides as follows:

For the purposes of application of Article 13(3) of Law No 11/90 of 5 April 1990, the maximum permitted participation by foreign entities in the capital of companies whose re-privatisation has been completed shall henceforth be fixed at 25%, save where a higher limit has previously been fixed by the legislation providing for their re-privatisation.

14 Article 1 of Decree-Law No 380/93 provides:

1. The acquisition inter vivos, with or without consideration, by a single natural or legal person, of shares representing more than 10% of the voting capital, and the acquisition of shares which, when added to those already held, exceeds that limit, in companies which are to be re-privatised, shall require the prior authorisation of the Minister for Financial Affairs.

2. Subject to the conditions laid down for each privatisation procedure, the provisions of paragraph 1 shall apply only to acquisitions made following privatisation.

Pre-litigation procedure

15 Following fruitless contacts in 1992, 1993 and 1994, the Commission issued a formal notice to the Portuguese Government on 4 July 1994 in which it asserted that Law No 11/90 and Decree-Laws Nos 380/93 and 65/94 were contrary to Articles 52, 56, 58, 73b et seq. and 221 of the Treaty and to Articles 221 to 231 of the Act of Accession.

16 The Portuguese Government replied to that formal notice by letter of 28 September 1994, in which it maintained that the special situation of Portugal since 1975 justified the restrictions in issue. At the same time, it undertook, in relation to future privatisations, no longer to impose restrictions on the acquisition of shares based on the nationality of the investors concerned.

17 The Commission was not persuaded by the arguments put forward by the Portuguese Government, and therefore sent a reasoned opinion to the Portuguese Republic on 29 May 1995.

18 The Portuguese Government replied to the reasoned opinion by letter of 7 September 1995, in which it again undertook not to use, in the context of future privatisations, the possibility afforded by Law No 11/90 of limiting participation by Community investors. In addition, it argued that the system established by Decree-Law No 380/93 was applicable without any discrimination based on the nationality of investors, and that it was designed to permit attainment of the objectives pursued by re-privatisation operations in accordance with Article 3 of Law No 11/90.

19 The Commission was not satisfied by those responses, and therefore decided to bring the present action before the Court.

Pleas and arguments of the parties

20 The Commission states, as a preliminary point, that the phenomenon of widespread intra-Community investment has prompted certain Member States to adopt measures to control that situation. Those measures, most of which have been adopted in the context of privatisations, are liable, in certain circumstances, to be incompatible with Community law. For that reason, it adopted on 19 July 1997 its Communication on certain legal aspects concerning intra-EU investment (OJ 1997 C 220, p. 15, hereinafter the 1997 Communication).

21 In that communication, the Commission interpreted the relevant Treaty provisions concerning the free movement of capital and freedom of establishment, inter alia in the context of procedures for the grant of general authorisation or the exercise of a right of veto by public authorities.

22 Point 9 of the 1997 Communication is worded as follows:

The analysis undertaken above concerning measures having a restrictive character on intra-Community investment has concluded that discriminatory measures (i.e. those applied exclusively to investors from another EU Member State) would be considered as incompatible with Articles 73b and 52 of the Treaty governing the free movement of capital and the right of establishment unless covered by one of the exceptions of the Treaty. As regards non-discriminatory measures (i.e. those applied to nationals and other EU investors alike), they are permitted in so far as they are based on a set of objective and stable criteria which have been made public and can be justified on imperative requirements in the general interest. In all cases, the principle of proportionality has to be respected.

23 According to the Commission, the legislation at issue is contrary to the criteria laid down by the 1997 Communication.

24 First, the prohibition precluding investors from another Member State from acquiring more than a given number of shares in certain Portuguese undertakings, pursuant to Decree-Law No 65/94 in conjunction with Law No 11/90, gives rise to discrimination between Portuguese entities and those of other Member States which is incompatible with Articles 52 and 73b of the Treaty. Such discriminatory restrictions can be accepted only if they are justified on grounds of public policy, public security

or public health, which is not the position in the present case.

25 Second, the obligation imposed by Decree-Law No 380/93, whereby prior authorisation must be obtained for the acquisition of an interest in a Portuguese undertaking above a certain level, is likewise incompatible with Articles 52 and 73b of the Treaty.

26 Those national rules, although applicable without distinction, create obstacles to the right of establishment of nationals of other Member States and to the free movement of capital within the Community, inasmuch as they are liable to impede, or render less attractive, the exercise of those freedoms.

27 According to the Commission, authorisation and opposition procedures can be held to be compatible with those freedoms only if they are covered by the exceptions contained in Article 55 of the EC Treaty (now Article 45 EC) and in Articles 56 and 73d of the Treaty, or if they are justified by overriding requirements of the general interest and qualified by stable, objective criteria which have been made public, in such a way as to restrict to the minimum the discretionary power of the national authorities.

28 The provisions in issue do not meet any of those criteria and the conditions governing those exceptions are not fulfilled. Furthermore, Article 222 of the Treaty is irrelevant in the present case. That article merely signifies that each Member State may organise as it thinks fit the system of ownership of undertakings whilst at the same time respecting the fundamental freedoms enshrined in the Treaty.

29 The Portuguese Republic denies the alleged failure to comply with its obligations. As regards, first, the prohibition precluding investors from other Member States from acquiring more than a given number of shares in certain Portuguese undertakings, pursuant to Decree-Law No 65/94 in conjunction with Law No 11/90, the Portuguese Government admits the alleged infringement in principle but contends that since 1994 it has undertaken, as a matter of policy, not to use the powers conferred on it by those provisions. Moreover, by virtue of the direct effect and primacy of Community law, the provisions in question must in any event be interpreted as referring solely to investors who are not Community nationals.

30 As regards, second, the obligation imposed by Decree-Law No 380/93, whereby prior authorisation must be obtained for the acquisition of an interest in a Portuguese undertaking above a certain level, the scheme applies generally to all potential investors, whether they are from Portugal, elsewhere in the Community or outside the Community, and which does not give rise to any restriction or discrimination based on nationality.

31 In any event, the scheme is justified by overriding requirements of the general interest. Decree-Law No 380/93 is intended to enable the Portuguese Republic, when re-privatising an undertaking in stages, to make sure, with a view to safeguarding the general interest, that the economic policy objectives pursued by the re-privatisation are not frustrated in the course of the operation. Depending on the operation in question, those objectives may involve choosing a strategic partner where the activities of the undertaking are to assume an international dimension, or strengthening the competitive structure of the market concerned, or modernising and increasing the efficiency of means of production.

32 The Portuguese Government further argues that it is unacceptable for a Member State to be precluded from becoming involved in a process of re-privatisation by appropriate means whilst respecting the general rules of the Treaty, with a view to safeguarding its financial interest. Such an interest constitutes an overriding requirement of the general interest.

33 The criterion of proportionality is likewise satisfied, inasmuch as an assessment of operations which alter the structure of the share ownership constitutes an appropriate means of attaining the

objective pursued.

34 As to the question whether the scheme in question is necessary, the Portuguese Government states that it is applicable only for as long as the re-privatisation process is continuing, and relates only to substantial holdings, namely those conferring more than 10% of the voting rights.

35 Moreover, any decision taken by the Minister for Financial Affairs may be the subject of a review conducted in the context of court proceedings and, where appropriate, declared invalid.

Findings of the Court

Article 73b of the Treaty

36 It must be recalled at the outset that Article 73b(1) of the Treaty gives effect to free movement of capital between Member States and between Member States and third countries. To that end it provides, within the framework of the provisions of the chapter headed Capital and payments, that all restrictions on the movement of capital between Member States and between Member States and third countries are prohibited.

37 Although the Treaty does not define the terms movements of capital and payments, it is settled case-law that Directive 88/361, together with the nomenclature annexed to it, may be used for the purposes of defining what constitutes a capital movement (Case C-222/97 Trummer and Mayer [1999] ECR I-1661, paragraphs 20 and 21).

38 Points I and III in the nomenclature set out in Annex I to Directive 88/361, and the explanatory notes appearing in that annex, indicate that direct investment in the form of participation in an undertaking by means of a shareholding or the acquisition of securities on the capital market constitute capital movements within the meaning of Article 73b of the Treaty. The explanatory notes state that direct investment is characterised, in particular, by the possibility of participating effectively in the management of a company or in its control.

39 In the light of those considerations, it is necessary to consider whether the legislation in issue, which (a) prohibits the acquisition by investors from other Member States of more than a given number of shares in certain Portuguese undertakings and (b) requires the grant by the Portuguese Republic of prior authorisation for the acquisition of a holding in certain Portuguese undertakings in excess of a specified level, constitute a restriction on the movement of capital between Member States.

40 As regards the prohibition precluding investors from other Member States from acquiring more than a given number of shares in certain Portuguese undertakings, it is common ground - and, moreover, not disputed by the Portuguese Government - that this involves unequal treatment of nationals of other Member States and restricts the free movement of capital. The Portuguese Government does not plead any justification in that regard. However, it argues that it has undertaken, as a matter of policy, not to use the powers conferred on it by the provisions in issue and that, by virtue of the direct effect and primacy of Community law, those provisions must in any event be interpreted as referring solely to investors who are not Community nationals.

41 That argument cannot be accepted. The Court has consistently held that the incompatibility of provisions of national law with provisions of the Treaty, even those directly applicable, can be definitively eliminated only by means of binding domestic provisions having the same legal force as those which require to be amended. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty, since they maintain, for the persons concerned, a state of uncertainty as regards the extent of their rights as guaranteed by the Treaty (see, in particular, Case C-151/94 Commission v Luxembourg

[1995] ECR I-3685, paragraph 18, and Case C-358/98 Commission v Italy [2000] ECR I-1255, paragraph 17).

42 Consequently, as regards the prohibition precluding investors from other Member States from acquiring more than a given number of shares in certain Portuguese undertakings, non-compliance with Article 73b of the Treaty is established.

43 As regards the obligation to obtain prior authorisation from the Portuguese Republic for the acquisition of a holding in certain Portuguese undertakings in excess of a specified level, the Portuguese Government concedes in principle that the restrictions arising from the rules in issue fall within the scope of the free movement of capital but argues that the rules apply without distinction to national shareholders and to shareholders who are nationals of other Member States. They do not therefore involve any discriminatory or particularly restrictive treatment of nationals of other Member States.

44 That argument cannot be accepted. Article 73b of the Treaty lays down a general prohibition on restrictions on the movement of capital between Member States. That prohibition goes beyond the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial markets.

45 Even though the rules in issue may not give rise to unequal treatment, they are liable to impede the acquisition of shares in the undertakings concerned and to dissuade investors in other Member States from investing in the capital of those undertakings. They are therefore liable, as a result, to render the free movement of capital illusory (see, in that regard, Joined Cases C-163/94, C-165/94 and C-250/94 Sanz de Lera and Others [1995] ECR I-4821, paragraph 25, and Case C-302/97 Konle [1999] ECR I-3099, paragraph 44).

46 In those circumstances, the rules in issue must be regarded as a restriction on the movement of capital within the meaning of Article 73b of the Treaty. It is therefore necessary to consider whether, and on what basis, that restriction may be justified.

47 As is also apparent from the 1997 Communication, it is undeniable that, depending on the circumstances, certain concerns may justify the retention by Member States of a degree of influence within undertakings that were initially public and subsequently privatised, where those undertakings are active in fields involving the provision of services in the public interest or strategic services (see today's judgments in Case C-483/99 Commission v France, not yet published in the European Court Reports, paragraph 43, and Case C-503/99 Commission v Belgium, not yet published in the European Court Reports, paragraph 43).

48 However, those concerns cannot entitle Member States to plead their own systems of property ownership, referred to in Article 222 of the Treaty, by way of justification for obstacles, resulting from privileges attaching to their position as shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty. As is apparent from the Court's case-law (Konle, cited above, paragraph 38), that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty.

49 The free movement of capital, as a fundamental principle of the Treaty, may be restricted only by national rules which are justified by reasons referred to in Article 73d(1) of the Treaty or by overriding requirements of the general interest and which are applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, the national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality (see, to that effect, Sanz de Lera, cited above, paragraph 23, and Case C-54/99 Eglise de scientologie [2000] ECR I-1335, paragraph 18).

50 As regards a scheme of prior administrative authorisation of the kind at issue in the present case, the Court has previously held that such a scheme must be proportionate to the aim pursued, inasmuch as the same objective could not be attained by less restrictive measures, in particular a system of declarations ex post facto (see, to that effect, Sanz de Lera, paragraphs 23 to 28; Konle, paragraph 44; and Case C-205/99 Analir and Others [2001] ECR I-1271, paragraph 35). Such a scheme must be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, and all persons affected by a restrictive measure of that type must have a legal remedy available to them (Analir, cited above, paragraph 38).

51 Having regard to those considerations, it is necessary to consider the grounds of justification put forward by the Portuguese Government.

52 As regards the need to safeguard the financial interest of the Portuguese Republic, it must be recalled that, save in so far as they may fall within the ambit of the reasons set out in Article 73d(1) of the Treaty, which relate in particular to tax law, the general financial interests of a Member State cannot constitute adequate justification. It is settled case-law that economic grounds can never serve as justification for obstacles prohibited by the Treaty (see, as regards the free movement of goods, Case C-265/95 Commission v France [1997] ECR I-6959, paragraph 62, and, in relation to freedom to provide services, Case C-398/95 SETTG [1997] ECR I-3091, paragraph 23). That reasoning is equally applicable to the economic policy objectives reflected in Article 3 of Law No 11/90 and the objectives mentioned by the Portuguese Government in the present proceedings, namely choosing a strategic partner, strengthening the competitive structure of the market concerned or modernising and increasing the efficiency of means of production. Such interests cannot constitute a valid justification for restrictions on the fundamental freedom concerned.

53 Consequently, as regards the obligation to obtain prior authorisation from the Portuguese Republic for the acquisition of a holding in certain Portuguese undertakings in excess of a specified level, non-compliance with Article 73b of the Treaty is established.

54 In view of all the foregoing considerations, it must be held that, by adopting and maintaining in force the legislation in issue, the Portuguese Republic has failed to comply with its obligations under Article 73b of the Treaty.

Articles 52, 56, 58 and 221 of the Treaty

55 The Commission also seeks a declaration of failure to comply with Articles 52, 56, 58 and 221 of the Treaty, namely the Treaty rules regarding freedom of establishment, in so far as they concern undertakings.

56 To the extent that the legislation in issue involves 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 an infringement of Article 73b of the Treaty 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.

Articles 221 and 231 of the Act of Accession

57 The Commission also seeks a declaration that the adoption and maintenance in force of the legislation in issue constitutes a failure to comply with Articles 221 and 231 of the Act of Accession. However, it does not indicate in the grounds of its application what that failure is alleged to consist of.

58 It is clear that those provisions of the Act of Accession establish, in relation to direct investments, a transitional regime which came to an end on 31 December 1989. Since all of the national rules in issue were adopted after that date, they cannot be said to infringe a transitional regime which has ceased to have any effect.

59 The Commission's application for a declaration of non-compliance with Articles 221 and 231 of the Act of Accession must therefore be dismissed.

DOCNUM	61998J0367
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2002 Page I-04731
DOC	2002/06/04
LODGED	1998/10/14
JURCIT	11992E052 : N 1 55 56 11992E056 : N 1 55 56 11992E058 : N 1 55 56 11992E073B : N 1 2 36 - 46 53 - 56 11992E073D : N 3 49 - 52 11992E221 : N 1 11992E222 : N 7 48 11985I221 : N 1 57 - 59 11985I222 : N 8 11985I231 : N 9 57 - 59 31988L0361-N1 : N 4 - 6 37 38 61997J0222 : N 37 61994J0151 : N 41 61998J0358 : N 41 61994J0163 : N 45 49 50 61997J0302 : N 45 48 50 61999J0483 : N 47 61999J0503 : N 47 61999J0054 : N 49 61999J0205 : N 50 61995J0265 : N 52 61995J0398 : N 52
CONCERNS	Failure concerning 11992E073B -
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of capital ; Accession
AUTLANG	Portuguese

APPLICA Commission ; Institutions

DEFENDA Portugal ; Member States

NATIONA Portugal

NOTES Novak, Meinhard: Regelungen zu "Golden Shares" als Verstoss gegen die Kapitalverkehrsfreiheit, European Law Reporter 2002 p.215-217 ; Ruge, Reinhard: Goldene Aktien und EG-Recht, Europäische Zeitschrift für Wirtschaftsrecht 2002 p.421-424 ; Ebke, Werner F. ; Traub, Mathias: "Golden Shares" (Sonderaktien) bei der Privatisierung von Unternehmen - nur ausnahmsweise kein Verstoß gegen Kapitalverkehrsfreiheit, Europäisches Wirtschafts- & Steuerrecht - EWS 2002 p.335-338 ; Martínez Soria, José: Deutsches Verwaltungsblatt 2002 p.1106-1108 ; Schutte-Veenstra, J.N.: Ondernemingsrecht 2002 p.274-276 ; Krause, Hartmut: Von "goldenen Aktien", dem VW-Gesetz und der Übernahmerichtlinie, Neue juristische Wochenschrift 2002 p.2747-2751 ; Gippini-Fournier, Eric ; Rodríguez Míguez, José Antonio: Golden shares en la Comunidad Europea: fin de la edad dorada?, Gaceta Jurídica de la C.E. y de la Competencia 2002 no 220 p.38-62 ; Drijber, B.J.: Gouden aandelen van hun glans ontdaan, Nederlands tijdschrift voor Europees recht 2002 p.237-241 ; Mortelmans, K.J.M.: S.E.W. ; Sociaal-economische wetgeving 2002 p.341-347 ; Marini, Luca: Golden Share e diritto comunitario nelle recenti sentenze della Corte di giustizia, Diritto del commercio internazionale 2002 p.489-493 ; Bayer, Walter: Zulässige und unzulässige Einschränkungen der europäischen Grundfreiheiten im Gesellschaftsrecht, Betriebs-Berater 2002 p.2289-2291 ; Idot, L.: Entreprises privatisées, Europe 2002 Octobre Comm. no 286 p.19-20 ; Weil, Kurt ; Lustig, Ekkard: Case law of the European Court of Justice on "golden shares" of Member States in privatised companies: Comment on the ECJ decisions of 4 June 2002, The European legal forum 2002 p.278-281 (EN) ; Vossestein, G.J.: Gouden aandelen, Weekblad voor privaatrecht, notariaat en registratie 2002 p.807-812 ; Weil, Kurt ; Lustig, Ekkard: La giurisprudenza della Corte di giustizia delle Comunità europee in merito alle "golden share" degli Stati membri nelle imprese privatizzate: commento alle sentenze della Corte di giustizia del 04.06.2002, The European Legal Forum 2002 p.277-280 (I) ; Weil, Kurt ; Lustig, Ekkard: Die Rechtsprechung des Europäischen Gerichtshofes zu "Goldenen Aktien" der Mitgliedstaaten an privatisierten Unternehmen: Besprechung der Urteile des EuGH vom 4.6.2002, The European legal forum 2002 p.277-280 (D) ; Guillaume, Emmanuel: Libre circulation des capitaux: les enseignements des arrêts de la Cour européenne de justice du 4 juin 2002, Cahiers juridiques de l'électricité et du gaz 2002 p.640-645 ; Grisay, Dominique: Privatisation, golden shares et droit européen, Journal des tribunaux / droit européen 2002 no 94 p.238-240 ; Schiano, Emanuela: Golden shares: Francia e Portogallo violano il Trattato CE, valida la normativa belga, Diritto pubblico comparato ed europeo 2002 p.1782-1786 ; Salerno, Luigi: Golden shares, interessi pubblici e modelli societari tra diritto interno e disciplina comunitaria, Diritto del commercio internazionale 2002 p.671-704 ; Câmara, Paulo: The End of the "Golden" Age of Privatisations? - The Recent ECJ Decisions on Golden Shares, European Business Organization Law Review 2002 p.503-513 ; Fleischer, Holger: Common Market Law Review 2003 p.493-501 ; Kronenberger, Vincent: The rise of the "golden" age of free movement of capital: A comment on

the golden shares judgments of the Court of Justice of the European Communities, European Business Organization Law Review 2003 p.115-135 ; Luby, Monique: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes, Journal du droit international 2003 p.619-622 ; Garau Sobrino, Federico F.: La incompatibilidad con el Derecho comunitario de la normativa española sobre inversiones en empresas publicas privatizadas. Ultimo acto y telon, Gaceta Jurídica de la C.E. y de la Competencia 2003 no 225 p.56-68 ; Valaguzza, Sara: Giurisprudenza comunitaria in tema di golden share e principio di legalità, Il Foro amministrativo 2003 p.2752-2773 ; Ballarino, Tito ; Bellodi, Leonardo: La Golden Share nel diritto comunitario. A proposito delle recenti sentenze della Corte comunitaria, Rivista delle società 2004 p.2-42

PROCEDU Action for failure to fulfil obligations - successful;Action for failure to fulfil obligations - unfounded

ADVGEN Ruiz-Jarabo Colomer

JUDGRAP Jann

DATES of document: 04/06/2002
of application: 14/10/1998

Judgment of the Court (Fifth Chamber) of 14 April 1994

Christel Schmidt v Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen. Reference for a preliminary ruling: Landesarbeitsgericht Schleswig-Holstein - Germany. Safeguarding of employees' rights in the event of the transfer of an undertaking. Case C-392/92.

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Social policy - Approximation of laws - Transfers of undertakings - Safeguarding of employees' rights - Directive 77/187 - Scope - Recourse to an outside undertaking for carrying out cleaning work previously performed by the staff of the undertaking - Included - Activity involving a single employee - Immaterial

(Council Directive 77/187, Art. 1(1))

Article 1(1) of Council Directive 77/187 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses is to be interpreted as covering a situation in which an undertaking entrusts by contract to another undertaking the responsibility for carrying out cleaning operations which it previously performed itself, even though, prior to the transfer, such work was carried out by a single employee.

Neither the fact that such a transfer relates only to an ancillary activity of the transferor not necessarily connected with its objects, nor the fact that it is not accompanied by any transfer of tangible assets, nor the number of employees concerned is capable of exempting such an operation from the scope of the directive since the decisive criterion for establishing whether there is a transfer for the purposes of that directive is whether the business in question retains its identity, as indicated in particular by the actual continuation or resumption by the new employer of the same or similar activities.

In Case C-392/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Landesarbeitsgericht Schleswig-Holstein (Germany) for a preliminary ruling in the proceedings pending before that court between

Christel Schmidt

and

Spar- und Leihkasse der frueheren AEmter Bordesholm, Kiel und Cronshagen

on the interpretation of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (Official Journal 1977 L 61, p. 26),

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, R. Joliet, G.C. Rodríguez Iglesias, F. Grévisse (Rapporteur) and M. Zuleeg, Judges,

Advocate General: W. Van Gerven,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- the Spar- und Leihkasse der frueheren AEmter Bordesholm, Kiel und Cronshagen, the defendant and respondent in the main proceedings, by Wolfgang Jordan, Rechtsanwalt, Bordesholm,

- the Government of the Federal Republic of Germany, by Ernst Roeder, Ministerialrat at the Federal Ministry for Economic Affairs, acting as Agent,

- the United Kingdom, by Sue Cochrane, of the Treasury Solicitor' s Department, and Derrick Wyatt, Barrister, acting as Agents,

- the Commission of the European Communities, by Karen Banks and Juergen Grunwald, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the German Government, the United Kingdom, represented by John E. Collins, Assistant Treasury Solicitor, and Derrick Wyatt, acting as Agents, and the Commission, at the hearing on 20 January 1994,

after hearing the Opinion of the Advocate General delivered at the sitting on 23 February 1994,

gives the following

Judgment

1 By order of 27 October 1992, received at the Court on 9 November 1992, the Landesarbeitsgericht (Higher Labour Court) Schleswig-Holstein referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses ("the directive").

2 Those questions were raised in a dispute between Christel Schmidt and the Spar- und Leihkasse der frueheren AEmter Bordesholm, Kiel und Cronshagen (Savings and Lending Bank of the former Bordesholm, Kiel and Cronshagen Districts) ("the Savings Bank").

3 It appears from the order of reference that the plaintiff and appellant in the main proceedings, who was employed by the Savings Bank to clean the premises of its branch office in Wacken, was dismissed in February 1992 on account of the refurbishment of that branch office, in which the Savings Bank wished to entrust the cleaning to Spiegelblank, the firm which was already responsible for the cleaning of most of the Savings Bank' s other premises.

4 Spiegelblank offered to employ Mrs Schmidt for a monthly wage which was higher than that which she had previously been receiving. Mrs Schmidt, however, was not prepared to work on those terms, as she calculated that her hourly wage would in fact be lower as a result of the increase in the surface area to be cleaned.

5 Mrs Schmidt brought an action challenging her dismissal, in which she was unsuccessful at first instance. She thereupon appealed to the Landesarbeitsgericht Schleswig-Holstein.

6 Taking the view that the outcome of the dispute depended on the interpretation of Directive 77/187, the national court accordingly referred the following questions to the Court of Justice for a preliminary ruling:

> "1. May an undertaking' s cleaning operations, if they are transferred by contract to a different firm, be treated as part of a business within the meaning of Directive 77/187/EEC?

2. If the answer to Question 1 is in principle in the affirmative, does that also apply if prior to the transfer the cleaning operations were undertaken by a single employee?"

7 Those two questions may be dealt with together for the purposes of a reply.

8 Article 1(1) provides that "this directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger."

9 In its two questions, the national court seeks to ascertain whether the cleaning operations of a branch of an undertaking can be treated as part of a business within the meaning of the directive and whether it is possible to do so where the work was performed by a single employee before being transferred by contract to an outside firm.

10 The Savings Bank, the Federal Republic of Germany and the United Kingdom argue that those questions should be answered in the negative. In essence, the Savings Bank contends that the performance of cleaning operations is neither the main function nor an ancillary function of the undertaking, while the Government of the Federal Republic of Germany and the United Kingdom submit that the decision by the Savings Bank to entrust those operations to a different firm did not involve either the transfer of an economic unit or the transfer of premises or tangible assets.

11 The Commission takes the view, in particular, that if the cleaning is carried out by the staff of the undertaking, it is a service which the latter performs itself and the fact that such work is merely an ancillary activity not necessarily connected with the objects of the undertaking cannot have the effect of excluding the transfer from the scope of the directive.

12 According to the case-law of the Court (judgment in Case C-209/91 Watson Rask and Christensen v ISS Kantineservice [1992] ECR I-5755, at paragraph 15), the directive is applicable where, following a legal transfer or merger, there is a change in the legal or natural person who is responsible for carrying on the business and who by virtue of that fact incurs the obligations of an employer vis-à-vis the employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred.

13 The protection provided by the directive applies in particular, by virtue of Article 1(1), where the transfer relates only to a business or part of a business, that is to say, a part of an undertaking. In those circumstances the transfer relates to employees assigned to that part of the undertaking since, as the Court held in its judgment in Case 186/83 Botzen and Others v Rotterdamsche Droogdok Maatschappij [1985] ECR 519, at paragraph 15, an employment relationship is essentially characterized by the link between the employee and the part of the undertaking or business to which he is assigned to carry out his duties.

14 Thus, when an undertaking entrusts by contract the responsibility for operating one of its services, such as cleaning, to another undertaking which thereby assumes the obligations of an employer towards employees assigned to those duties, that operation may come within the scope of the directive. As the Court held at paragraph 17 of its judgment in Watson Rask and Christensen, cited above, the fact that in such a case the activity transferred is for the transferor merely an ancillary activity not necessarily connected with its objects cannot have the effect of excluding that operation from the scope of the directive.

15 Nor is the fact that the activity in question was performed, prior to the transfer, by a single employee sufficient to preclude the application of the directive since its application does not depend on the number of employees assigned to the part of the undertaking which is the subject of the transfer. It should be noted that one of the objectives of the directive, as clearly stated in the second recital in the preamble thereto, is to protect employees in the event of a change of employer, in particular to ensure that their rights are safeguarded. That protection extends to all staff and must therefore be guaranteed even where only one employee is affected by the transfer.

16 The arguments of the Government of the Federal Republic of Germany and of the United Kingdom based on the absence of any transfer of tangible assets cannot be accepted either. The fact that in its case-law the Court includes the transfer of such assets among the various factors to be

taken into account by a national court to enable it, when assessing a complex transaction as a whole, to decide whether an undertaking has in fact been transferred does not support the conclusion that the absence of these factors precludes the existence of a transfer. The safeguarding of employees' rights, which constitutes the subject-matter of the directive, as is clear from its actual title, cannot depend exclusively on consideration of a factor which the Court has in any event already held not to be decisive on its own (judgment in Case 24/85 Spijkers v Benedik [1986] ECR 1119, at paragraph 12).

17 According to the case-law of the Court (see the judgment in Spijkers, cited above, at paragraph 11, and the judgment in Case C-29/91 Dr Sophie Redmond Stichting v Bartol and Others [1992] ECR I-3189, at paragraph 23), the decisive criterion for establishing whether there is a transfer for the purposes of the directive is whether the business in question retains its identity. According to that case-law, the retention of that identity is indicated inter alia by the actual continuation or resumption by the new employer of the same or similar activities. Thus, in this case, where all the relevant information is contained in the order for reference, the similarity in the cleaning work performed before and after the transfer, which is reflected, moreover, in the offer to re-engage the employee in question, is typical of an operation which comes within the scope of the directive and which gives the employee whose activity has been transferred the protection afforded to him by that directive.

18 It may, however, be noted that while Article 4(1) of the directive provides that the transfer of an undertaking or part of an undertaking cannot in itself constitute grounds for dismissal by the transferor or the transferee, that provision does not stand in the way of dismissals for economic, technical or organizational reasons entailing changes in the workforce.

19 Finally, it should also be borne in mind that the directive does not preclude an amendment to the employment relationship with the new employer, in so far as national law allows such an amendment otherwise than through a transfer of the undertaking (see, most recently, the judgment in Watson Rask and Christensen, cited above, at paragraph 31).

20 The answer to the questions submitted must therefore be that Article 1(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses is to be interpreted as covering a situation, such as that outlined in the order for reference, in which an undertaking entrusts by contract to another undertaking the responsibility for carrying out cleaning operations which it previously performed itself, even though, prior to the transfer, such work was carried out by a single employee.

Costs

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

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Landesarbeitsgericht Schleswig-Holstein, by order of 27 October 1992, hereby rules:

Article 1(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers

of undertakings, businesses or parts of businesses is to be interpreted as covering a situation, such as that outlined in the order for reference, in which an undertaking entrusts by contract to another undertaking the responsibility for carrying out cleaning operations which it previously performed itself, even though, prior to the transfer, such work was carried out by a single employee.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1994 Page I-01311 Swedish special edition Page I-00081 Finnish special edition Page I-00111
DOC	1994/04/14
LODGED	1992/11/09
JURCIT	31977L0187-A01P1 : N 8 - 20 61991J0209-N15 : N 12 61983J0186-N15 : N 13 61991J0209-N17 : N 14 31977L0187-C2 : N 15 61985J0024-N12 : N 16 61991J0029-N23 : N 17 61985J0024-N11 : N 17 31977L0187-A04P1 : N 18 61991J0209-N31 : N 19
CONCERNS	Interprets 31977L0187 -A01P1
SUB	Social provisions
AUTLANG	German
OBSERV	Federal Republic of Germany ; United Kingdom ; Commission ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A9* Landesarbeitsgericht Schleswig-Holstein, Vorlagebeschluß vom 27/10/1992 (1 Sa 235/92) ; - Zeitschrift für Wirtschaftsrecht 1994 p.1040-1041

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PROCEDU Reference for a preliminary ruling

ADVGEN Van Gerven

JUDGRAP Grévisse

DATES of document: 14/04/1994
of application: 09/11/1992

Judgment of the Court (Fifth Chamber) of 17 September 1997

Danmarks Aktive Handelsrejsende, acting on behalf of Carina Mosbæk v Lønmodtagernes Garantifond. Reference for a preliminary ruling: Ostre Landsret - Denmark. Social policy - Protection of employees in the event of the employer's insolvency - Directive 80/987/EEC - Employee residing and employed in a State other than that in which the employer is established - Guarantee institution. Case C-117/96.

Social policy - Approximation of laws - Protection of employees in the event of the insolvency of their employer - Directive 80/987 - Responsible guarantee institution - Employee residing and having been employed in a Member State other than that in which the employer is established - Responsibility of the institution of the Member State in which either it is decided to open the proceedings for the collective satisfaction of creditors' claims or it has been established that the employer's undertaking or business has been closed down

(Council Directive 80/987, Arts 2(1) and 3)

Where the employer is established in a Member State other than that in which the employee resides and was employed, the guarantee institution responsible, under Article 3 of Directive 80/987 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, for the payment of that employee's claims in the event of the employer's insolvency is the institution of the State in which, in accordance with Article 2(1) of the directive, either it is decided to open the proceedings for the collective satisfaction of creditors' claims or it has been established that the employer's undertaking or business has been closed down.

In Case C-117/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Ostre Landsret, Denmark, for a preliminary ruling in the proceedings pending before that court between

Danmarks Aktive Handelsrejsende, acting on behalf of Carina Mosbæk

and

Lønmodtagernes Garantifond

on the interpretation of Article 3 of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23),

THE COURT

(Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, L. Sevon, D.A.O. Edward, P. Jann and M. Wathelet (Rapporteur), Judges,

Advocate General: G. Cosmas,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Lønmodtagernes Garantifond, by U. Andersen and A. Rubach-Larsen, both of the Copenhagen Bar,

- the German Government, by E. Röder, Ministerialrat in the Federal Ministry of the Economy, and B. Kloke, Oberregierungsrat in the same ministry, acting as Agents,

- the French Government, by C. de Salins, Head of Subdirectorate in the Legal Directorate of the Ministry of Foreign Affairs, and C. Chavance, Foreign Affairs Secretary in the same directorate, acting as Agents,

- the United Kingdom Government, by S. Ridley, of the Treasury Solicitor's Department, acting as Agent, assisted by N. Green, Barrister, and

- the Commission of the European Communities, by H. Støvlbæk and M. Patakia, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Danmarks Aktive Handelsrejsende, acting on behalf of Carina Mosbæk, represented by C. Elmquist-Clausen, of the Copenhagen Bar; of Lønmodtagernes Garantifond, represented by U. Andersen; of the French Government, represented by C. Chavance; of the United Kingdom Government, represented by S. Ridley, assisted by N. Green; and of the Commission, represented by H. Støvlbæk, at the hearing on 24 April 1997,

after hearing the Opinion of the Advocate General at the sitting on 29 May 1997,

gives the following

Judgment

1 By order of 27 March 1996, received at the Court on 12 April 1996, the Ostre Landsret (Eastern Regional Court, Denmark) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 3 of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23; `the directive').

2 The question arose in a dispute between Mrs Mosbæk and the Lønmodtagernes Garantifond, the guarantee institution responsible pursuant to the directive for settling outstanding claims in Denmark (`the Fund'), following the insolvency of Mrs Mosbæk's employer.

3 Mrs Mosbæk, who lives in Denmark, was employed from 1 June 1993 by the English company Colorgen Ltd (`Colorgen') as commercial manager for Denmark, Norway, Sweden, Finland and, subsequently, Germany.

4 Colorgen, whose registered office was at Warrington, England, was neither established nor registered in Denmark either as an undertaking or in any other capacity, and in particular was not registered with the tax or customs authorities. It was represented there only by Mrs Mosbæk. For the performance of her activities, Colorgen had rented an office.

5 During the whole of the employment relationship, Mrs Mosbæk's remuneration was paid directly to her by Colorgen, with no deductions for tax, pension or other social security contributions under Danish law.

6 In July 1994, Colorgen was declared insolvent, and its employees, including Mrs Mosbæk, were dismissed. Pursuant to Article 3 of the directive, Mrs Mosbæk declared, both to the Fund and to the company's English receiver, an outstanding claim of DKR 471 996, representing her salary, commissions and expenses.

7 The Fund refused to settle the claim on the ground that responsibility lay with the guarantee institution of the State where the employer was established, in this case the National Insurance Fund.

8 On 19 December 1994, Mrs Mosbæk brought court proceedings against the Fund in Hillerød, Denmark.

9 The case was then referred, at the Fund's request, to the Ostre Landsret, which considered it necessary to refer the following question to the Court of Justice:

`In a situation where the employer is not established in the Member State in which the employee is resident and is solely represented in the State of the employee's residence by way of the said employee's work, which inter alia is carried out in office premises rented by the employer for the employee's use, is it the guarantee institution in the country where the employer is established or the guarantee institution in the country where the employee is resident which, on the employer's insolvency, according to Article 3 of Directive 80/987/EEC is to guarantee payment of the employee's outstanding claims resulting from the employment relationship in question?'

10 As a preliminary point, it must be borne in mind that the directive is intended to guarantee to employees a minimum level of protection under Community law in the event of the insolvency of their employer, without prejudice to more favourable provisions existing in the Member States. To that end it provides in particular for specific guarantees of payment of outstanding claims.

11 Article 1(1) of the directive provides:

`This directive shall apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1).'

12 Article 2(1) provides:

`For the purposes of this directive, an employer shall be deemed to be in a state of insolvency:

(a) where a request has been made for the opening of proceedings involving the employer's assets, as provided for under the laws, regulations and administrative provisions of the Member State concerned, to satisfy collectively the claims of creditors and which make it possible to take into consideration the claims referred to in Article 1(1), and

(b) where the authority which is competent pursuant to the said laws, regulations and administrative provisions has:

- either decided to open the proceedings,

- or established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings.'

13 Article 3 of the directive requires the Member States to take the measures necessary to ensure that guarantee institutions guarantee payment of employees' outstanding claims resulting from contracts of employment or employment relationships and relating to pay for the period prior to a given date.

14 Finally, Article 5 provides:

`Member States shall lay down detailed rules for the organization, financing and operation of the guarantee institutions, complying with the following principles in particular:

(a) the assets of the institutions shall be independent of the employers' operating capital and be inaccessible to proceedings for insolvency;

(b) employers shall contribute to financing, unless it is fully covered by the public authorities;

(c) the institutions' liabilities shall not depend on whether or not obligations to contribute to financing have been fulfilled.'

15 What the national court wishes to know is, essentially, which guarantee institution is responsible under Article 3 of the directive for guaranteeing payment of an employee's claims on the employer's insolvency, where that employer is established in a Member State other than that in which the employee

resides and was employed.

16 Whilst it is true that the directive contains no provisions expressly envisaging the circumstances described in the order for reference, it cannot be inferred that it does not apply to the claims of employees residing and employed, or having been employed, in a Member State other than that in which their employer is established.

17 The purpose of the directive is to guarantee a minimum level of protection for employees who have suffered as a result of their employer's insolvency, there being no restriction imposed, in particular in Article 1(1) of the directive which defines its scope, as regards cases where the employee's place of residence or employment does not coincide with the employer's place of establishment.

18 In order to be effective, Community law - which guarantees freedom of movement for persons within the Community and thus encourages situations involving, as in the present case, foreign elements - requires such an interpretation of the directive, the second recital in the preamble to which states that it is intended to reduce existing differences between Member States `which can have a direct effect on the functioning of the common market'.

19 It is therefore necessary to determine the guarantee institution responsible for paying claims where the employer is established in a Member State other than that of the employee's place of residence or employment.

20 That institution, it is clear from the scheme of the directive, must be the guarantee institution of the State in which, in accordance with Article 2(1) of the directive, either it is decided to open the proceedings for the collective satisfaction of creditors' claims, or it has been established that the employer's undertaking or business has been definitively closed down.

21 In the first place, for the directive to apply, Article 2(1) requires two events to have occurred: first, a request for proceedings to be opened to satisfy collectively the claims of creditors must have been lodged with the competent national authority; secondly, there must have been either a decision to open those proceedings, or a finding that the business has been closed down where the available assets are insufficient (Joined Cases C-94/95 and C-95/95 Bonifaci and Others and Berto and Others v INPS [1997] ECR I-0000, paragraph 35, and Case C-373/95 Maso and Others v INPS [1997] ECR I-0000, paragraph 45).

22 As the Fund, the French and United Kingdom Governments and the Commission have pointed out, it thus appears that the operation of the guarantee system established by the directive, and hence the intervention of the guarantee institution, are conditional, first and foremost, upon a request being made for the opening of proceedings to satisfy creditors' claims collectively, thus making it possible for the salary claims in question to be taken into consideration.

23 In practice, the opening of such proceedings is most often requested in the State in which the employer is established. That general tendency should be reinforced by the entry into force of the Convention on Insolvency Proceedings signed at Brussels on 23 November 1995 (not yet published in the Official Journal of the European Communities), Article 3(1) of which uses as the main criterion for jurisdiction `the centre of a debtor's main interests'.

24 In the second place, Article 5(b) of the directive provides that the guarantee system which it is designed to establish is to be financed by employers, unless it is fully covered by the public authorities. It accords with the scheme of the directive, in the absence of any contrary indication therein, for the guarantee institution responsible for employees' outstanding claims to be the one which levied, or at all events should have levied, the insolvent employer's contributions. That cannot be the case of the institution of the Member State in which the employee resides and was employed without the employer having some establishment or commercial presence there.

25 Thus, Article 5(b) of the directive confirms the link between the obligation of the guarantee institution to pay and the place of establishment of the employer who, as a general rule, contributes to the financing of the institution. As has already been emphasized in paragraph 23 of this judgment, the State of the employer's establishment is most often that in which the request for the opening of the proceedings is made.

26 Finally, the fact that the directive has not provided for a system of set-off or reimbursement of payments between the guarantee institutions of the various Member States tends to confirm that the Community legislature intended, in the event of an employer's insolvency, that the guarantee institution of only one Member State should become involved, in order to prevent unnecessary entanglements between national systems and, in particular, situations in which a worker might claim the benefit of the directive in several Member States.

27 The answer to the question must therefore be that, where the employer is established in a Member State other than that in which the employee resides and was employed, the guarantee institution responsible, under Article 3 of the directive, for the payment of that employee's claims in the event of the employer's insolvency is the institution of the State in which, in accordance with Article 2(1) of the directive, either it is decided to open the proceedings for the collective satisfaction of creditors' claims or it has been established that the employer's undertaking or business has been closed down.

Costs

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

On those grounds,

THE COURT

(Fifth Chamber),

in answer to the question referred to it by the Ostre Landsret by order of 27 March 1996, hereby rules:

Where the employer is established in a Member State other than that in which the employee resides and was employed, the guarantee institution responsible, under Article 3 of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, for the payment of that employee's claims in the event of the employer's insolvency is the institution of the State in which, in accordance with Article 2(1) of the directive, either it is decided to open the proceedings for the collective satisfaction of creditors' claims or it has been established that the employer's undertaking or business has been closed down.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment

TREATY	European Economic Community
PUBREF	European Court reports 1997 Page I-05017
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JURCIT	31980L0987-C1 : N 18 31980L0987-A01P1 : N 11 17 31980L0987-A02P1 : N 12 21 27 31980L0987-A03 : N 1 9 13 15 27 31980L0987-A05 : N 14 31980L0987-A05LB : N 24 25 61995J0094-N35 : N 21 61995J0373-N45 : N 21
CONCERNS	Interprets 31980L0987 -A02P1 Interprets 31980L0987 -A03
SUB	Social provisions
AUTLANG	Danish
OBSERV	Federal Republic of Germany ; France ; United Kingdom ; Commission ; Member States ; Institutions
NATIONA	Denmark
NATCOUR	*A9* Ostre Landsret, 15. afdeling, kendelse af 27/03/1996 (B-1423-95) ; *P1* Ostre Landsret, 15. afdeling, dom af 11/10/1999 (B-1423-95) ; - Ugeskrift for Retsvæsen A 2002 p.383-387 ; *P2* Højesteret, dom af 27/11/2001 (I 538/1999) ; - Ugeskrift for Retsvæsen A 2002 p.387-388
NOTES	Weber, Romana: Arbeitgeberstaat muß Insolvenz-Ausfallgeld für im Ausland beschäftigte Arbeitnehmer zahlen, Osterreichisches Recht der Wirtschaft 1997 p.678-679 ; Idot, Laurence: Europe 1997 Novembre Comm. no 348 p.13 ; Rijnsbergen, F.: S.E.W. ; Sociaal-economische wetgeving 1998 p.428-429 ; Menozzi Cantele, Maria Luisa: La giurisprudenza della Corte di giustizia, Fallimento e amministrazione straordinaria - Quaderni di giurisprudenza commerciale no 193 (Ed. Giuffré - Milano) 1999 p.97-101 ; X: Il Foro italiano 2000 IV Col.423-424
PROCEDU	Reference for a preliminary ruling
ADVGEN	Cosmas
JUDGRAP	Wathelet
DATES	of document: 17/09/1997 of application: 12/04/1996

**Judgment of the Court
of 2 December 1997
Fantask A/S e.a. v Industriministeriet (Erhvervministeriet). Reference for a preliminary ruling: Ostre Landsret - Denmark. Directive 69/335/EEC - Registration charges on companies - Procedural timelimits under national law. Case C-188/95.**

1 Tax provisions - Harmonization of laws - Indirect taxes on the raising of capital - Registration of capital companies - Duties paid by way of fees or dues - Concept - Charges in direct proportion to the capital raised - Excluded

(Council Directive 69/335, Art. 12(1)(e))

2 Tax provisions - Harmonization of laws - Indirect taxes on the raising of capital - Charges levied in breach of Directive 69/335 - Recovery - Procedures - Application of national law - Limits - Application of a principle of national law excluding the recovery of charges levied in breach of Community law over a long period and without the knowledge of either the national authorities or the persons liable to pay the charges - Not permissible

(Council Directive 69/335)

3 Tax provisions - Harmonization of laws - Indirect taxes on the raising of capital - Charges levied in breach of Directive 69/335 - Recovery - Limitation period - Application of national law - Permissible - Conditions

(Council Directive 69/335)

4 Tax provisions - Harmonization of laws - Indirect taxes on the raising of capital - Directive 69/335 - Articles 10 and 12(1)(e) - Direct effect

(Council Directive 69/335, Arts 10 and 12(1)(e))

5 On a sound construction of Article 12(1)(e) of Directive 69/335 concerning indirect taxes on the raising of capital, in order for charges levied on registration of public and private limited companies and on their capital being increased to be by way of fees or dues, their amount must be calculated solely on the basis of the cost of the formalities in question. It may, however, also cover the costs of minor services performed without charge. In calculating their amount, a Member State is entitled to take account of all the costs related to the effecting of registration, including the proportion of the overheads which may be attributed thereto. Furthermore, a Member State may impose flat-rate charges and fix their amount for an indefinite period, provided that it checks at regular intervals that they continue not to exceed the average cost of the registrations at issue. It follows that charges with no upper limit which increase directly in proportion to the nominal value of the capital raised cannot amount to duties paid by way of fees or dues within the meaning of Article 12(1)(e) of the directive, since the amount of such charges will generally bear no relation to the costs actually incurred by the authority on the registration formalities.

6 Community law precludes actions for the recovery of charges levied in breach of Directive 69/335 from being dismissed on the ground that those charges were imposed as a result of an excusable error by the authorities of the Member State inasmuch as they were levied over a long period without either those authorities or the persons liable to them having been aware that they were unlawful. While the recovery of sums levied in breach of Community law may, in the absence of Community rules governing the matter, be sought only under the substantive and procedural conditions laid down by the national law of the Member States, those conditions must nevertheless be no less favourable than those governing similar domestic claims nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law. The application of a general principle of national law under which the courts of a Member State should dismiss claims for the recovery of charges

levied over a long period in breach of Community law without either the authorities of that State or the persons liable to pay the charges having been aware that they were unlawful, would make it excessively difficult to obtain recovery of charges which are contrary to Community law and, moreover, would have the effect of encouraging infringements of Community law which have been committed over a long period.

7 Community law, as it now stands, does not prevent a Member State which has not properly transposed Directive 69/335 from resisting actions for the repayment of charges levied in breach thereof by relying on a limitation period under national law which runs from the date on which the charges in question became payable, provided that such a period is not less favourable for actions based on Community law than for actions based on national law and does not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

8 Article 10 of Directive 69/335 in conjunction with Article 12(1)(e) thereof gives rise to rights on which individuals may rely before national courts. The prohibition laid down in Article 10 and the derogation from that prohibition in Article 12(1)(e) are expressed in sufficiently precise and unconditional terms to be invoked by individuals in their national courts in order to contest a provision of national law which infringes the directive.

In Case C-188/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Ostre Landsret, Denmark, for a preliminary ruling in the proceedings pending before that court between

Fantask A/S and Others

and

Industriministeriet (Erhvervsministeriet)

on the interpretation of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412), as most recently amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23),

THE COURT,

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

Advocate General: F.G. Jacobs,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Fantask A/S, by Thomas Rørdam, of the Copenhagen Bar,

- Norsk Hydro Danmark A/S, Tryg Forsikring skadesforsikringsselskab A/S and Tryg Forsikring livsforsikringsselskab A/S, by Kai Michelsen, Claus Høeg Madsen and Henning Aasmul-Olsen, of the Copenhagen Bar,

- Aalborg Portland A/S, by Karen Dyekjær-Hansen, of the Copenhagen Bar,

- Forsikrings-Aktieselskabet Alka, Robert Bosch A/S, Uponor A/S, Uponor Holding A/S and Pen-Sam ApS and others, by Vagn Thorup, Henrik Stenbjerre, Jørgen Boe and Lau Normann Jørgensen, from the firm Kromann and Münter, of the Copenhagen Bar,

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

acting as Agent, assisted by Karsten Hagel-Sørensen, of the Copenhagen Bar,

- the French Government, by Catherine de Salins, Assistant Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Frédéric Pascal, Administrative Attaché in the same Directorate, acting as Agents,

- the Swedish Government, by Erik Brattgård, Adviser in the Trade Department of the Ministry of Foreign Affairs, acting as Agent,

- the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by Eleanor Sharpston, Barrister,

- the Commission of the European Communities, by Anders C. Jessen and Enrico Traversa, of its Legal Service, acting as Agents, assisted by Susanne Helsteen and Jens Rostock-Jensen, from the firm Reumert & Partnere, of the Copenhagen Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Fantask A/S, represented by Preben Jøker Thorsen, of the Copenhagen Bar; Norsk Hydro Danmark A/S, Tryg Forsikring skadesforsikringsselskab A/S and Tryg Forsikring livsforsikringsselskab A/S, represented by Henning Aasmul-Olsen; Aalborg Portland A/S, represented by Lars Hennenberg, of the Copenhagen Bar; Forsikrings-Aktieselskabet Alka, Robert Bosch A/S, Uponor A/S, Uponor Holding A/S and Pen-Sam ApS and others, represented by Henrik Peytz, of the Copenhagen Bar; the Industriministeriet (Erhvervsministeriet), represented by Karsten Hagel-Sørensen; the Danish Government, represented by Peter Biering; the French Government, represented by Gautier Mignot, Foreign Affairs Secretary in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; the Italian Government, represented by Danilo Del Gaizo, Avvocato dello Stato; the United Kingdom Government, represented by John E. Collins, assisted by Eleanor Sharpston; and the Commission, represented by Anders C. Jessen and Enrico Traversa, assisted by Jens Rostock-Jensen and Hans Henrik Skjødt, of the Copenhagen Bar, at the hearing on 29 April 1997,

after hearing the Opinion of the Advocate General at the sitting on 26 June 1997,

gives the following

Judgment

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the Ostre Landsret by order of 8 June 1995, hereby rules:

1. On a sound construction of Article 12(1)(e) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as most recently amended by Council Directive 85/303/EEC of 10 June 1985, in order for charges levied on registration of public and private limited companies and on their capital being increased to be by way of fees or dues, their amount

must be calculated solely on the basis of the cost of the formalities in question. It may, however, also cover the costs of minor services performed without charge. In calculating their amount, a Member State is entitled to take account of all the costs related to the effecting of registration, including the proportion of the overheads which may be attributed thereto. Furthermore, a Member State may impose flat-rate charges and fix their amount for an indefinite period, provided that it checks at regular intervals that they continue not to exceed the average cost of the registrations at issue.

2. Community law precludes actions for the recovery of charges levied in breach of Directive 69/335, as amended, from being dismissed on the ground that those charges were imposed as a result of an excusable error by the authorities of the Member State inasmuch as they were levied over a long period without either those authorities or the persons liable to them having been aware that they were unlawful.

3. Community law, as it now stands, does not prevent a Member State which has not properly transposed Directive 69/335, as amended, from resisting actions for the repayment of charges levied in breach thereof by relying on a limitation period under national law which runs from the date on which the charges in question became payable, provided that such a period is not less favourable for actions based on Community law than for actions based on national law and does not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

4. Article 10 of Directive 69/335, as amended, in conjunction with Article 12(1)(e) thereof gives rise to rights on which individuals may rely before national courts.

1 By order of 8 June 1995, received at the Court on 15 June 1995, the Ostre Landsret (Eastern Regional Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty eight questions on the interpretation of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412; `the Directive'), as most recently amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23).

2 Those questions were raised in actions brought by Fantask A/S (`Fantask') and a number of other companies or groups of companies against the Industriministeriet (Erhvervsministeriet) [Danish Ministry of Industry (Ministry of Trade)] relating to charges levied on registration of new public and private limited companies and on the capital of such companies being increased.

3 Law No 468 of 29 September 1917, the First Law on Public Limited Companies (Lovtidende A 1917, p. 1117), made it compulsory for public limited companies and increases in their capital to be entered in a companies register. Entries in the register were subject to a charge at a rate to be determined by the competent minister. Substantially recast for the first time in 1930, the Law was subject to general amendment by Law No 370 of 13 June 1973 on Public Limited Companies (Lovtidende A 1973, p. 1025). On the same day Law No 371 on Private Limited Companies (Lovtidende A 1973, p. 1063) was adopted, which lays down, in relation to such companies, registration formalities analogous to those applicable to public limited companies.

4 Article 154(3) of the Law on Public Limited Companies and Article 124(3) of the Law on Private Limited Companies initially gave the competent minister the power to determine the rates of the registration charges for those two categories of company.

5 From the adoption of the First Law on Public Limited Companies until 1992, there was no change in the charging structure for the registration of new companies and of increases in their capital. It consisted of a fixed basic charge and a supplementary charge calculated in proportion to the nominal value of the capital raised. The rates, on the other hand, were amended on several occasions.

6 Between 1 January 1974 and 1 May 1992, the basic charge ranged from DKR 500 to DKR 1 700 for the registration of new public and private limited companies and from DKR 200 to DKR 900 for the registration of an increase in the capital of either category of company. During that period, the supplementary charge was DKR 4 per DKR 1 000 of the subscribed capital on registration of a new company and the same percentage of the capital raised on registration of an increase in capital.

7 The registry of public limited companies set up by Law No 468 constituted a directorate of the Ministry of Trade and was responsible for the registration of entries relating to public limited companies and, from 1974, to private limited companies. By Law No 851 of 23 December 1987 amending, in particular, the Law on Public Limited Companies and the Law on Private Limited Companies (Lovtidende A 1987, p. 3229), the registry became the Erhvervs- og Selskabsstyrelsen (Trade and Companies Office). Apart from carrying out its registration duties and setting and collecting the related charges, the Trade and Companies Office is involved in the drafting of legislation in the fields of company and business law and ensures its application. It also performs various functions involving the provision of advice and information.

8 Following a report from the Danish Court of Auditors, which found that the Trade and Companies Office had enjoyed significant surpluses of income over expenditure as a result of the levying of the supplementary charge and questioned whether that charge was allowed under Danish law, the supplementary charge was abolished by Order No 301 of 30 April 1992 (Lovtidende A 1992, p. 1149) with effect from 1 May 1992. At the same time the basic charge was increased to DKR 2 500 for the registration of a new public limited company and to DKR 1 800 for that of a new private limited company. The fee for registration of an increase in the capital of either category of company was raised to DKR 600.

9 Fantask and a number of other companies or groups of companies then asked the Trade and Companies Office to refund the supplementary charges which they had been obliged to pay to that directorate between 1983 and 1992. Only Fantask also claimed repayment of the basic charge.

10 Since their requests for a refund were rejected, the companies in question commenced proceedings in the Ostre Landsret against the Ministry of Industry. In their actions they submitted inter alia that, in the light, in particular, of the judgment in Joined Cases C-71/91 and C-178/91 Ponente Carni and Cispadana Costruzioni v Amministrazione delle Finanze dello Stato [1993] ECR I-1915 (`Ponente Carni'), the supplementary charge - and in Fantask's case the basic charge too - was contrary to Articles 10 and 12 of the Directive.

11 In those circumstances the Ostre Landsret stayed proceedings and referred the following eight questions to the Court of Justice for a preliminary ruling:

`1. Does Community law impose requirements upon the Member States' delimitation of the concept of "fees or dues" in Article 12(1)(e) of Directive 69/335/EEC or are the individual Member States free to decide what may be regarded as "fees or dues" for a specific service?

2. May the basis for the calculation of duties charged under Article 12(1)(e) of Directive 69/335/EEC by a Member State for registration of formation or increase in capital of a public limited company or a private limited company include the following types of costs or some of them:

- the cost of salaries and pension contributions for officials not involved in effecting the registration, such as the registration authority's administrative staff or staff of the registration authority or other authorities who are engaged on preparatory legal work in the field of company law.

- the cost of effecting registration of other matters relating to companies, in respect of which the Member State has determined that no specific consideration is to be paid.

- the cost of performing duties, other than registration, required of the registration authority

in pursuance of company legislation and legislation related thereto, such as examination of companies' accounts and supervision of companies' bookkeeping.

- payment of interest and depreciation of all capital costs which are regarded by the registration authority as concerning the field of company law and related fields of law.

- the cost of official journeys not connected with the specific work of registration.

- the cost of the registration authority's external dissemination of information and guidance not connected with the specific work of registration, such as lecturing, preparation of articles and brochures and holding of meetings with trade organizations and other interested groups.

3.(a) Is Article 12(1)(e) of Directive 69/335/EEC to be interpreted as meaning that a Member State is precluded from fixing standardized charges by rules valid without limitation of time?

(b) If that is not possible, is a Member State required to adjust its scale of charges every year or at other fixed intervals?

(c) Is it of any significance for the answer whether charges are fixed in proportion to the amount of the capital to be raised, as notified for registration?

4. Is Article 12(1)(e) in conjunction with Article 10(1) of Directive 69/335/EEC to be interpreted as meaning that the amount charged as consideration for a specific service - such as, for example, registration of the formation or increase in capital of a public limited company or a private limited company - is to be calculated on the basis of the actual cost of the specific service - registration - or can the duty for the individual registration be fixed at, for example, a basic charge together with DKR 4 per DKR 1 000 of the nominal value of the capital subscribed, so that the amount of the duty is independent of the registration authority's time used and other costs necessary for effecting the registration?

5. Is Article 12(1)(e) in conjunction with Article 10(1) of Directive 69/335/EEC to be interpreted as meaning that the Member State in calculating any amount to be recovered must work on the basis that the duty must reflect the cost of the specific service at the time at which the service is performed, or is the Member State entitled to make a comprehensive assessment over a longer period, for example an accounting year or within the period in which it will be possible under national law to assert a claim for recovery?

6. If national law contains a general principle that, in determining claims for recovery of charges made without the requisite authority, importance should be attached to the fact that the charge was made in pursuance of rules which have been in force over a long period without either the authorities or other parties having been aware that the charge was unauthorized, will Community law preclude dismissal on those grounds of an action for recovery of charges levied contrary to Directive 69/335/EEC?

7. Does Community law make it impossible under national law for the authorities of a Member State, in cases of claims for recovery concerning charges made contrary to Directive 69/335/EEC, to contend and establish that national limitation periods start to run from a time at which an unlawful implementation of Directive 69/335/EEC occurred?

8. Does Article 10(1) in conjunction with Article 12(1)(e) of Directive 69/335/EEC as interpreted in the foregoing questions result in rights on which citizens in the individual Member States may rely before the national courts?'

12 First, the objectives and the content of the Directive, as set out in the judgment in Ponente Carni, should be noted.

13 As the recitals in its preamble indicate, the Directive aims at encouraging the free movement of capital which is regarded as essential for the creation of an economic union whose characteristics

are similar to those of a domestic market. As far as concerns taxes on the raising of capital, the pursuit of such an objective presupposes the abolition of indirect taxes in force in the Member States until then and imposing in place of them a duty charged only once in the common market and at the same level in all the Member States.

14 The Directive thus provides for charging a capital duty on the raising of capital, which, according to the sixth and seventh recitals in the preamble, should be harmonized with regard both to its structures and to its rates, so as not to interfere with the movement of capital (Case 161/78 Conradsen v Ministeriet for Skatter og Afgifter [1979] ECR 2221, paragraph 11). That capital duty is governed by Articles 2 to 9 of the Directive.

15 Article 3 defines the capital companies to which the Directive applies and they include, in particular, public and private limited companies under Danish law.

16 Articles 4, 8 and 9 list, subject to the provisions of Article 7, the transactions subject to capital duty and those which the Member States may exempt. Under Article 4(1)(a) and (c) transactions subject to capital duty include the formation of a capital company and an increase in the capital of such a company by contribution of assets of any kind.

17 According to the last recital in its preamble, the Directive also provides for the abolition of other indirect taxes with the same characteristics as the capital duty or the stamp duty on securities, whose retention might frustrate the purposes of the legislation. Those indirect taxes, the levying of which is prohibited, are listed in Articles 10 and 11 of the Directive. Article 10 provides:

`Apart from capital duty, Member States shall not charge, with regard to companies, firms, associations or legal persons operating for profit, any taxes whatsoever:

...

(c) in respect of registration or any other formality required before the commencement of business to which a company, firm, association or legal person operating for profit may be subject by reason of its legal form'.

18 Article 12(1) of the Directive lays down an exhaustive list of taxes and duties other than capital duty which, in derogation from Articles 10 and 11, may be imposed on capital companies in connection with the transactions referred to in those latter provisions (see, to that effect, Case 36/86 Ministeriet for Skatter og Afgifter v Dansk Sparinvest [1988] ECR 409, paragraph 9). Article 12(1)(e) of the Directive covers `duties paid by way of fees or dues'.

Questions 1 to 5

19 In its first five questions, which should be answered together, the national court essentially asks whether, on a sound construction of Article 12(1)(e) of the Directive, in order for charges levied on registration of public and private limited companies and on their capital being increased to be by way of fees or dues, their amount must be calculated solely on the basis of the cost of the formalities in question, or whether it may be set so as to cover the whole or part of the costs of the authority responsible for registrations.

20 Since Article 12 of the Directive derogates, in particular, from the prohibitions laid down in Article 10, it is necessary to consider at the outset whether the charges at issue fall under any of those prohibitions.

21 Article 10 of the Directive, read in the light of the last recital in the preamble, prohibits in particular indirect taxes with the same characteristics as capital duty. It thus applies, inter alia, to taxes in any form which are payable in respect of the formation of a capital company or an increase in its capital (Article 10(a)), or in respect of registration or any other formality

required before the commencement of business, to which a company may be subject by reason of its legal form (Article 10(c)). That latter prohibition is justified by the fact that, even though the taxes in question are not imposed on capital contributions as such, they are nevertheless imposed on account of formalities connected with the company's legal form, in other words on account of the instrument employed for raising capital, so that their continued existence would similarly risk frustrating the aims of the Directive (Case C-2/94 Denkavit Internationaal and Others v Kamer van Koophandel en Fabrieken voor Midden-Gelderland and Others [1996] ECR I-2827, paragraph 23).

22 In this case, in so far as the basic charge and the supplementary charge are paid on the registration of new public and private limited companies, they are directly referred to in the prohibition laid down by Article 10(c) of the Directive. A similar conclusion must also be reached where those charges are payable on the registration of increases in the capital of such companies, since they too are imposed on account of an essential formality connected with the legal form of the companies in question. While registration of an increase in capital does not formally amount to a procedure which is required before a capital company commences business, it is none the less necessary for the carrying on of that business.

23 The Danish and Swedish Governments maintain that the term `duties paid by way of fees or dues' in Article 12 of the Directive also covers charges whose amount is calculated so as to offset not only the registration costs directly at issue but also all the expenses of the charging authority which are linked, in particular, to the drafting and application of legislation in the field of company law.

24 The Danish Government points out in particular that the Directive did not harmonize the laws of the Member States concerning the duties paid by way of fees or dues referred to in Article 12(1)(e) and that their definition continues to be a matter for national law. However, the discretion granted to the Member States is not unlimited inasmuch as the assessment of the costs borne by the authority responsible for registrations must, according to the judgment in Ponente Carni, be fixed in a reasonable manner. It therefore considers that, unlike the position in that case, a Member State may not, when calculating the charges, take account of expenditure which has no link whatsoever with the administration of company law.

25 According to Fantask, the other applicants in the main proceedings which lodged observations and the Commission, it is, on the contrary, clear from Ponente Carni that the term `duties paid by way of fees or dues' is one of Community law and that such charges must be calculated solely on the basis of the cost of effecting the registration in respect of which they are paid. Thus, a charge set as a proportion of the subscribed capital, such as the supplementary charge, cannot, by its very nature, fall within the derogation provided for in Article 12(1)(e) of the Directive. While a Member State is entitled to set charges paid by way of fees or dues in advance, without limitation in time and on the basis of a flat-rate assessment of the cost of effecting registrations, it must review them periodically, for example once a year, so as to ensure that they continue not to exceed the costs incurred.

26 It should be noted in that regard that the term `duties paid by way of fees or dues' is contained in a provision of Community law which does not refer to the law of the Member States in order to determine the term's meaning and scope. Furthermore, the objectives of the Directive would be undermined if the Member States were entirely free to retain taxes with the same characteristics as capital duty by categorizing them as duties paid by way of fees or dues. It follows that the interpretation of the term at issue, considered in its entirety, cannot be left to the discretion of each Member State (see Case 270/81 Felicitas v Finanzamt für Verkehrsteuern [1982] ECR 2771, paragraph 14).

27 Moreover, the Court has already held, in its judgment in Ponente Carni at paragraphs 41 and

42, that the distinction between taxes prohibited by Article 10 of the Directive and duties paid by way of fees or dues implies that the latter cover only payments collected on registration whose amount is calculated on the basis of the cost of the service rendered. A payment the amount of which had no link with the cost of the particular service or was calculated not on the basis of the cost of the transaction for which it is consideration but on the basis of all the running and capital costs of the department responsible for that transaction would have to be regarded as a tax falling solely under the prohibition of Article 10 of the Directive.

28 It follows that charges levied on registration of public and private limited companies and on their capital being increased cannot be by way of fees or dues within the meaning of Article 12(1)(e) of the Directive if their amount is calculated so as to cover costs of the kind specified by the national court in the first three indents of its second question. The costs in question are in fact unrelated to the registrations in respect of which the contested charges are paid. However, for the reasons given by the Advocate General in paragraphs 37 and 45 of his Opinion, a Member State may impose charges for major transactions only and pass on in those charges the costs of minor services performed without charge.

29 As regards the setting of the amount of duties paid by way of fees or dues, the Court stated in Ponente Carni, at paragraph 43, that it may be difficult to determine the cost of certain transactions such as the registration of a company. In such a case the assessment of the cost can only be on a flat-rate basis and must be fixed in a reasonable manner, taking account, in particular, of the number and qualification of the officials, the time taken by them and the various material costs necessary for carrying out the transaction.

30 It must be stated in that regard that, in calculating the amount of duties paid by way of fees or dues, the Member States are entitled to take account not only of the material and salary costs which are directly related to the effecting of the registrations in respect of which they are incurred, but also, in the circumstances indicated by the Advocate General in paragraph 43 of his Opinion, of the proportion of the overheads of the competent authority which can be attributed to those registrations. To that extent only, the costs specified by the national court in the first three indents of its second question may form part of the basis for calculating the charges.

31 Charges with no upper limit which increase directly in proportion to the nominal value of the capital raised cannot, by their very nature, amount to duties paid by way of fees or dues within the meaning of the Directive. Even if there may be a link in some cases between the complexity of a registration and the amount of capital raised, the amount of such charges will generally bear no relation to the costs actually incurred by the authority on the registration formalities.

32 Finally, as is evident from the judgment in Ponente Carni, at paragraph 43, the amount of duties paid by way of fees or dues does not necessarily have to vary in accordance with the costs actually incurred by the authority in effecting each registration and a Member State is entitled to prescribe in advance, on the basis of the projected average registration costs, standard charges for carrying out registration formalities in relation to capital companies. Furthermore, there is nothing to prevent those charges from being set for an indefinite period, provided that the Member State checks at regular intervals, for example once a year, that they continue not to exceed the registration costs.

33 It is for the national court to review, on the basis of the above considerations, the extent to which the charges at issue are paid by way of fees or dues and, where appropriate, to order a refund on that basis.

34 The reply to the first five questions should therefore be that, on a sound construction of Article 12(1)(e) of the Directive, in order for charges levied on registration of public and private limited

companies and on their capital being increased to be by way of fees or dues, their amount must be calculated solely on the basis of the cost of the formalities in question. It may, however, also cover the costs of minor services performed without charge. In calculating their amount, a Member State is entitled to take account of all the costs related to the effecting of registration, including the proportion of the overheads which may be attributed thereto. Furthermore, a Member State may impose flat-rate charges and fix their amount for an indefinite period, provided that it checks at regular intervals that they continue not to exceed the average cost of the registrations at issue.

Question 6

35 By its sixth question, the national court seeks to ascertain whether Community law precludes actions for the recovery of charges levied in breach of the Directive from being dismissed on the ground that those charges were imposed as a result of an excusable error by the authorities of the Member State inasmuch as they were levied over a long period without either those authorities or the persons liable to them having been aware that they were unlawful.

36 It is settled case-law that the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177 of the Treaty, the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force.

37 It follows that the rule as so interpreted may, and must, be applied by the courts to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied (see Case 61/79 Amministrazione delle Finanze dello Stato v Denkavit Italiana [1980] ECR 1205, paragraph 16, and Joined Cases C-197/94 and C-252/94 Bautiaa and Société Française Maritime [1996] ECR I-505, paragraph 47).

38 It is also settled case-law that entitlement to the recovery of sums levied by a Member State in breach of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions as interpreted by the Court (Case 199/82 Amministrazione delle Finanze dello Stato v San Giorgio [1983] ECR 3595, paragraph 12). The Member State is therefore in principle required to repay charges levied in breach of Community law (Joined Cases C-192/95 to C-218/95 Comateb and Others v Directeur Général des Douanes et Droits Indirects [1997] ECR I-165, paragraph 20).

39 Accordingly, while the recovery of such charges may, in the absence of Community rules governing the matter, be sought only under the substantive and procedural conditions laid down by the national law of the Member States, those conditions must nevertheless be no less favourable than those governing similar domestic claims nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law (see, for example, Case C-312/93 Peterbroeck v Belgian State [1995] ECR I-4599, paragraph 12).

40 A general principle of national law under which the courts of a Member State should dismiss claims for the recovery of charges levied over a long period in breach of Community law without either the authorities of that State or the persons liable to pay the charges having been aware that they were unlawful, does not satisfy the above conditions. Application of such a principle in the circumstances described would make it excessively difficult to obtain recovery of charges which are contrary to Community law. It would, moreover, have the effect of encouraging infringements of Community law which have been committed over a long period.

41 The reply to the sixth question should therefore be that Community law precludes actions for the recovery of charges levied in breach of the Directive from being dismissed on the ground that those charges were imposed as a result of an excusable error by the authorities of the Member State

inasmuch as they were levied over a long period without either those authorities or the persons liable to them having been aware that they were unlawful.

Question 7

42 By its seventh question, the national court essentially asks whether Community law prevents a Member State from relying on a limitation period under national law to resist actions for the recovery of charges levied in breach of the Directive as long as that Member State has not properly transposed the Directive.

43 It is clear from the order for reference that under Danish law the right to recovery of a whole range of debts becomes statute-barred after five years and that that period generally runs from the date on which the debt became payable. On the expiry of that period the debt is normally no longer exigible, unless the debtor has in the meantime acknowledged the debt or the creditor has commenced legal proceedings.

44 When a number of the applicants in the main proceedings brought their applications for repayment, the relevant time-limit for at least some of their claims had expired.

45 The applicants and the Commission consider, on the basis of Case C-208/90 Emmott v Minister for Social Welfare and the Attorney General [1991] ECR I-4269, that a Member State may not rely on a limitation period under national law as long as the Directive, in breach of which charges have been wrongly levied, has not been properly transposed into national law. According to them, until that date individuals are unable to ascertain the full extent of their rights under the Directive. A limitation period under national law thus does not begin to run until the Directive has been properly transposed.

46 The Danish, French and United Kingdom Governments consider that a Member State is entitled to rely on a limitation period under national law such as the period at issue, since it complies with the two conditions, of equivalence and of effectiveness, laid down by the Court's case-law (see, in particular, Amministrazione delle Finanze dello Stato v San Giorgio and Peterbroeck v Belgian State, both cited above). In their view, the judgment in Emmott must be confined to the quite particular circumstances of that case, as the Court has, moreover, confirmed in its subsequent case-law.

47 As the Court has pointed out in paragraph 39 of this judgment, it is settled case-law that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules for actions seeking the recovery of sums wrongly paid, provided that those rules are not less favourable than those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

48 The Court has thus acknowledged, in the interests of legal certainty which protects both the taxpayer and the authority concerned, that the setting of reasonable limitation periods for bringing proceedings is compatible with Community law. Such periods cannot be regarded as rendering virtually impossible or excessively difficult the exercise of rights conferred by Community law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought (see, in particular, Case 33/76 Rewe v Landwirtschaftskammer Saarland [1976] ECR 1989, paragraph 5, Case 45/76 Comet v Produktschap voor Siergewassen [1976] ECR 2043, paragraphs 17 and 18, and Case C-261/95 Palmisani v Istituto Nazionale della Previdenza Sociale [1997] ECR I-0000, paragraph 28).

49 The five-year limitation period under Danish law must be considered to be reasonable (Case C-90/94 Haahr Petroleum v benrå Havn and Others [1997] ECR I-0000, paragraph 49). Furthermore,

it is apparent that that period applies without distinction to actions based on Community law and those based on national law.

50 It is true that the Court held in Emmott, at paragraph 23, that until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time.

51 However, as was confirmed by the judgment in Case C-410/92 Johnson v Chief Adjudication Officer [1994] ECR I-5483, at paragraph 26, it is clear from Case C-338/91 Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen [1993] ECR I-5475 that the solution adopted in Emmott was justified by the particular circumstances of that case, in which the time-bar had the result of depriving the applicant of any opportunity whatever to rely on her right to equal treatment under a Community directive (see also Haahr Petroleum, cited above, paragraph 52, and Joined Cases C-114/95 and C-115/95 Texaco and Olieselskabet Danmark [1997] ECR I-0000, paragraph 48).

52 The reply to the seventh question must therefore be that Community law, as it now stands, does not prevent a Member State which has not properly transposed the Directive from resisting actions for the repayment of charges levied in breach thereof by relying on a limitation period under national law which runs from the date on which the charges in question became payable, provided that such a period is not less favourable for actions based on Community law than for actions based on national law and does not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

Question 8

53 By its eighth question, the national court asks whether Article 10 of the Directive in conjunction with Article 12(1)(e) thereof gives rise to rights on which individuals may rely before national courts.

54 It is settled case-law that where the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon in national courts by individuals against the State where the State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly (see, in particular, Case C-236/92 Comitato di Coordinamento per la Difesa della Cava and Others v Regione Lombardia and Others [1994] ECR I-483, paragraph 8).

55 In this case, it is sufficient to observe that the prohibition laid down in Article 10 of the Directive and the derogation from that prohibition in Article 12(1)(e) are expressed in sufficiently precise and unconditional terms to be invoked by individuals in their national courts in order to contest a provision of national law which infringes the Directive.

56 The reply to the eighth question must therefore be that Article 10 of the Directive in conjunction with Article 12(1)(e) thereof gives rise to rights on which individuals may rely before national courts.

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AUTHOR Court of Justice of the European Communities

FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1997 Page I-06783
DOC	1997/12/02
LODGED	1995/06/15
JURCIT	11992E177 : N 36 37 31969L0335 : N 1 12 - 18 31969L0335-A10 : N 20 21 27 55 56 31969L0335-A10LA : N 21 31969L0335-A10LC : N 21 22 31969L0335-A11 : N 17 18 31969L0335-A12 : N 20 - 23 31969L0335-A12P1 : N 18 31969L0335-A12P1LE : N 18 28 34 55 56 31985L0303 : N 1 61991J0071 : N 12 61991J0071-N41 : N 27 61991J0071-N42 : N 27 61991J0071-N43 : N 29 32 61978J0161-N11 : N 14 61986J0036-N09 : N 18 61994J0002-N23 : N 21 61981J0270-N14 : N 26 61979J0061-N16 : N 37 61994J0197-N47 : N 37 61982J0199-N12 : N 38 61995J0192-N20 : N 38 61993J0312-N12 : N 39 61976J0033-N05 : N 48 61976J0045-N17 : N 48 61976J0045-N18 : N 48 61995J0261-N28 : N 48 61994J0090-N49 : N 49 61994J0090-N52 : N 51 61990J0208-N23 : N 50 61992J0410-N26 : N 51 61991J0338 : N 51 61995J0114-N48 : N 51 61992J0236-N08 : N 54
CONCERNS	Interprets 31969L0335 -A10 Interprets 31969L0335 -A12P1LE Interprets 31985L0303 -
SUB	Taxation
AUTLANG	Danish

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PROCEDU	Reference for a preliminary ruling
ADVGEN	Jacobs
JUDGRAP	Puissochet
DATES	of document: 02/12/1997 of application: 15/06/1995

Judgment of the Court (Fifth Chamber) of 27 June 1996

Waltraud Tomberger v Gebrüder von der Wettern GmbH. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Directive 78/660/EEC - Annual accounts - Balance sheet - Date at which profit is made. Case C-234/94.

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Freedom of movement for persons ° Freedom of establishment ° Companies ° Directive 78/660 ° Annual accounts of certain types of companies ° Principle of the true and fair view ° Requirement that only profits made at the balance-sheet date may be included ° Circumstances of the case

(Council Directive 78/660, Art. 31(1)(c)(aa))

In order to coordinate the content of annual accounts, the Fourth Directive 78/660 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies, as amended by the Seventh Directive 83/349 on consolidated accounts, lays down the principle of the "true and fair view", compliance with which is the primary objective of that directive. Application of that principle must, as far as possible, be guided by the general principles contained in Article 31 of the directive, particularly in Article 31(1)(c), (aa) and (bb), and (d). It is clear from those provisions that taking account of all elements which actually relate to the financial year in question ensures observance of the principle of a true and fair view.

Where

° one company (the parent company) is the sole shareholder in another company (the subsidiary), and controls it,

° under national law, the parent company and the subsidiary form a group,

° the financial years of the two companies coincide,

° the subsidiary' s annual accounts for the financial year in question were adopted by the general meeting before completion of the audit of the parent company' s annual accounts for that year,

° the subsidiary' s annual accounts for the financial year in question, as adopted by its general meeting, show that on the subsidiary' s balance-sheet date ° namely the last day of that financial year ° the subsidiary appropriated profits to the parent company, and

° the national court is satisfied that the subsidiary' s annual accounts for the financial year in question give a true and fair view of its assets and liabilities, financial position and profit or loss,

it is not contrary to the rule laid down in Article 31(1)(c)(aa) of the directive ° according to which, for the purpose of valuing the items shown in the annual accounts, only profits made at the balance-sheet date may be included ° for the national court to consider that the profits in question must be entered in the parent company' s balance sheet for the financial year in respect of which they were appropriated by the subsidiary.

In Case C-234/94,

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

Waltraud Tomberger

and

Gebrueder von der Wettern GmbH,

on the interpretation of Articles 31(1) and 59 of 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), as amended by the Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts (OJ 1983 L 193, p. 1),

THE COURT (Fifth Chamber),

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

Advocate General: G. Tesauro,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

° Mrs Tomberger, by Hansjuergen Herrmann, Rechtsanwalt, Cologne,

° Gebrueder von der Wettern GmbH, by Adelgund Hofmeister, Rechtsanwalt, Cologne,

° the German Government, by Alfred Dittrich, Regierungsdirektor in the Federal Ministry of Justice, and Bernd Kloke, Oberregierungsrat in the Federal Ministry for the Economy, acting as Agents,

° the Commission of the European Communities, by Antonio Caeiro and Juergen Grunwald, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Tomberger, represented by Klaus Heinemann, Rechtsanwalt, Cologne, Gebrueder von der Wettern GmbH, represented by Adelgund Hofmeister, the German Government, represented by Alfred Dittrich, the United Kingdom, represented by David Anderson, Barrister, and the Commission, represented by Juergen Grunwald, at the hearing on 16 November 1995,

after hearing the Opinion of the Advocate General at the sitting on 25 January 1996,

gives the following

Judgment

1 By order of 21 July 1994, received at the Court on 18 August 1994, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 31(1) and 59 of 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 (hereinafter "the Fourth Directive"), as amended by the Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts.

2 That question was raised in proceedings between Mrs Tomberger (hereinafter "the plaintiff") and Gebrueder von der Wettern GmbH (hereinafter "the defendant"), a company governed by German law and established in Germany.

3 Article 2(3) of the Fourth Directive provides, in the same terms as the fourth recital of the preamble, as follows:

> "The annual accounts shall give a true and fair view of the company' s assets, liabilities, financial position and profit or loss."

4 Article 2(5) lays down that:

"Where in exceptional cases the application of a provision of this directive is incompatible with the obligation laid down in paragraph 3, that provision must be departed from in order to give a true and fair view within the meaning of paragraph 3."

5 Article 31(1) of the Fourth Directive provides:

"(1) The Member States shall ensure that the items shown in the annual accounts are valued in accordance with the following general principles:

(...)

(c) valuation must be made on a prudent basis, and in particular:

(aa) only profits made at the balance-sheet date may be included;

(bb) account must be taken of all foreseeable liabilities and potential losses arising in the course of the financial year concerned or of a previous one, even if such liabilities or losses become apparent only between the date of the balance sheet and the date on which it is drawn up;

(...)

(d) account must be taken of income and charges relating to the financial year, irrespective of the date of receipt or payment of such income or charges;

(...)".

6 Article 59(1) of the Fourth Directive, as amended by the Seventh Directive, provides as follows:

"A Member State may require or permit that participating interests, as defined in Article 17, in the capital of undertakings over the operating and financial policies of which significant influence is exercised, be shown in the balance sheet in accordance with paragraphs (2) to (9) below, as sub-items of the items 'shares in affiliated undertakings' or 'participating interests' , as the case may be."

7 Article 59(2) to (9), as amended, lays down two methods of valuing the holdings referred to in paragraph (1).

8 The plaintiff, a shareholder in the defendant company, challenges that company' s annual accounts for the financial year 1 January 1989 to 31 December 1989 as approved on 19 October 1990 by the general meeting of the company.

9 The defendant, in particular, has a 100% shareholding in the companies Technische Sicherheitssystem GmbH and Gesellschaft fuer Bauwerksabdichtungen mbH (hereinafter "TSS and GfB").

10 On 29 June 1990 the annual accounts of TSS and GfB, likewise for the financial year 1 January 1989 to 31 December 1989, were approved by resolutions of their respective general meetings. Those accounts showed that certain profits had been appropriated to the defendant for the financial year 1989 but had not yet been paid to it.

11 The defendant' s annual accounts for 1989 showed the profits distributed to it by TSS and GfB for the financial year 1988 but not those appropriated to it for the financial year 1989.

12 The plaintiff considered that under the Fourth Directive the defendant' s annual accounts for the financial year 1989 should have included the profits appropriated to it by TSS and GfB for that same year; she therefore brought an action before the Landgericht (Regional Court) for annulment of the resolution of the general meeting approving the defendant' s annual accounts for 1989. The action was dismissed at first instance and on appeal, whereupon the plaintiff appealed to the Bundesgerichtshof on a point of law.

13 The Bundesgerichtshof considers that the entitlement of an undertaking (the parent company) which is the sole or majority shareholder of another company (the subsidiary) to the profits of the subsidiary is sufficiently certain at the balance-sheet date for it to be regarded as forming part of the assets of the parent company. It follows, in its view, that the debt receivable by the parent company from its subsidiary company must be included in the annual accounts of the parent company as from the date when the corresponding liability of the subsidiary company came into being. However, the Bundesgerichtshof is in doubt as to the compatibility of that view with the requirements of the Fourth Directive.

14 The Bundesgerichtshof therefore decided to stay proceedings pending a ruling from the Court of Justice on the following question:

> "Is there an infringement of Article 31(1)(c)(aa) of the Fourth Directive 78/660/EEC of 25 July 1978, according to which only profits made at the balance-sheet date may be included, and of the principles laid down in Article 59 of that directive on the 'equity method' , if the profit entitlement of an undertaking, as against a private limited company in which it is the sole or majority shareholder and in respect of which the presumptions of dependency within the meaning of Paragraph 17(2) of the Aktiengesetz (Law on Private Companies) and of belonging to a single group within the meaning of the third sentence of Paragraph 18(1) of that Law have not been rebutted, is regarded as forming part as from the balance-sheet date of the subsidiary company of the assets of the undertaking which is the sole or majority shareholder and must therefore be shown as an asset of the latter 'as from that date' , on the assumption that the financial years of the two undertakings coincide and the meeting of shareholders in the private limited company controlled by the other resolves to adopt the annual accounts and appropriate the profits at a time when the auditing of the annual accounts of the undertaking which is the sole shareholder has not yet been completed?"

15 It should be emphasized at the outset that, as appears from the terms of the question referred and the order for reference, the question arises in the context of a highly specific set of circumstances:

° the parent company is the sole shareholder in the subsidiary, and controls it,

° under national law, the parent company and the subsidiary form a group,

° the financial years of the two companies coincide,

° the subsidiary' s annual accounts for the financial year in question were adopted by its general meeting before completion of the audit of the parent company' s annual accounts for that year,

° the subsidiary' s annual accounts for the financial year in question, as adopted by its general meeting, show that on the subsidiary' s balance-sheet date ° namely the last day of that financial year ° the subsidiary appropriated profits to the parent company, and

° in the light of the presumptions of national law as to the relationship between the parent company and its subsidiary, the national court considers that the parent company' s entitlement to the profits in question is sufficiently certain at the balance-sheet date of the two companies for it to be regarded as forming, at that date, part of the assets of the parent company.

16 As regards Article 59 of the Fourth Directive, as amended, to which the national court refers, it is sufficient to note, as the Advocate General has done at point 12 of his Opinion, that this provision can have no bearing on the resolution of the dispute in the main proceedings since the German legislature has not exercised the option made available to it under that article, so that the methods of valuation there provided for do not apply in Germany.

17 With regard to Article 31 of the Fourth Directive, it should be borne in mind that the Fourth Directive seeks to coordinate national provisions concerning the presentation and content of annual

accounts of certain types of companies (see the first recital of the preamble). In order to coordinate the content of annual accounts, the directive lays down the principle of the "true and fair view", compliance with which is the primary objective of the directive. According to that principle, the annual accounts of the companies to which the Fourth Directive applies must give a true and fair view of their assets and liabilities, financial position and profit or loss (see the fourth recital in the preamble to the Fourth Directive and Article 2(3) and (5) thereof).

18 Application of that principle must, as far as possible, be guided by the general principles contained in Article 31 of the Fourth Directive. In this case, the principles set out in Article 31(1)(c)(aa) and (bb) and (d) are of particular importance.

19 First, Article 31(1)(c)(aa) provides that only profits made at the balance-sheet date may be included in the balance sheet.

20 Second, Article 31(1)(d) provides that account must be taken in the balance sheet for a financial year of all income and charges relating to that year, irrespective of the date of receipt or payment of such income or charges.

21 Third, in accordance with Article 31(1)(c)(bb), account must be taken of liabilities and losses arising in the course of a financial year even if they become apparent only between the end of the financial year and the date on which the balance sheet for that year is drawn up.

22 It is clear from those provisions that taking account of all elements ° profits made, charges, income, liabilities and losses ° which actually relate to the financial year in question ensures observance of the requirement of a true and fair view.

23 In the present case, according to the subsidiary' s annual accounts, the profits in question were made by that company during the financial year 1989 and were appropriated by it to the parent company as at 31 December 1989, that is to say before the end of that financial year. Before examining the parent company' s accounts, the national court must be satisfied that there is no reason to question that that presentation of the subsidiary' s financial position complies with the principle of the true and fair view.

24 It follows from all the foregoing that, if the subsidiary' s accounts themselves comply with the principle of the true and fair view, it is not contrary to the rule laid down in Article 31(1)(c)(aa) of the Fourth Directive for the national court to consider that, in the circumstances described, the profits in question must be entered in the parent company' s balance sheet for the financial year in respect of which the subsidiary appropriated them.

25 The answer to the question referred by the national court must therefore be that, where

° one company (the parent company) is the sole shareholder in another company (the subsidiary), and controls it,

° under national law, the parent company and the subsidiary form a group,

° the financial years of the two companies coincide,

° the subsidiary' s annual accounts for the financial year in question were adopted by the general meeting before completion of the audit of the parent company' s annual accounts for that year,

° the subsidiary' s annual accounts for the financial year in question, as adopted by its general meeting, show that on the subsidiary' s balance-sheet date ° namely the last day of that financial year ° the subsidiary appropriated profits to the parent company, and

° the national court is satisfied that the subsidiary' s annual accounts for the financial year in question give a true and fair view of its assets and liabilities, financial position and profit

or loss,

it is not contrary to the rule laid down in Article 31(1)(c)(aa) of the Fourth Directive for the national court to consider that the profits in question must be entered in the parent company' s balance sheet for the financial year in respect of which they were appropriated by the subsidiary.

Costs

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

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Bundesgerichtshof by order of 21 July 1994, hereby rules:

Where

° one company (the parent company) is the sole shareholder in another company (the subsidiary), and controls it,

° under national law, the parent company and the subsidiary form a group,

° the financial years of the two companies coincide,

° the subsidiary' s annual accounts for the financial year in question were adopted by the general meeting before completion of the audit of the parent company' s annual accounts for that year,

° the subsidiary' s annual accounts for the financial year in question, as adopted by its general meeting, show that on the subsidiary' s balance-sheet date ° namely the last day of that financial year ° the subsidiary appropriated profits to the parent company, and

° the national court is satisfied that the subsidiary' s annual accounts for the financial year in question give a true and fair view of its assets and liabilities, financial position and profit or loss,

it is not contrary to the rule laid down in Article 31(1)(c)(aa) of 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, as amended by the Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts, for the national court to consider that the profits in question must be entered in the parent company' s balance sheet for the financial year in respect of which they were appropriated by the subsidiary.

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PROCEDU Reference for a preliminary ruling

ADVGEN Tesauro

JUDGRAP Edward

DATES of document: 27/06/1996
of application: 18/08/1994

Judgment of the Court (Sixth Chamber)
of 20 May 1992
Claus Ramrath v Ministre de la Justice, and l'Institut des réviseurs d'entreprises. Reference for a preliminary ruling: Conseil d'Etat - Grand Duchy of Luxemburg. Auditors - Requirement of a professional establishment within a Member State. Case C-106/91.

++++

1. Freedom of movement for persons ° Freedom of establishment ° More than one centre of activity within the Community ° Auditors

(EEC Treaty, Art. 52)

2. Freedom of movement for persons ° Freedom to provide services ° Workers ° Auditors ° Access to the profession ° Restrictions justified in the general interest ° Whether permissible ° Conditions

(EEC Treaty, Arts 48 and 59)

1. The Treaty provisions on the right of establishment preclude a Member State from prohibiting a person from becoming established in its territory and practising as an auditor there on the grounds that that person is established and authorized to practise in another Member State.

2. Articles 48 and 59 of the Treaty do not preclude a Member State from making practice as an auditor within its territory by a person who is already authorized to practise as an auditor in another Member State subject to conditions which are objectively necessary for ensuring compliance with the rules of professional practice and which relate to a permanent infrastructure for carrying out the work, actual presence in that Member State and supervision of compliance with the rules of professional conduct, unless compliance with such rules and conditions is already ensured through an auditor, whether a natural or legal person, who is established and authorized in that State' s territory and in whose service the person who intends to practise as an auditor is employed for the duration of the work.

In Case C-106/91,

REFERENCE to the Court under Article 177 of the EEC Treaty from the judicial division of the Conseil d' Etat, Luxembourg, for a preliminary ruling in the action pending before that court between

Claus Ramrath

and

Ministre de la Justice (Minister of Justice)

in the presence of the Institut des Réviseurs d' Entreprises (Institute of Auditors), intervener in the main proceedings,

on the interpretation of the rules on freedom of movement for persons,

THE COURT (Sixth Chamber),

composed of: F.A. Schockweiler, President of the Chamber, G.F. Mancini, C.N. Kakouris, M. Díez de Velasco and J.L. Murray, Judges,

Advocate General: F.G. Jacobs,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

° the Minister of Justice, by Francis Delaporte, of the Luxembourg Bar,

° the Institut des Réviseurs d' Entreprises, by Claude Kremer and Patrick Kinsch, of the Luxembourg Bar,

° the Commission of the European Communities, by Henri Etienne, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Claus Ramrath, represented by J.J. Wagner, of the Luxembourg Bar, the Minister of Justice, the Institut des Réviseurs d' Entreprises and the Commission, at the hearing on 13 February 1992,

after hearing the Opinion of the Advocate General at the sitting on 19 March 1992,

gives the following

Judgment

Costs

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

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Conseil d' Etat, Luxembourg, by order of 12 March 1991, hereby rules:

1. The Treaty provisions on the right of establishment preclude a Member State from prohibiting a person from becoming established on its territory and practising as an auditor there on the grounds that that person is established and authorized to practise in another Member State.

2. Articles 48 and 59 of the Treaty do not preclude a Member State from making practice as an auditor within its territory by a person who is already authorized to practise as an auditor in another Member State subject to conditions which are objectively necessary for ensuring compliance with the rules of professional practice and which relate to a permanent infrastructure for carrying out the work, actual presence in that Member State and supervision of compliance with the rules of professional conduct, unless compliance with such rules and conditions is already ensured through an auditor, whether a natural or legal person, who is established and authorized in that State' s territory and in whose service the person who intends to practise as an auditor is employed for the duration of the work.

1 By order of 12 March 1991, received at the Court on 3 April 1991, the Conseil d' Etat, Luxembourg, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of the provisions of the EEC Treaty relating to freedom of movement for persons.

2 Those questions arose in proceedings between Mr Ramrath and the Luxembourg Minister of Justice ("the Minister"), in the presence of the Institut des Réviseurs d' Entreprises.

3 The proceedings relate to the withdrawal by the Minister in 1989 of Mr Ramrath' s authorization to practise as an auditor.

4 The profession of auditor is regulated in Luxembourg by the Law of 28 June 1984 (Mémorial 1984, p. 1346). Article 3 of that Law provides that

> "The statutory audit of the documents referred to in Article 1 may be carried out only by persons authorized by the Minister of Justice.
>
> (1) Natural persons must, in order to obtain authorization, satisfy the following conditions:
>
> (a) they must be nationals of a Member State of the European Community ...
>
> (b) provide proof of professional qualifications and integrity...
>
> (c) have a professional establishment in Luxembourg.
>
> (2) Legal persons must, in order to obtain authorization, satisfy the conditions stated in paragraph 1, subparagraphs (a) and (c), and the following conditions:
>
> (a) natural persons who carry out the statutory audit of the documents referred to in Article 1 on behalf of a legal person must satisfy the conditions prescribed in paragraph 1 above and be able to bind the legal person;
>
> ...
>
> (3) The Minister of Justice shall withdraw authorization from persons who no longer satisfy one of the conditions listed above..."

5 Under Article 6 of the aforesaid Law,

> "The profession of auditor is not compatible with any activity likely to impair the professional independence of the auditor. He may not be employed except by a person authorized under Article 3."

6 At Community level, authorization to practise as an auditor is dealt with in the Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents (OJ 1984 L 126, p. 20, hereinafter referred to as "the Eighth Directive").

7 Article 3 of the Eighth Directive reads as follows:

> "The authorities of a Member State shall grant approval only to persons of good repute who are not carrying on any activity which is incompatible, under the law of that Member State, with the statutory auditing of the documents referred to..."

8 Articles 23, 24, 25 and 26 of Section III ("Professional integrity and independence") of the Eighth Directive read as follows:

> "Article 23
>
> Member States shall prescribe that persons approved for the statutory auditing of the documents referred to in Article 1(1) shall carry out such audits with professional integrity.
>
> *Article 24*
>
> Member States shall prescribe that such persons shall not carry out statutory audits which they have required if such persons are not independent in accordance with the law of the Member State which requires the audit.

Article 25

Articles 23 and 24 shall also apply to natural persons who satisfy the conditions imposed in Articles 3 to 19 and carry out the statutory audit of the documents referred to in Article 1(1) on behalf of a firm of auditors.

Article 26

Member States shall ensure that approved persons are liable to appropriate sanctions when they do not carry out audits in accordance with Articles 23, 24 and 25."

9 On 11 February 1985 the Minister granted Mr Ramrath authorization to practise as an auditor. Mr Ramrath was employed at the time by Société Civile Treuarbeit, established in Luxembourg (hereinafter "Treuarbeit Luxembourg"), a legal person which was likewise authorized to practise in Luxembourg.

10 In 1988, Mr Ramrath stated that he was employed by Treuarbeit AG, a company established in Duesseldorf, Germany (hereinafter "Treuarbeit Duesseldorf"), and that his professional establishment was in Duesseldorf. Mr Ramrath explained that he and Treuarbeit Duesseldorf were both authorized by the German authorities to practise as auditors, adding that Treuarbeit Duesseldorf had agreed not to exert any influence on him when Treuarbeit Luxembourg asked him to carry out audits in Luxembourg. Treuarbeit Luxembourg later stated that when Mr Ramrath worked in Luxembourg, he was in fact employed by Treuarbeit Luxembourg for the duration of that work.

11 On 19 May 1989 the Minister withdrew Mr Ramrath' s authorization on two grounds: first, he had admitted, by implication, in stating that his professional address was in Duesseldorf, that he no longer had a professional establishment in Luxembourg within the meaning of Article 3(1)(c) of the Law of 28 June 1984, and secondly, as an employee of Treuarbeit Duesseldorf he no longer fulfilled the condition of professional independence laid down by Article 6 of that Law.

12 In support of his appeal against the Minister' s decision, Mr Ramrath argued before the Luxembourg Conseil d' Etat inter alia that he was the victim of discrimination: under the Law of 28 June 1984 it was consistent with professional independence for an auditor to be employed by a legal person authorized as such by the Luxembourg authorities, whereas it was not permitted for an auditor to be employed by a legal person authorized to practise as an auditor by the authorities of another Member State, even if the legislation of that State laid down similar requirements of independence with regard to economic agents.

13 By judgment of 12 March 1991 the Luxembourg Conseil d' Etat stayed the proceedings pending a preliminary ruling by the Court of Justice on the following questions:

> "1. (a) Do Article 52 et seq., or any other provisions of the Treaty and the implementing rules, permit the competent authorities of a Member State to deem it incompatible with the exercise by a natural person of the profession of auditor in that Member State for that person to be established as an auditor in another Member State?

and if not,

(b) May a Member State impose, on a person authorized to carry on the profession of auditor in another Member State in which that person also has a business establishment, requirements with regard to a permanent infrastructure for the performance of his work, minimum conditions with regard to actual presence in that Member State and the conditions necessary for ensuring compliance with

the rules of professional conduct?

2. Do Article 52 et seq. of the EEC Treaty, or any other provisions of the Treaty and the implementing rules, permit the competent authorities of a Member State to grant authorizations to practise as auditors only to employees of a person so authorized under its national legislation, to the exclusion of employees of a person authorized under the legislation of another Member State?"

14 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the 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.

15 It is important to note, first, that at this stage of the proceedings the national court has not finally determined Mr Ramrath' s position from the point of view of the provisions of Community law applicable to him. The national court' s findings of fact and the selected provisions of Community law referred to in its questions raise various possibilities in that respect, depending on whether Mr Ramrath falls within the provisions of Community law on the basis of a professional activity carried on by him, or of employment sought by him, or as an employee covered by the provisions of Community law by reason of his professional activity.

16 His position might therefore come within the chapter of the Treaty on workers, more particularly Article 48, or within the chapters on the right of establishment and on services, in particular Articles 52, 56 and 59.

17 Furthermore, a comparison of those different provisions shows that they are based on the same principles as regards both the entry into and residence in the territory of the Member States of persons covered by Community law and also the prohibition of all discrimination against them on grounds of nationality.

18 The questions submitted by the Luxembourg Conseil d' Etat must be answered in the light of those considerations.

The first question

19 In this question, the national court seeks essentially to ascertain whether the Treaty provisions on the right of establishment preclude a Member State from prohibiting a person from becoming established in its territory and practising as an auditor there on the grounds that that person is established and authorized to practise in another Member State.

20 In that respect, according to the settled case-law of the Court (see, for example, the judgments in Case 107/83 Ordre des Avocats au Barreau de Paris v Klopp [1984] ECR 2971, paragraph 19; Case 143/87 Stanton and L' Etoile 1905 v Inasti [1988] ECR 3877, paragraph 11; and Joined Cases 154 and 155/87 RSVZ v Wolf and Others [1988] ECR 3897, paragraph 11), the right of establishment also entails the right to set up and maintain, subject to observance of the rules of professional practice, more than one place of work within the Community.

21 It follows that the right of establishment precludes a Member State from requiring a person practising a profession to have no more than one place of business within the Community.

22 Consequently, the answer to the first question must be that the Treaty provisions on the right of establishment preclude a Member State from prohibiting a person from becoming established in its territory and practising as an auditor there on the grounds that that person is established and authorized to practise in another Member State.

The second and third questions

23 These questions ask in substance whether the Treaty provisions on the free movement of persons preclude a Member State from making practice as an auditor in its territory by a person who is

already authorized to practise that profession in another Member State subject to conditions relating to permanent professional infrastructure, actual presence in that Member State, supervision of compliance with the rules of professional conduct or, in the case of an employee, the fact that his principal employer is authorized to practise as an auditor within that State' s territory.

24 It is unnecessary to consider whether an auditor who wishes to carry out audits in another Member State has the status of an employee, a self-employed person or a provider of services, this being for the national court to decide, if at all; however, all the Treaty provisions relating to freedom of movement for persons must be examined in order to determine whether they preclude the imposition of conditions such as those laid down by the Law of 28 June 1984.

25 The principle of freedom of movement for workers, stated in Article 48 of the Treaty, gives every national of a Member State the right to enter the territory of another Member State and to reside there for the purposes referred to in that article. The same principle also guarantees every employee the right to take up temporary employment in another Member State. He cannot be denied that right on the grounds that he is already in paid employment in his State of origin or that the work performed in the other Member State is part-time work.

26 Furthermore, the Court held in the abovementioned Stanton and Wolf judgments, paragraph 12 in each case, that the considerations set out above in connection with the answer to the first question concerning the right of establishment are also valid in the case of an employee who is established in one Member State and wishes, in addition, to work in a self-employed capacity in another Member State.

27 Finally, freedom to provide services within the meaning of Article 59 et seq. of the Treaty entails the abolition of all forms of discrimination against a person providing a service by reason inter alia of the fact that he is established in a Member State other than that in which the service is to be provided (see the judgment in Case 279/80 Webb [1981] ECR 3305, paragraph 14).

28 It follows that Articles 48 and 59 of the Treaty are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and preclude national legislation which might place Community nationals at a disadvantage when they wish to extend their activities beyond the territory of a single Member State (see the Stanton and Wolf judgments, cited above, paragraph 13 in each case).

29 However, in view of the special nature of certain professional activities, the imposition of specific requirements pursuant to the rules governing such activities cannot be considered incompatible with the Treaty. Nevertheless, as one of the fundamental principles of the Treaty, freedom of movement for persons may be restricted only by rules which are justified in the general interest and are applied to all persons and undertakings pursuing those activities in the territory of the State in question, in so far as that interest is not already safeguarded by the rules to which a Community national is subject in the Member State where he is established (see the judgment in Case C-180/89 Commission v Italy [1991] ECR I-709, paragraph 17).

30 In addition, such requirements must be objectively justified by the need to ensure that professional rules of conduct are complied with and that the interests which such rules are designed to safeguard are protected (ibid, paragraph 17).

31 It follows that such requirements may be regarded as compatible with the provisions on the free movement of persons only if it is shown that there are, with regard to the activity in question, compelling reasons in the general interest which justify restrictions on freedom of movement, that that interest is not already safeguarded by the rules of the State where the Community national is established, and that the same result cannot be achieved by less restrictive rules.

32 Accordingly, it must be examined whether the conditions imposed by the Member State in which the statutory audit of accounting documents is carried out, and relating to permanent professional infrastructure, actual presence in the territory of that Member State, compliance with the rules governing the profession of auditor or the employee status of an auditor authorized by the authorities of that State, are objectively necessary.

33 In the Minister' s view, it follows from the recitals in the preamble to the Eighth Directive and from Articles 3, 23, 24, 25 and 26 thereof that it is for each Member State to determine the criteria of independence and integrity for auditors. In that respect, supervision of compliance with the rules of professional practice by an auditor within a Member State' s territory presupposes that the auditor is under an obligation to have a permanent infrastructure and minimum presence within that State. Moreover, compliance with those rules by an employed auditor could be guaranteed only through his employer. Supervision by the authorities of compliance with such rules would be possible only at the level of the employer, who would therefore have to be approved by those authorities.

34 On this point, the provisions of the Eighth Directive leave to Member States inter alia the task of assessing in accordance with national law the independence and integrity of auditors practising within their territory.

35 A Member State may carry out that task by requiring compliance with rules of professional practice, justified by the public interest, relating to the integrity and independence of auditors and applying to all persons practising as auditors within the territory of that State. In that respect, requirements relating to the existence of infrastructure within the national territory and the auditor' s actual presence appear to be justified in order to safeguard that interest.

36 Such requirements are no longer objectively necessary, however, where the statutory audit of the accounting documents is carried out by an auditor who, while established and authorized to practise in another Member State, is temporarily in the service of a natural or legal person authorized to practise as an auditor by the authorities of the Member State in which that audit is carried out. In those circumstances, it is through that person that the Member State can ensure compliance with the rules by an auditor who from time to time carries out audits in its territory.

37 It follows from all those considerations that the answer to the second and third questions of the Luxembourg Conseil d' Etat must be that Articles 48 and 59 of the Treaty do not preclude a Member State from making practice as an auditor within its territory by a person who is already authorized to practise as an auditor in another Member State subject to conditions which are objectively necessary for ensuring compliance with the rules of professional practice and which relate to a permanent infrastructure for carrying out the work, actual presence in that Member State and supervision of compliance with the rules of professional conduct, unless compliance with such rules and conditions is already ensured through an auditor, whether a natural or legal person, who is established and authorized in that State' s territory and in whose service the person who intends to practise as an auditor is employed for the duration of the work.

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NOTES	Cartou, Louis: Liberté d'établissement - Professions réglementées - Contrôle des sociétés - Accès, Les petites affiches 1992 no 130 p.16-17 ; Bertoli, Giuseppe ; Gratani, Adabella: Revisori contabili e libera prestazione dei servizi, Diritto comunitario e degli scambi internazionali 1992 p.713-714 ; Dios, José María de: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1993 p.273-275 ; Wouters, Jan: Vrij verkeer van bedrijfsrevisoren in de Europese Gemeenschap, Revue de droit commercial belge 1993 p.344-365 ; Boutard-Labarde, Marie-Chantal: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes. Libre circulation des personnes et des services, Journal du droit international 1993 p.428-429

PROCEDU	Reference for a preliminary ruling
ADVGEN	Jacobs
JUDGRAP	Mancini
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Judgment of the Court (Sixth Chamber)
of 17 November 1987
British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission of the European Communities. Competition - Rights of complainants - Shareholding in a competing company. Joined cases 142 and 156/84.

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1 . COMPETITION - ADMINISTRATIVE PROCEEDINGS - RIGHTS OF COMPLAINANTS - PROTECTION OF BUSINESS SECRETS OF THE COMPANY UNDER INVESTIGATION (EEC TREATY, ART. 214; COUNCIL REGULATION NO 17/62, ARTS 3 AND 20*(2)*)

2 . COMPETITION - AGREEMENTS, DECISIONS AND CONCERTED PRACTICES - ACQUISITION OF A SHAREHOLDING IN A COMPETING COMPANY - RESTRICTION OF COMPETITION - ASSESSMENT CRITERIA

(EEC TREATY, ART. 85)

3 . ACTION FOR A DECLARATION THAT A MEASURE IS VOID - COMMISSION DECISION ON THE BASIS OF ARTICLE 85*(1) OF THE TREATY - APPRAISAL OF COMPLEX ECONOMIC MATTERS - JUDICIAL REVIEW - LIMITS

(EEC TREATY, ARTS 85*(1) AND 173)

4 . COMPETITION - DOMINANT POSITION - ABUSE - ACQUISITION OF A SHAREHOLDING IN A COMPETING COMPANY - CONDITIONS

(EEC TREATY, ART. 86)

5 . MEASURES ADOPTED BY THE COMMUNITY INSTITUTIONS - STATEMENT OF REASONS - OBLIGATION - SCOPE - DECISION APPLYING RULES ON COMPETITION

(EEC TREATY, ART. 190; COUNCIL REGULATION NO 17/62, ART. 3)

1 . AN INVESTIGATION CARRIED OUT BY THE COMMISSION IN FULFILMENT OF ITS DUTY TO ENSURE THAT THE RULES ON COMPETITION ARE OBSERVED DOES NOT CONSTITUTE ADVERSARY PROCEEDINGS BETWEEN COMPANIES WHICH HAVE SUBMITTED AN APPLICATION UNDER ARTICLE 3 OF REGULATION NO 17/62, HAVING SHOWN THAT THEY HAVE A LEGITIMATE INTEREST IN SEEKING AN END TO THE ALLEGED INFRINGEMENT, AND COMPANIES WHICH ARE THE OBJECT OF THE INVESTIGATION.

ALTHOUGH COMPLAINANTS MUST BE GIVEN THE OPPORTUNITY TO DEFEND THEIR LEGITIMATE INTERESTS DURING THE ADMINISTRATIVE PROCEEDINGS AND THE COMMISSION MUST CONSIDER ALL THE MATTERS OF FACT AND OF LAW WHICH THEY BRING TO ITS ATTENTION, THEIR PROCEDURAL RIGHTS ARE NOT AS FAR-REACHING AS THE RIGHT TO A FAIR HEARING OF THE COMPANIES WHICH ARE THE OBJECT OF THE COMMISSION' S INVESTIGATION, AND THE LIMITS OF SUCH RIGHTS ARE REACHED WHERE THEY BEGIN TO INTERFERE WITH THOSE COMPANIES' RIGHTS TO A FAIR HEARING.

THE OBLIGATION OF PROFESSIONAL SECRECY LAID DOWN IN ARTICLE 214 OF THE TREATY AND ARTICLE 20*(2) OF REGULATION NO 17/62 IS MITIGATED IN REGARD TO COMPLAINANTS, BUT THEY MAY NOT IN ANY CIRCUMSTANCES BE PROVIDED WITH DOCUMENTS CONTAINING BUSINESS SECRETS.

THE LEGITIMATE INTERESTS OF COMPLAINANTS ARE FULLY PROTECTED WHERE THEY ARE INFORMED OF THE OUTCOME OF THE CONFIDENTIAL NEGOTIATIONS BETWEEN THE COMMISSION AND THE COMPANIES WHICH ARE THE OBJECT OF ITS INVESTIGATION

WITH A VIEW TO BRINGING THE AGREEMENTS OR PRACTICES COMPLAINED OF INTO CONFORMITY WITH THE RULES LAID DOWN IN THE TREATY; THE RIGHT OF THE COMMISSION AND THOSE COMPANIES TO ENTER INTO CONFIDENTIAL NEGOTIATIONS WOULD BE IMPERILLED IF THE COMPLAINANTS WERE GIVEN THE RIGHT TO ATTEND SUCH NEGOTIATIONS OR BE KEPT INFORMED OF THE PROGRESS MADE IN ORDER TO SUBMIT THEIR OBSERVATIONS ON THE PROPOSALS PUT FORWARD BY ONE PARTY OR THE OTHER.

2 . WHERE THE ACQUISITION OF SHARES IN A COMPETING COMPANY IS THE SUBJECT-MATTER OF AGREEMENTS ENTERED INTO BY COMPANIES WHICH REMAIN INDEPENDENT AFTER THE ENTRY INTO FORCE OF THE AGREEMENTS, THE ISSUE MUST FIRST BE EXAMINED FROM THE POINT OF VIEW OF ARTICLE 85 OF THE TREATY .

ALTHOUGH THE ACQUISITION BY ONE COMPANY OF AN EQUITY INTEREST IN A COMPETITOR DOES NOT IN ITSELF CONSTITUTE CONDUCT RESTRICTING COMPETITION, SUCH AN ACQUISITION MAY NEVERTHELESS SERVE AS AN INSTRUMENT FOR INFLUENCING THE COMMERCIAL CONDUCT OF THE COMPANIES IN QUESTION SO AS TO RESTRICT OR DISTORT COMPETITION ON THE MARKET ON WHICH THEY CARRY ON BUSINESS.

THAT WOULD BE TRUE IN PARTICULAR WHERE, BY THE ACQUISITION OF A SHAREHOLDING OR THROUGH SUBSIDIARY CLAUSES IN THE AGREEMENT, THE INVESTING COMPANY OBTAINS LEGAL OR DE FACTO CONTROL OF THE COMMERCIAL CONDUCT OF THE OTHER COMPANY OR WHERE THE AGREEMENT PROVIDES FOR COMMERCIAL COOPERATION BETWEEN THE COMPANIES OR CREATES A STRUCTURE LIKELY TO BE USED FOR SUCH COOPERATION, OR WHERE THE AGREEMENT GIVES THE INVESTING COMPANY THE POSSIBILITY OF REINFORCING ITS POSITION AT A LATER STAGE AND TAKING EFFECTIVE CONTROL OF THE OTHER COMPANY.

EVERY AGREEMENT MUST BE ASSESSED IN ITS ECONOMIC CONTEXT AND IN PARTICULAR IN THE LIGHT OF THE SITUATION ON THE RELEVANT MARKET. WHERE THE COMPANIES CONCERNED ARE MULTINATIONAL CORPORATIONS WHICH CARRY ON BUSINESS ON A WORLDWIDE SCALE, THEIR RELATIONSHIPS OUTSIDE THE COMMUNITY CANNOT BE IGNORED, AND IT IS NECESSARY IN PARTICULAR TO CONSIDER THE POSSIBILITY THAT THE AGREEMENT IN QUESTION MAY BE PART OF A POLICY OF GLOBAL COOPERATION BETWEEN THEM. THE COMMISSION MUST EXERCISE PARTICULAR VIGILANCE IN THE CASE OF A STAGNANT AND OLIGOPOLISTIC MARKET, SUCH AS THAT FOR CIGARETTES.

3 . ALTHOUGH AS A GENERAL RULE THE COURT UNDERTAKES A COMPREHENSIVE REVIEW OF THE QUESTION WHETHER OR NOT THE CONDITIONS FOR THE APPLICATION OF ARTICLE 85*(1) OF THE TREATY ARE MET, ITS REVIEW OF THE COMMISSION' S APPRAISALS OF COMPLEX ECONOMIC MATTERS IS NECESSARILY LIMITED TO VERIFYING WHETHER THE RELEVANT RULES ON PROCEDURE AND ON THE STATEMENT OF REASONS HAVE BEEN COMPLIED WITH, WHETHER THE FACTS HAVE BEEN ACCURATELY STATED AND WHETHER THERE HAS BEEN ANY MANIFEST ERROR OF APPRAISAL OR A MISUSE OF POWERS.

4 . THE ACQUISITION BY ONE COMPANY OF A SHAREHOLDING IN A COMPETING COMPANY CAN CONSTITUTE AN ABUSE OF A DOMINANT POSITION WITHIN THE MEANING OF ARTICLE 86 OF THE TREATY ONLY WHERE THAT SHAREHOLDING RESULTS IN EFFECTIVE CONTROL OF THE OTHER COMPANY OR AT LEAST IN SOME INFLUENCE ON ITS COMMERCIAL POLICY.

5 . WHERE THE COMMISSION REJECTS AN APPLICATION PURSUANT TO ARTICLE 3 OF REGULATION NO 17/62, IT NEED ONLY STATE THE REASONS FOR WHICH IT DID NOT CONSIDER IT POSSIBLE TO HOLD THAT AN INFRINGEMENT OF THE RULES ON COMPETITION HAD OCCURRED, AND IT IS NOT OBLIGED TO EXPLAIN ANY DIFFERENCES IN RELATION

TO THE STATEMENT OF OBJECTIONS, SINCE THAT IS A PREPARATORY DOCUMENT CONTAINING ASSESSMENTS WHICH ARE PURELY PROVISIONAL IN NATURE AND ARE INTENDED TO DEFINE THE SCOPE OF THE ADMINISTRATIVE PROCEEDINGS WITH REGARD TO THE COMPANIES AGAINST WHICH THEY ARE BROUGHT, OR TO DISCUSS ALL THE MATTERS OF FACT AND OF LAW WHICH MAY HAVE BEEN DEALT WITH DURING THE ADMINISTRATIVE PROCEEDINGS.

IN JOINED CASES 142 AND 156/84

BRITISH AMERICAN TOBACCO COMPANY LTD, LONDON, REPRESENTED BY P. V. F . BOS, FORMERLY OF THE AMSTERDAM BAR, SUBSEQUENTLY OF THE ROTTERDAM BAR, NOLST TRENITE, HAVING CHAMBERS IN BRUSSELS, INSTRUCTED BY COUDERT BROTHERS, ATTORNEYS AT LAW, NEW YORK, HAVING CHAMBERS IN BRUSSELS, AND WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE CHAMBERS OF J. LOESCH, 2 RUE GOETHE,

AND

R . J . REYNOLDS INDUSTRIES, INC., WINSTON SALEM, NORTH CAROLINA, UNITED STATES OF AMERICA, ACTING THROUGH JOSEPH F. ABELY JR, VICE-CHAIRMAN OF THE BOARD, REPRESENTED BY J. F. LEVER, QC, AND R. J . BUXTON, QC, OF GRAY' S INN CHAMBERS, GRAY' S INN, LONDON, INSTRUCTED BY A. J. C. PAINES AND M. J. REYNOLDS, OF ALLEN AND OVERY, LONDON AND BRUSSELS, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE CHAMBERS OF J. LOESCH, 2 RUE GOETHE,

APPLICANTS,

V

COMMISSION OF THE EUROPEAN COMMUNITIES, REPRESENTED BY ITS LEGAL ADVISER A . MCCLELLAN AND BY K. BANKS, A MEMBER OF ITS LEGAL DEPARTMENT, ACTING AS AGENTS, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICE OF G.*KREMLIS, A MEMBER OF ITS LEGAL DEPARTMENT, JEAN MONNET BUILDING, KIRCHBERG,

DEFENDANT,

SUPPORTED BY

PHILIP MORRIS INCORPORATED, NEW YORK, REPRESENTED BY M. SIRAGUSA, OF THE ROME BAR, AND M. WAELBROECK, OF THE BRUSSELS BAR, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE CHAMBERS OF E. ARENDT, CENTRE LOUVIGNY, 34B RUE PHILIPPE II,

AND

REMBRANDT GROUP LIMITED, STELLENBOSCH, REPUBLIC OF SOUTH AFRICA, REPRESENTED BY C. BELLAMY AND K. B. PARKER, GRAY' S INN, LONDON, INSTRUCTED BY MALCOLM G. C. NICHOLSON, SOLICITOR, SLAUGHTER AND MAY, LONDON, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE CHAMBERS OF MESSRS ELVINGER AND HOSS, 15 COTE D' EICH,

INTERVENERS,

APPLICATION FOR A DECLARATION THAT THE DECISION, CONTAINED IN THE COMMISSION' S LETTER NO SG(84)*D/3946 OF 22 MARCH 1984 CONCERNING CASES NO IV/30.342 AND NO IV/30.926, REJECTING THE APPLICATIONS MADE BY THE APPLICANTS PURSUANT TO ARTICLE 3*(2) OF REGULATION NO 17/62 OF THE COUNCIL OF 6 FEBRUARY 1962 (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1959-62, P.*87) AND DECLARING THAT CERTAIN

AGREEMENTS CONCLUDED BETWEEN THE INTERVENERS DO NOT INFRINGE ARTICLES 85 AND 86 OF THE EEC TREATY, IS VOID,

THE COURT (SIXTH CHAMBER)

COMPOSED OF : O. DUE, PRESIDENT OF CHAMBER, G. C. RODRIGUEZ IGLESIAS, T . KOOPMANS, K. BAHLMANN AND C. KAKOURIS, JUDGES,

ADVOCATE GENERAL : G. F. MANCINI

REGISTRAR : B. PASTOR, ADMINISTRATOR

HAVING REGARD TO THE REPORT FOR THE HEARING AS SUPPLEMENTED FURTHER TO THE HEARING ON 12 NOVEMBER 1986,

AFTER HEARING THE OPINION OF THE ADVOCATE GENERAL DELIVERED AT THE SITTING ON 17 MARCH 1987,

GIVES THE FOLLOWING

JUDGMENT

COSTS

75 UNDER ARTICLE 69*(2) OF THE RULES OF PROCEDURE, THE UNSUCCESSFUL PARTY IS TO BE ORDERED TO PAY THE COSTS. SINCE THE APPLICANTS HAVE FAILED IN THEIR SUBMISSIONS, THEY MUST BE ORDERED JOINTLY AND SEVERALLY TO PAY THE COSTS, INCLUDING THE COSTS OF THE INTERVENERS.

ON THOSE GROUNDS,

THE COURT (SIXTH CHAMBER)

HEREBY :

(1) DISMISSES THE APPLICATIONS;

(2) ORDERS THE APPLICANTS JOINTLY AND SEVERALLY TO PAY THE COSTS, INCLUDING THE COSTS OF THE INTERVENERS.

1 BY APPLICATIONS LODGED AT THE COURT REGISTRY ON 4 AND 20 JUNE 1984 RESPECTIVELY, BRITISH AMERICAN TOBACCO COMPANY LTD, WHOSE HEAD OFFICE IS IN LONDON, AND R. J. REYNOLDS INDUSTRIES INC., WINSTON SALEM, NORTH CAROLINA, UNITED STATES OF AMERICA, BROUGHT TWO ACTIONS PURSUANT TO THE SECOND PARAGRAPH OF ARTICLE 173 OF THE EEC TREATY FOR THE ANNULMENT OF THE DECISION CONTAINED IN THE COMMISSION' S LETTERS NO SG(84)*D/3946 OF 22 MARCH 1984 CONCERNING CASES NO IV/30.342 AND NO IV/30.926, REJECTING THE APPLICATIONS MADE BY THE APPLICANTS PURSUANT TO ARTICLE 3*(2) OF REGULATION NO 17/62 OF THE COUNCIL OF 6 FEBRUARY 1962 (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1959-62, P.*87) AND DECLARING THAT CERTAIN AGREEMENTS CONCLUDED BETWEEN PHILIP MORRIS INCORPORATED (HEREINAFTER REFERRED TO AS PHILIP MORRIS), NEW YORK, AND REMBRANDT GROUP LIMITED (HEREINAFTER REFERRED TO AS REMBRANDT), STELLENBOSCH, REPUBLIC OF SOUTH AFRICA, DO NOT INFRINGE ARTICLES 85 AND 86 OF THE EEC TREATY. THE APPLICANTS ALSO ASK THE COURT TO ORDER THE COMMISSION TO ALTER ITS POSITION WITH REGARD TO THOSE APPLICATIONS IN ORDER TO COMPLY WITH THE JUDGMENT OF THE COURT.

2 BY ORDERS OF 28 NOVEMBER 1984 THE COURT GRANTED PHILIP MORRIS AND REMBRANDT LEAVE TO INTERVENE IN SUPPORT OF THE COMMISSION' S CONCLUSIONS . BY AN ORDER OF 26 SEPTEMBER 1984 THE COURT JOINED THE CASES FOR THE PURPOSES OF THE ORAL PROCEDURE AND OF THE JUDGMENT.

3 THE APPLICATIONS SUBMITTED BY THE APPLICANTS PURSUANT TO ARTICLE 3*(2) OF REGULATION NO 17/62 WERE DIRECTED AGAINST AGREEMENTS BETWEEN PHILIP MORRIS AND REMBRANDT UNDER WHICH PHILIP MORRIS BOUGHT FROM REMBRANDT, FOR USD*350*MILLION, 50% OF THE SHARES IN ROTHMANS TOBACCO (HOLDINGS) LTD (HEREINAFTER REFERRED TO AS ROTHMANS HOLDINGS), A HOLDING COMPANY WHOLLY OWNED BY REMBRANDT WHICH HELD A SUFFICIENTLY LARGE SHAREHOLDING IN ROTHMANS INTERNATIONAL PLC (HEREINAFTER REFERRED TO AS ROTHMANS INTERNATIONAL) TO CONTROL THE LATTER COMPANY, AN IMPORTANT MANUFACTURER OF CIGARETTES ON THE COMMUNITY MARKET, ESPECIALLY IN THE BENELUX COUNTRIES. UNDER THOSE AGREEMENTS PHILIP MORRIS ACQUIRED AN INDIRECT SHARE OF 21.9% IN THE PROFITS OF ITS COMPETITOR ROTHMANS INTERNATIONAL.

4 THOSE AGREEMENTS (HEREINAFTER REFERRED TO AS THE "1981 AGREEMENTS ") ALSO CONTAINED CONDITIONS INTENDED TO MAINTAIN A BALANCE BETWEEN THE PARTIES WITH REGARD TO THEIR DIRECT OR INDIRECT SHAREHOLDINGS IN ROTHMANS INTERNATIONAL AND GAVE EACH OF THE PARTIES A "RIGHT OF FIRST REFUSAL" IN THE EVENT OF THE DISPOSAL BY THE OTHER PARTY OF ITS SHAREHOLDING IN ROTHMANS HOLDINGS.

5 WITH REGARD TO MANAGEMENT, THE 1981 AGREEMENTS GAVE THE TWO PARTIES THE RIGHT TO APPOINT AN EQUAL NUMBER OF MEMBERS TO THE BOARD OF DIRECTORS OF ROTHMANS HOLDINGS. THEY PROVIDED THAT REMBRANDT WAS TO RETAIN THE MANAGEMENT FUNCTIONS WHICH IT HAD EXERCISED UNTIL THEN IN RELATION TO THE COMMERCIAL ACTIVITIES OF ROTHMANS INTERNATIONAL, AND THAT INFORMATION OF A COMPETITIVE NATURE WAS NOT TO BE MADE AVAILABLE TO PHILIP MORRIS, BUT THEY ALSO CONTAINED PROVISIONS FOR COOPERATION BETWEEN PHILIP MORRIS AND ROTHMANS INTERNATIONAL IN SECTORS SUCH AS JOINT DISTRIBUTION AND MANUFACTURE, TECHNICAL KNOW-HOW AND RESEARCH, AND SO FORTH.

6 FOLLOWING COMPLAINTS LODGED BY THE APPLICANTS, AMONG OTHERS, THE COMMISSION ISSUED A STATEMENT OF OBJECTIONS TO PHILIP MORRIS AND REMBRANDT TO THE EFFECT THAT THE 1981 AGREEMENTS INFRINGED BOTH ARTICLES 85 AND 86 OF THE TREATY. AFTER NEGOTIATIONS WITH THE COMMISSION, PHILIP MORRIS AND REMBRANDT FINALLY REPLACED THOSE AGREEMENTS WITH NEW AGREEMENTS INTENDED TO REMOVE THE CAUSE FOR THE COMMISSION' S OBJECTIONS. IT IS THOSE AGREEMENTS (HEREINAFTER REFERRED TO AS THE "1984 AGREEMENTS ") WHICH ARE THE SUBJECT-MATTER OF THE CONTESTED COMMISSION DECISIONS; THE COMMISSION DID NOT CONSIDER IT NECESSARY TO ADOPT A DECISION CONCERNING THE ORIGINAL 1981 AGREEMENTS, SINCE THEY HAD BEEN RESCINDED AND REPLACED BY THE 1984 AGREEMENTS.

7 UNDER THE 1984 AGREEMENTS, PHILIP MORRIS ABANDONED ITS SHAREHOLDING IN ROTHMANS HOLDINGS IN EXCHANGE FOR A DIRECT SHAREHOLDING IN ROTHMANS INTERNATIONAL. THAT HOLDING IS 30.8%, BUT REPRESENTS ONLY 24.9% OF THE VOTES, WHEREAS REMBRANDT' S HOLDING, ALSO 30.8%, REPRESENTS 43.6% OF THE VOTES.

8 LIKE THE 1981 AGREEMENTS, THE NEW AGREEMENTS GIVE EACH PARTY A RIGHT OF FIRST REFUSAL IF THE OTHER DISPOSES OF ITS SHAREHOLDING. FURTHERMORE, IN THE CASE OF A DISPOSAL TO THIRD PARTIES A PARTY MUST DISPOSE OF THE WHOLE OF ITS SHAREHOLDING, AND MAY TRANSFER IT ONLY TO A SINGLE INDEPENDENT

PURCHASER OR TO 10 OR MORE INDEPENDENT PURCHASERS . IF REMBRANDT DISPOSES OF ITS SHAREHOLDING TO A SINGLE PURCHASER, THAT PURCHASER MUST MAKE AN IDENTICAL OFFER FOR PHILIP MORRIS' S SHAREHOLDING. FINALLY, WHERE ONE OR OTHER OF THE PARTIES DISPOSES OF ITS SHAREHOLDING, THE AGREEMENTS PROVIDE FOR THE POSSIBILITY OF AN EQUAL DIVISION OF VOTING RIGHTS IN ROTHMANS INTERNATIONAL.

9 THE 1984 AGREEMENTS WERE ACCOMPANIED BY A NUMBER OF UNDERTAKINGS GIVEN BY THE PARTIES TO THE COMMISSION. THOSE UNDERTAKINGS ARE INTENDED IN PARTICULAR TO ENSURE THAT PHILIP MORRIS IS NOT REPRESENTED IN THE MANAGEMENT OF ROTHMANS INTERNATIONAL AND THAT INFORMATION CONCERNING THE ROTHMANS INTERNATIONAL GROUP WHICH MIGHT INFLUENCE THE BEHAVIOUR OF THE PHILIP MORRIS GROUP IN THE COMPETITIVE RELATIONSHIP BETWEEN THE TWO GROUPS WITHIN THE COMMUNITY IS NOT MADE AVAILABLE TO PHILIP MORRIS. FURTHERMORE, PHILIP MORRIS UNDERTOOK TO INFORM THE COMMISSION OF ANY AMENDMENT TO THE AGREEMENTS AND OF ANY INCREASE IN ITS SHAREHOLDING IN ROTHMANS INTERNATIONAL OR ANY CIRCUMSTANCES IN WHICH IT WOULD OBTAIN 25% OR MORE OF THE VOTING RIGHTS IN ROTHMANS INTERNATIONAL. IN THE TWO LATTER CASES THE COMMISSION MAY REQUIRE A "HOLD SEPARATE" ARRANGEMENT WITH REGARD TO THE RESPECTIVE INTERESTS OF ROTHMANS INTERNATIONAL AND PHILIP MORRIS SO AS TO ENSURE MAINTENANCE OF THE STATUS QUO FOR A PERIOD OF THREE MONTHS, DURING WHICH THE COMMISSION MAY DETERMINE WHAT FURTHER MEASURES, IF ANY, ARE APPROPRIATE .

10 REFERENCE IS MADE TO THE REPORT FOR THE HEARING FOR A MORE COMPLETE ACCOUNT OF THE FACTS, THE PROCEDURE AND THE SUBMISSIONS AND ARGUMENTS SUBMITTED BY THE APPLICANTS, THE COMMISSION AND THE INTERVENERS, WHICH ARE MENTIONED OR DISCUSSED HEREINAFTER ONLY IN SO FAR AS IS NECESSARY FOR THE REASONING OF THE COURT.

I - ADMISSIBILITY

11 ONE OF THE INTERVENERS, REMBRANDT, SUBMITS THAT THE ACTIONS ARE INADMISSIBLE ON THE GROUND THAT THE COMMISSION' S LETTERS OF 22 MARCH 1984 DID NOT CONSTITUTE DECISIONS FOR THE PURPOSES OF THE SECOND PARAGRAPH OF ARTICLE 173 OF THE TREATY AND THAT THE APPLICANTS ARE NOT DIRECTLY AND INDIVIDUALLY CONCERNED WITHIN THE MEANING OF THAT ARTICLE . THE COMMISSION, FOR ITS PART, ARGUES THAT IN SO FAR AS THE APPLICANTS CLAIM THAT THE COURT SHOULD ORDER THE COMMISSION TO TAKE A SPECIFIC DECISION THE ACTIONS SHOULD BE DISMISSED AS INADMISSIBLE.

12 WITH REGARD TO THE CLAIMS FOR ANNULMENT, IT MUST BE POINTED OUT THAT THE COMMMISSION, ON THE APPLICATION OF THE APPLICANTS, DREW UP AND ADDRESSED ITS LETTERS TO THEM OF 22 MARCH 1984 IN THE FORM OF A "DECISION ". FURTHERMORE, THOSE LETTERS HAVE THE CONTENT AND EFFECT OF A DECISION, INASMUCH AS THEY CLOSE THE INVESTIGATION, CONTAIN AN ASSESSMENT OF THE AGREEMENTS IN QUESTION AND PREVENT THE APPLICANTS FROM REQUIRING THE REOPENING OF THE INVESTIGATION UNLESS THEY PUT FORWARD NEW EVIDENCE. IT IS NOT NECESSARY TO DECIDE WHETHER AN INTERVENER IS ENTITLED TO RAISE AN OBJECTION OF INADMISSIBILITY; THOSE OBSERVATIONS ARE SUFFICIENT FOR THE COMMISSION' S LETTERS OF 22 MARCH 1984 TO BE REGARDED AS DECISIONS ADDRESSED TO THE APPLICANTS WITHIN THE MEANING OF THE SECOND PARAGRAPH OF ARTICLE 173 OF THE TREATY, AND THE OBJECTIONS RAISED IN THAT REGARD MAY THEREFORE BE DISMISSED.

13 THE ACTIONS ARE INADMISSIBLE, HOWEVER, IN SO FAR AS THEY REQUEST THE COURT TO ORDER THE COMMISSION TO ADOPT A MEASURE REPLACING THE CONTESTED MEASURE, SINCE THE COURT HAS NO POWER TO MAKE SUCH AN ORDER IN PROCEEDINGS UNDER ARTICLE 173 FOR THE REVIEW OF THE LEGALITY OF A DECISION .

II - SUBSTANCE

14 THE SUBMISSIONS OF THE APPLICANTS CONCERN THE ADMINISTRATIVE PROCEDURE, THE COMMISSION' S ASSESSMENT OF THE AGREEMENTS AND THE STATEMENT OF THE REASONS FOR ITS DECISIONS.

A - ADMINISTRATIVE PROCEDURE

15 THE APPLICANTS ARGUE IN PARTICULAR THAT IN THEIR CAPACITY AS PERSONS HAVING SUBMITTED APPLICATIONS UNDER ARTICLE 3*(2) OF REGULATION NO 17/62 THEY WERE NOT SUFFICIENTLY INVOLVED IN THE COMMISSION' S INVESTIGATION OF THE AGREEMENTS IN QUESTION.

16 IT APPEARS FROM THE DOCUMENTS BEFORE THE COURT THAT, WITH THE EXCEPTION OF PASSAGES WHICH PHILIP MORRIS AND REMBRANDT CONSIDERED TO CONTAIN BUSINESS SECRETS, THE COMMISSION PROVIDED THE APPLICANTS WITH COPIES OF ITS STATEMENT OF OBJECTIONS OF 19 MAY 1982 IN WHICH IT STATED THAT THE 1981 AGREEMENTS WERE CONTRARY TO ARTICLES 85 AND 86 OF THE TREATY . THE APPLICANTS ALSO HAD THE OPPORTUNITY OF COMMENTING ON THE REPLIES OF PHILIP MORRIS AND REMBRANDT TO THE STATEMENT OF OBJECTIONS AND THEY TOOK PART IN THE HEARING ON 5 TO 7 OCTOBER 1982. SUBSEQUENTLY, THE APPLICANTS RECEIVED COPIES OF THE MINUTES OF THE HEARING AND THEY HAD THE OPPORTUNITY TO COMMENT ON THE ADDITIONAL OBSERVATIONS SUBMITTED BY PHILIP MORRIS IN WRITING AFTER THE HEARING.

17 IN MAY 1983 THE COMMISSION INFORMED THE APPLICANTS THAT PHILIP MORRIS AND REMBRANDT HAD MADE A NUMBER OF CHANGES IN THE 1981 AGREEMENTS, AND THERE WAS AN EXCHANGE OF LETTERS IN THAT REGARD, FOLLOWED BY MEETINGS BETWEEN THE APPLICANTS AND THE COMMISSION. AFTER PHILIP MORRIS AND REMBRANDT HAD FINALLY DECIDED TO REPLACE THE 1981 AGREEMENTS WITH THE NEW 1984 AGREEMENTS, THE APPLICANTS WERE INFORMED BY LETTERS OF 16 DECEMBER 1983, PURSUANT TO ARTICLE 6 OF REGULATION NO 99/63 OF THE COMMISSION OF 25 JULY 1963 ON THE HEARINGS PROVIDED FOR IN ARTICLE 19*(1) AND (2) OF COUNCIL REGULATION NO 17 (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1963-64, P.*47), THAT IN THE COMMISSION' S VIEW THERE WERE NO LONGER SUFFICIENT GROUNDS FOR GRANTING THEIR APPLICATIONS, AND THEY WERE INVITED TO SUBMIT ANY FURTHER OBSERVATIONS. THE APPLICANTS WERE, ACCORDINGLY, INFORMED OF THE CONTENT OF THE NEW AGREEMENTS AND OF THE UNDERTAKINGS ENTERED INTO BY PHILIP MORRIS AND REMBRANDT. IT WAS ONLY AFTER RECEIVING THE APPLICANTS' OBSERVATIONS ON THE NEW AGREEMENTS AND ON THOSE UNDERTAKINGS THAT THE COMMISSION ADOPTED THE DECISIONS AT ISSUE.

18 THE APPLICANTS ADMIT THAT UNTIL THE NEGOTIATIONS CONCERNING THE AMENDMENTS TO BE MADE TO THE ORIGINAL AGREEMENTS THEY WERE CLOSELY INVOLVED IN THE COMMISSION' S INVESTIGATION, BUT THEY ARGUE THAT IN FAILING TO MAKE AVAILABLE TO THEM CERTAIN DOCUMENTS AND PARTS OF DOCUMENTS THE COMMISSION GAVE TOO WIDE AN INTERPRETATION TO THE CONCEPT OF "BUSINESS SECRECY ". THEY ALSO ARGUE THAT THEY SHOULD HAVE BEEN ALLOWED TO TAKE PART IN THOSE NEGOTIATIONS

OR THAT THEY SHOULD AT LEAST HAVE BEEN SENT MINUTES OF THE MEETINGS AND THUS KEPT INFORMED OF THE PROGRESS MADE. THE APPLICANTS CONSIDER THAT ON THOSE POINTS THE COMMISSION WAS GUILTY OF PROCEDURAL IRREGULARITIES AMOUNTING TO A BREACH OF THEIR RIGHT TO A FAIR HEARING AS DEFINED IN THE CASE-LAW OF THE COURT .

19 THE CASES RELIED ON BY THE APPLICANTS CONCERN THE RIGHT TO A FAIR HEARING OF COMPANIES IN RESPECT OF WHICH THE COMMISSION CARRIES OUT AN INVESTIGATION. SUCH AN INVESTIGATION, HOWEVER, DOES NOT CONSTITUTE ADVERSARY PROCEEDINGS BETWEEN THE COMPANIES CONCERNED; IT IS A PROCEDURE COMMENCED BY THE COMMISSION, UPON ITS OWN INITIATIVE OR UPON APPLICATION, IN FULFILMENT OF ITS DUTY TO ENSURE THAT THE RULES ON COMPETITION ARE OBSERVED. IT FOLLOWS THAT THE COMPANIES WHICH ARE THE OBJECT OF THE INVESTIGATION AND THE COMPANIES WHICH HAVE SUBMITTED AN APPLICATION UNDER ARTICLE 3 OF REGULATION NO 17/62, HAVING SHOWN THAT THEY HAVE A LEGITIMATE INTEREST IN SEEKING AN END TO THE ALLEGED INFRINGEMENT, ARE NOT IN THE SAME PROCEDURAL SITUATION AND THE LATTER CANNOT INVOKE THE RIGHT TO A FAIR HEARING AS DEFINED IN THE CASES RELIED ON .

20 AS IS CLEAR IN PARTICULAR FROM THE JUDGMENT OF 28 MARCH 1985 IN CASE 298/83 CICCE V COMMISSION ((1985)) ECR 1105, THE COMPLAINANTS MUST, ON THE OTHER HAND, BE GIVEN THE OPPORTUNITY TO DEFEND THEIR LEGITIMATE INTERESTS IN THE COURSE OF THE ADMINISTRATIVE PROCEEDINGS, AND THE COMMISSION MUST CONSIDER ALL THE MATTERS OF FACT AND OF LAW WHICH THEY BRING TO ITS ATTENTION. HOWEVER, THE PROCEDURAL RIGHTS OF THE COMPLAINANTS ARE NOT AS FAR-REACHING AS THE RIGHT TO A FAIR HEARING OF THE COMPANIES WHICH ARE THE OBJECT OF THE COMMISSION' S INVESTIGATION. IN ANY EVENT, THE LIMITS OF SUCH RIGHTS ARE REACHED WHERE THEY BEGIN TO INTERFERE WITH THOSE COMPANIES' RIGHT TO A FAIR HEARING .

21 IN ITS JUDGMENT OF 24 JUNE 1986 IN CASE 53/85 AKZO CHEMIE BV AND AKZO CHEMIE UK LTD V COMMISSION ((1986)) ECR 1965, THE COURT HELD THAT THE OBLIGATION OF PROFESSIONAL SECRECY LAID DOWN IN ARTICLE 214 OF THE TREATY AND ARTICLE 20*(2) OF REGULATION NO 17/62 IS MITIGATED IN REGARD TO COMPLAINANTS, AND THAT THE COMMISSION MAY COMMUNICATE TO THEM CERTAIN INFORMATION COVERED BY THE OBLIGATION OF PROFESSIONAL SECRECY IN SO FAR AS IT IS NECESSARY TO DO SO FOR THE PROPER CONDUCT OF THE INVESTIGATION. THE COURT EMPHASIZED IN THAT JUDGMENT, HOWEVER, THAT A COMPLAINANT MAY NOT IN ANY CIRCUMSTANCES BE PROVIDED WITH DOCUMENTS CONTAINING BUSINESS SECRETS, AND SET OUT THE MANNER IN WHICH THE COMPANY UNDER INVESTIGATION MAY ACT TO PREVENT SUCH DISCLOSURE.

22 IN THESE PROCEEDINGS, THE APPLICANTS HAVE NOT DEMONSTRATED THAT THE COMMISSION FAILED TO PROVIDE THEM WITH DOCUMENTS WHICH IT COULD MAKE AVAILABLE TO THEM WITHOUT DISCLOSING BUSINESS SECRETS. IT FOLLOWS THAT THE FIRST PART OF THIS SUBMISSION MUST BE REJECTED.

23 WITH REGARD TO THE CLAIM CONCERNING THE NEGOTIATIONS BETWEEN PHILIP MORRIS AND REMBRANDT ON THE ONE HAND AND THE COMMISSION ON THE OTHER FOR THE AMENDMENT OF THE ORIGINAL AGREEMENTS, IT SHOULD BE RECALLED THAT THE ADMINISTRATIVE PROCEDURE PROVIDES, AMONG OTHER THINGS, AN OPPORTUNITY FOR THE COMPANIES CONCERNED TO BRING THE AGREEMENTS OR PRACTICES COMPLAINED

OF INTO CONFORMITY WITH THE RULES LAID DOWN IN THE TREATY. FOR SUCH A POSSIBILITY TO BE A REAL ONE THE COMPANIES AND THE COMMISSION MUST BE ENTITLED TO ENTER INTO CONFIDENTIAL NEGOTIATIONS IN ORDER TO DETERMINE WHAT ALTERATIONS WILL REMOVE THE CAUSE FOR THE COMMISSION' S OBJECTIONS.

24 SUCH A RIGHT WOULD BE IMPERILLED IF THE COMPLAINANTS WERE TO ATTEND THE NEGOTIATIONS OR BE KEPT INFORMED OF THE PROGRESS MADE IN ORDER TO SUBMIT THEIR OBSERVATIONS ON THE PROPOSALS PUT FORWARD BY ONE PARTY OR THE OTHER. THE LEGITIMATE INTERESTS OF THE COMPLAINANTS ARE FULLY PROTECTED WHERE THEY ARE INFORMED OF THE OUTCOME OF THE NEGOTIATIONS IN THE LIGHT OF WHICH THE COMMISSION PROPOSES TO CLOSE THE PROCEEDINGS. THE APPLICANTS RECEIVED ALL THE RELEVANT INFORMATION TOGETHER WITH THE COMMISSION' S LETTERS TO THEM PURSUANT TO ARTICLE 6 OF REGULATION NO 99/63. IT FOLLOWS THAT THE SECOND PART OF THIS SUBMISSION MUST ALSO BE REJECTED.

25 THE APPLICANTS GO ON TO ASSERT THAT DURING THE NEGOTIATIONS BETWEEN PHILIP MORRIS AND THE COMMISSION PRESSURE WAS PLACED ON THE COMMISSION, IN PARTICULAR BY ONE OF ITS FORMER MEMBERS. IT IS SUFFICIENT TO POINT OUT IN THAT REGARD THAT THE APPLICANTS HAVE PRESENTED NO EVIDENCE IN SUPPORT OF THAT ASSERTION.

26 FINALLY, THE APPLICANTS COMPLAIN THAT IN THE DECISIONS AT ISSUE THE COMMISSION ADDED NEW ARGUMENTS WHICH WERE NOT CONTAINED IN THE LETTERS SENT PURSUANT TO ARTICLE 6 OF REGULATION NO 99/63 AND ON WHICH THE APPLICANTS DID NOT HAVE THE OPPORTUNITY OF COMMENTING BEFOREHAND.

27 THIS ARGUMENT MUST ALSO BE REJECTED. IN THEIR CAPACITY AS COMPLAINANTS THE APPLICANTS HAD THE OPPORTUNITY OF STATING THEIR POSITION ON THE ARGUMENTS SET OUT IN THOSE LETTERS. THE FACT THAT THE APPLICANTS' OBSERVATIONS PROMPTED FURTHER REFLECTION ON THE PART OF THE COMMISSION AND THAT THE COMMISSION THEREFORE THOUGHT IT APPROPRIATE TO INCLUDE ADDITIONAL ARGUMENTS IN ITS FINAL DECISIONS DOES NOT PUT THE COMMISSION UNDER AN OBLIGATION TO GIVE THEM A FURTHER HEARING BEFORE ADOPTING THOSE DECISIONS.

28 IT FOLLOWS FROM ALL THE FOREGOING CONSIDERATIONS THAT THE SUBMISSION REGARDING THE ADMINISTRATIVE PROCEDURE MUST BE REJECTED AS UNFOUNDED IN ITS ENTIRETY.

B - THE COMMISSION' S ASSESSMENT OF THE AGREEMENTS

29 THE APPLICANTS ARGUE THAT IN THE DECISIONS AT ISSUE THE COMMISSION APPLIED ARTICLES 85 AND 86 OF THE TREATY INCORRECTLY AND WAS GUILTY OF MANIFEST ERROR INASMUCH AS IT CONSIDERED THAT THE UNDERTAKINGS ENTERED INTO BY PHILIP MORRIS AND REMBRANDT WERE SUFFICIENT IN ORDER TO AVOID AN INFRINGEMENT OF THOSE ARTICLES.

30 IT MUST BE POINTED OUT FIRST OF ALL THAT THE DECISIONS AT ISSUE CONCERN ONLY THE 1984 AGREEMENTS AND NOT THE 1981 AGREEMENTS, WHICH ARE RELEVANT ONLY IN SO FAR AS THEY REVEAL THE ORIGINAL INTENTIONS OF THE PARTIES . THE MAIN ISSUE IN THESE CASES IS WHETHER AND IN WHAT CIRCUMSTANCES THE ACQUISITION OF A MINORITY SHAREHOLDING IN A COMPETING COMPANY MAY CONSTITUTE AN INFRINGEMENT OF ARTICLES 85 AND 86 OF THE TREATY.

31 SINCE THE ACQUISITION OF SHARES IN ROTHMANS INTERNATIONAL WAS THE SUBJECT-MATTER

OF AGREEMENTS ENTERED INTO BY COMPANIES WHICH HAVE REMAINED INDEPENDENT AFTER THE ENTRY INTO FORCE OF THE AGREEMENTS, THE ISSUE MUST BE EXAMINED FIRST OF ALL FROM THE POINT OF VIEW OF ARTICLE 85 .

THE APPLICATION OF ARTICLE 85

32 THE APPLICANTS ARGUE IN SUBSTANCE THAT WHERE A COMPANY ACQUIRES A SUBSTANTIAL SHAREHOLDING, ALBEIT A MINORITY ONE, IN A COMPETING COMPANY IT MUST BE PRESUMED THAT THERE WILL BE A RESTRICTIVE EFFECT ON COMPETITION . THE ACQUISITION OF SUCH A SHAREHOLDING INEVITABLY HAS AN INFLUENCE ON THE COMMERCIAL BEHAVIOUR OF THE COMPANIES CONCERNED, PARTICULARLY IN A STAGNANT AND HIGHLY OLIGOPOLISTIC MARKET SUCH AS THAT FOR CIGARETTES, WHERE ANY ATTEMPT TO INCREASE THE MARKET SHARE OF ONE COMPANY WILL BE AT THE EXPENSE OF ITS COMPETITORS. THE ESTABLISHMENT OF LINKS BETWEEN TWO OF THE LARGEST FIRMS ON THE MARKET FOR CIGARETTES WILL DESTROY THE COMPETITIVE BALANCE.

33 ACCORDING TO THE APPLICANTS, THE TRANSACTION IN QUESTION NOT ONLY HAS THE EFFECT OF RESTRICTING COMPETITION BUT WAS INTENDED TO DO SO. THAT IS CLEAR FROM THE RELATIONSHIP BETWEEN THE AGREEMENTS IN ISSUE AND THE ORIGINAL 1981 AGREEMENTS WHICH PROVIDED FOR COMMERCIAL COOPERATION BETWEEN THE PARTIES. IT WAS BY MEANS OF THE RIGHTS WHICH IT OBTAINED UNDER THE ORIGINAL AGREEMENTS THAT PHILIP MORRIS WAS ABLE TO ACQUIRE A DIRECT SHAREHOLDING IN ROTHMANS INTERNATIONAL, AND THERE IS NO INDICATION THAT THE IDEA OF COMMERCIAL COOPERATION WAS ABANDONED, ESPECIALLY SINCE THE PRICE PAID BY PHILIP MORRIS REMAINED THE SAME . THE INTENTION OF PHILIP MORRIS AND ROTHMANS INTERNATIONAL TO COOPERATE ON THE COMMUNITY MARKET IS CONFIRMED, MOREOVER, BY THE FACT THAT THEY HAVE AGREEMENTS TO COOPERATE IN INDONESIA, MALAYSIA AND THE PHILIPPINES.

34 THE APPLICANTS ALSO SUBMIT THAT THE ANTI-COMPETITIVE EFFECT AND INTENTION OF THE AGREEMENTS AT ISSUE ARE REINFORCED BY THE CLAUSES PROVIDING FOR A RIGHT OF FIRST REFUSAL IN THE EVENT THAT ONE OF THE PARTIES SHOULD WISH TO DISPOSE OF ITS SHAREHOLDING IN ROTHMANS INTERNATIONAL. THOSE CLAUSES ARE INTENDED TO PRESERVE FOR PHILIP MORRIS THE POSSIBILITY OF ACQUIRING CONTROL OF ROTHMANS INTERNATIONAL, AND SHOW THAT ITS ACQUISITION OF AN EQUITY INTEREST IS NOT A SIMPLE PASSIVE INVESTMENT. THE FACT THAT THE EXERCISE OF THE RIGHTS GRANTED BY THOSE CLAUSES WOULD BE CONTRARY TO ARTICLE 85 IS SUFFICIENT IN ITSELF TO JUSTIFY A FINDING THAT THE OBJECT OF THE AGREEMENTS IS TO RESTRICT COMPETITION.

35 FINALLY, THE UNDERTAKINGS REQUIRED BY THE COMMISSION ARE, ACCORDING TO THE APPLICANTS, IN NO WAY SUFFICIENT TO RID THE AGREEMENTS OF THEIR ANTI-COMPETITIVE NATURE. FIRST OF ALL, THE UNDERTAKINGS REGARDING THE EXISTING MANAGEMENT OF ROTHMANS INTERNATIONAL DO NOT PREVENT PHILIP MORRIS FROM EXERTING INFORMAL INFLUENCE IN ITS CAPACITY AS A SUBSTANTIAL SHAREHOLDER IN ROTHMANS INTERNATIONAL. FURTHERMORE, THE UNDERTAKINGS REGARDING THE SEPARATION OF THE INTERESTS OF PHILIP MORRIS AND ROTHMANS INTERNATIONAL SHOULD PHILIP MORRIS EXERCISE ITS RIGHT OF FIRST REFUSAL CONCERN THE PERIOD FOLLOWING AN INFRINGEMENT OF ARTICLE 85 AND WOULD NOT EVEN APPLY IF PHILIP MORRIS GAINED EFFECTIVE CONTROL OF ROTHMANS INTERNATIONAL ON THE SALE OF REMBRANDT' S SHAREHOLDING TO AT LEAST 10 PURCHASERS INDEPENDENT OF EACH OTHER AND OF PHILIP MORRIS.

36 IT SHOULD BE RECALLED THAT THE AGREEMENTS PROHIBITED BY ARTICLE 85 ARE THOSE WHICH HAVE AS THEIR OBJECT OR EFFECT THE PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION WITHIN THE COMMON MARKET.

37 ALTHOUGH THE ACQUISITION BY ONE COMPANY OF AN EQUITY INTEREST IN A COMPETITOR DOES NOT IN ITSELF CONSTITUTE CONDUCT RESTRICTING COMPETITION, SUCH AN ACQUISITION MAY NEVERTHELESS SERVE AS AN INSTRUMENT FOR INFLUENCING THE COMMERCIAL CONDUCT OF THE COMPANIES IN QUESTION SO AS TO RESTRICT OR DISTORT COMPETITION ON THE MARKET ON WHICH THEY CARRY ON BUSINESS.

38 THAT WILL BE TRUE IN PARTICULAR WHERE, BY THE ACQUISITION OF A SHAREHOLDING OR THROUGH SUBSIDIARY CLAUSES IN THE AGREEMENT, THE INVESTING COMPANY OBTAINS LEGAL OR DE FACTO CONTROL OF THE COMMERCIAL CONDUCT OF THE OTHER COMPANY OR WHERE THE AGREEMENT PROVIDES FOR COMMERCIAL COOPERATION BETWEEN THE COMPANIES OR CREATES A STRUCTURE LIKELY TO BE USED FOR SUCH COOPERATION.

39 THAT MAY ALSO BE THE CASE WHERE THE AGREEMENT GIVES THE INVESTING COMPANY THE POSSIBILITY OF REINFORCING ITS POSITION AT A LATER STAGE AND TAKING EFFECTIVE CONTROL OF THE OTHER COMPANY. ACCOUNT MUST BE TAKEN NOT ONLY OF THE IMMEDIATE EFFECTS OF THE AGREEMENT BUT ALSO OF ITS POTENTIAL EFFECTS AND OF THE POSSIBILITY THAT THE AGREEMENT MAY BE PART OF A LONG-TERM PLAN.

40 FINALLY, EVERY AGREEMENT MUST BE ASSESSED IN ITS ECONOMIC CONTEXT AND IN PARTICULAR IN THE LIGHT OF THE SITUATION ON THE RELEVANT MARKET . MOREOVER, WHERE THE COMPANIES CONCERNED ARE MULTINATIONAL CORPORATIONS WHICH CARRY ON BUSINESS ON A WORLD-WIDE SCALE, THEIR RELATIONSHIPS OUTSIDE THE COMMUNITY CANNOT BE IGNORED. IT IS NECESSARY IN PARTICULAR TO CONSIDER THE POSSIBILITY THAT THE AGREEMENT IN QUESTION MAY BE PART OF A POLICY OF GLOBAL COOPERATION BETWEEN THE COMPANIES WHICH ARE PARTY TO IT.

41 IT IS IN THE LIGHT OF ALL THOSE CONSIDERATIONS THAT IT MUST BE DETERMINED WHETHER THE COMMISSION, IN EXAMINING THE 1984 AGREEMENTS, WAS WRONG TO HOLD THAT THERE WAS NO PROOF OF ANTI-COMPETITIVE OBJECT OR EFFECT .

42 WITH REGARD TO THE SITUATION ON THE MARKET FOR CIGARETTES, THE COMMISSION POINTED OUT IN ITS STATEMENT OF OBJECTIONS CONCERNING THE 1981 AGREEMENTS THAT THAT MARKET WAS STAGNANT IN VOLUME TERMS FROM 1976 TO 1980, THE PERIOD CONSIDERED BY IT. IT ALSO STATED THAT WITH THE EXCEPTION OF THE FRENCH AND ITALIAN MARKETS, WHERE THERE ARE STATE MONOPOLIES, THE COMMUNITY MARKET IS DOMINATED BY SIX GROUPS OF COMPANIES, AMONG THEM THE APPLICANTS AND INTERVENERS IN THIS CASE.

43 THE COMMISSION CONSIDERS THAT ON THE MARKET FOR CIGARETTES, WHICH IS STAGNANT AND OLIGOPOLISTIC AND ON WHICH THERE IS NO REAL COMPETITION ON PRICES OR IN RESEARCH, ADVERTISING AND CORPORATE ACQUISITION ARE THE PRINCIPAL MEANS OF INCREASING MARKET SHARE. FURTHERMORE, SINCE THE MARKET IS DOMINATED BY LARGE COMPANIES WITH CONSIDERABLE RESOURCES AND EXPERTISE, AND ADVERTISING IS OF GREAT IMPORTANCE, BARRIERS TO ENTRY ARE VERY HIGH.

44 IN THE MARKET SITUATION DESCRIBED BY THE COMMISSION, A DESCRIPTION WHICH WAS NOT DISPUTED IN ANY SUBSTANTIAL RESPECT BY THE OTHER PARTIES TO THE PROCEEDINGS, ANY COMPANY WISHING TO INCREASE ITS MARKET SHARE WILL BE STRONGLY TEMPTED, WHERE THE OPPORTUNITY ARISES, TO TAKE CONTROL OF A COMPETITOR. IN SUCH CIRCUMSTANCES, ANY ATTEMPTED TAKE-OVER AND ANY AGREEMENT

LIKELY TO PROMOTE COMMERCIAL COOPERATION BETWEEN TWO OR MORE OF THOSE DOMINANT COMPANIES IS LIABLE TO RESULT IN RESTRICTION OF COMPETITION.

45 IN SUCH A MARKET SITUATION THE COMMISSION MUST DISPLAY PARTICULAR VIGILANCE . IT MUST CONSIDER IN PARTICULAR WHETHER AN AGREEMENT WHICH AT FIRST SIGHT PROVIDES ONLY FOR A PASSIVE INVESTMENT IN A COMPETITOR IS NOT IN FACT INTENDED TO RESULT IN A TAKE-OVER OF THAT COMPANY, PERHAPS AT A LATER STAGE, OR TO ESTABLISH COOPERATION BETWEEN THE COMPANIES WITH A VIEW TO SHARING THE MARKET. NEVERTHELESS, IN ORDER FOR THE COMMISSION TO HOLD THAT AN INFRINGEMENT OF ARTICLE 85 HAS BEEN COMMITTED, IT MUST BE ABLE TO SHOW THAT THE AGREEMENT HAS THE OBJECT OR EFFECT OF INFLUENCING THE COMPETITIVE BEHAVIOUR OF THE COMPANIES ON THE RELEVANT MARKET.

46 THE 1984 AGREEMENTS AND THE UNDERTAKINGS GIVEN BY PHILIP MORRIS AND REMBRANDT TO THE COMMISSION PREVENT PHILIP MORRIS FROM HAVING ANY REPRESENTATIVE ON THE BOARD OF DIRECTORS OR ANY OTHER MANAGEMENT BODY OF ROTHMANS INTERNATIONAL AND LIMIT ITS SHAREHOLDING TO LESS THAN 25% OF THE VOTING RIGHTS. REMBRANDT' S SHAREHOLDING, ON THE OTHER HAND, REPRESENTS 43.6% OF THE VOTES, WHICH, BECAUSE OF THE WIDESPREAD DISTRIBUTION OF THE REST OF THE VOTES AND IN VIEW OF REMBRANDT' S REPRESENTATION IN THE MANAGEMENT OF ROTHMANS INTERNATIONAL, ALLOWS REMBRANDT TO CONTINUE TO DETERMINE ROTHMANS INTERNATIONAL' S COMMERCIAL POLICY ON THE CIGARETTE MARKET.

47 FURTHERMORE, UNLIKE THE 1981 AGREEMENTS, THE 1984 AGREEMENTS DO NOT CONTAIN ANY PROVISIONS REGARDING COMMERCIAL COOPERATION OR CREATE A STRUCTURE LIKELY TO BE USED FOR SUCH COOPERATION BETWEEN PHILIP MORRIS AND ROTHMANS INTERNATIONAL, AND THE COMPANIES HAVE UNDERTAKEN NOT TO EXCHANGE INFORMATION WHICH MIGHT INFLUENCE THEIR COMPETITIVE BEHAVIOUR . SUBJECT TO THE PROVISIONS ON THE POSSIBLE DISPOSAL BY ONE OR OTHER OF THE PARTIES OF ITS SHAREHOLDING IN ROTHMANS INTERNATIONAL, WHICH WILL BE CONSIDERED BELOW, THE 1984 AGREEMENTS, SUPPLEMENTED BY THE UNDERTAKINGS GIVEN TO THE COMMISSION, ARE THEREFORE NOT SUFFICIENT TO SUPPORT THE CONCLUSION THAT THE AGREEMENTS HAVE THE OBJECT OR EFFECT OF ALLOWING ONE OF THE COMPANIES TO INFLUENCE THE COMMERCIAL BEHAVIOUR OF THE OTHER.

48 HOWEVER, IT MUST ALSO BE CONSIDERED WHETHER, IN THE CIRCUMSTANCES OF THIS CASE, PHILIP MORRIS' S SHAREHOLDING IN ROTHMANS INTERNATIONAL REQUIRES THE COMPANIES INVOLVED TO TAKE INTO CONSIDERATION THE OTHER PARTY' S INTEREST WHEN DETERMINING THEIR COMMERCIAL POLICY, AS THE APPLICANTS ARGUE.

49 THE COMMISSION SUBMITS THAT REMBRANDT RETAINS ITS INTEREST IN DERIVING THE GREATEST POSSIBLE PROFIT FROM ITS INVESTMENT IN ROTHMANS INTERNATIONAL AND THAT THROUGH ITS VOTING RIGHTS AND ITS TRADITIONAL MANAGEMENT LINKS WITH ROTHMANS INTERNATIONAL IT IS IN PRACTICE ABLE TO CONTROL ROTHMANS INTERNATIONAL' S COMMERCIAL POLICY WITHOUT TAKING INTO ACCOUNT PHILIP MORRIS' S INTERESTS. ALTHOUGH PHILIP MORRIS HAS SUFFICIENT VOTES TO BLOCK CERTAIN SPECIAL RESOLUTIONS, THAT POSSIBILITY IS TOO HYPOTHETICAL TO AMOUNT TO A REAL THREAT WHICH MIGHT HAVE AN INFLUENCE ON REMBRANDT IN THE MANAGEMENT OF ROTHMANS INTERNATIONAL. THERE IS NO REASON TO SUPPOSE THAT THE MANAGEMENT AND EMPLOYEES OF ROTHMANS INTERNATIONAL DO NOT HAVE AN INTEREST IN MAKING THAT COMPANY AS PROFITABLE AS POSSIBLE.

50 ALTHOUGH PHILIP MORRIS, BECAUSE OF ITS SHARE IN THE PROFITS OF ROTHMANS

INTERNATIONAL, HAS AN INTEREST IN THE SUCCESS OF THAT COMPANY, ITS FIRST PREOCCUPATION MUST, ACCORDING TO THE COMMISSION, REMAIN THAT OF INCREASING THE MARKET SHARE AND TURNOVER OF ITS OWN COMPANIES . PHILIP MORRIS THUS RETAINS A CONSIDERABLE INTEREST IN LIMITING ANY INCREASE IN ROTHMANS INTERNATIONAL' S MARKET SHARE BY ITS OWN INDUSTRIAL AND COMMERCIAL EFFORTS. THE COMMISSION THEREFORE CONSIDERS THAT THE ACQUISITION BY PHILIP MORRIS OF A MINORITY SHAREHOLDING IN ROTHMANS INTERNATIONAL DOES NOT IN ITSELF RESULT IN ANY CHANGE IN THE COMPETITIVE POSITION ON THE COMMUNITY CIGARETTE MARKET .

51 THERE IS NOTHING IN THE EVIDENCE BEFORE THE COURT TO INVALIDATE THAT ASSESSMENT BY THE COMMISSION. IN PARTICULAR, THERE IS NO GROUND FOR THE CONCLUSION THAT THE ACQUISITION OF A SHAREHOLDING MIGHT RESULT IN A SHARING OF THE MARKET ON THE BASIS THAT PHILIP MORRIS, WITHOUT ITSELF LOSING MARKET SHARE, COULD CONCENTRATE ON ONE SPECIFIC SECTOR OF THE MARKET, THUS ALLOWING ROTHMANS INTERNATIONAL TO INCREASE ITS ACTIVITIES IN ANOTHER SECTOR OF THE MARKET.

52 NOR ARE THERE SUFFICIENT GROUNDS FOR THE CONCLUSION THAT PHILIP MORRIS AND ROTHMANS INTERNATIONAL COOPERATE OUTSIDE THE COMMUNITY MARKET IN SUCH A WAY AS TO AFFECT THEIR RELATIONSHIP ON THAT MARKET. THE APPLICANTS ARGUE ONLY THAT THERE IS SUCH COOPERATION ON MARKETS IN CERTAIN PARTS OF THE WORLD, AND THE INTERVENERS ASSERT THAT THAT COOPERATION CONCERNS ONLY AGREEMENTS ON THE USE OF CERTAIN BRAND NAMES BELONGING TO THE OTHER PARTY, WHICH IN THEIR CONTENTION ARE ENTIRELY NORMAL ARRANGEMENTS IN THE SECTOR IN QUESTION AND ARE IN FACT USED BY THE APPLICANTS. IN THOSE CIRCUMSTANCES, IT CANNOT BE CONCLUDED THAT THE AGREEMENTS AT ISSUE ARE PART OF A POLICY OF GLOBAL COOPERATION BETWEEN TWO MULTINATIONAL CORPORATIONS ON THE WORLD MARKET FOR CIGARETTES .

53 THE FACT THAT THE AGREEMENTS AT ISSUE CONTAIN PROVISIONS ON THE POSSIBLE SALE OF SHARES IN ROTHMANS INTERNATIONAL BY ONE OR THE OTHER PARTY AND THAT THOSE PROVISIONS ENVISAGE A POSSIBILITY WHICH MIGHT, IF THE SURROUNDING CIRCUMSTANCES REMAINED UNALTERED, BE CONTRARY TO ARTICLE 85 IS NOT IN ITSELF SUFFICIENT TO SHOW THAT THE OBJECT OF THE AGREEMENTS IS TO RESTRICT COMPETITION. IT IS TRUE THAT THE 1984 AGREEMENTS REPLACEAGREEMENTS PROVIDING FOR SHARED CONTROL OF ROTHMANS HOLDINGS, WHICH, IN TURN, HAD EFFECTIVE CONTROL OVER ROTHMANS INTERNATIONAL' S COMMERCIAL POLICY, AND THAT THEIR SUBSTITUTION FOR THOSE AGREEMENTS DID NOT RESULT IN ANY LOWERING OF THE PRICE PAID BY PHILIP MORRIS, BUT IT MUST BE BORNE IN MIND THAT PHILIP MORRIS RETAINED OTHER BENEFITS, IN PARTICULAR THAT OF BEING ABLE TO PREVENT ANY COMPETING COMPANY FROM TAKING CONTROL OF ROTHMANS INTERNATIONAL, AND OBTAINED A CONSIDERABLE INCREASE IN ITS SHARE OF ROTHMANS INTERNATIONAL' S PROFITS. ALTHOUGH THE BACKGROUND TO THE AGREEMENTS AT ISSUE SHOWS THAT PHILIP MORRIS CONTEMPLATED A TRANSACTION GOING MUCH FURTHER THAN A PASSIVE INVESTMENT, THE PROVISIONS OF THOSE AGREEMENTS REFERRING TO A PURELY HYPOTHETICAL SITUATION DO NOT PERMIT THE CONCLUSION THAT THE ACQUISITION OF A MINORITY SHAREHOLDING WAS THE FIRST STAGE OF A PLAN INTENDED TO GIVE IT CONTROL OF ROTHMANS INTERNATIONAL.

54 IT MUST, HOWEVER, BE CONSIDERED WHETHER THOSE PROVISIONS GIVE RISE TO IMMEDIATE ANTI-COMPETITIVE EFFECTS AND WHETHER THE COMMISSION ALSO TOOK

SUFFICIENT ACCOUNT OF THEIR POTENTIAL EFFECTS.

55 THE COMMISSION DOES NOT CONSIDER THAT THOSE PROVISIONS HAVE ANY PRESENT INFLUENCE ON THE COMPETITIVE BEHAVIOUR OF THE PARTIES. SHOULD IT HAVE IN MIND THE POSSIBLE DISPOSAL AT SOME TIME OF ITS SHAREHOLDING IN ROTHMANS INTERNATIONAL, REMBRANDT HAS EVERY INTEREST IN INCREASING THE VALUE OF ITS INVESTMENT BY ENSURING THAT ROTHMANS INTERNATIONAL COMPETES EFFECTIVELY. PHILIP MORRIS, ON THE OTHER HAND, HAS AN INTEREST IN LIMITING THE PRICE WHICH REMBRANDT MIGHT OBTAIN FOR ITS SHARES IN ROTHMANS INTERNATIONAL AND THUS HAS NO REASON TO RESTRICT ITS OWN EFFORTS TO OBTAIN ADDITIONAL MARKET SHARE. MOREOVER, THE POSSIBILITY THAT EMPLOYEES OF ROTHMANS INTERNATIONAL MIGHT SUBSEQUENTLY BE EMPLOYED BY PHILIP MORRIS IS LIKELY TO ENCOURAGE THEM TO DISPLAY THEIR PROFESSIONAL ABILITY. NOR DOES THE COMMISSION THINK THAT PHILIP MORRIS' S ABILITY TO PLACE DIFFICULTIES IN THE WAY OF ANY DISPOSAL BY REMBRANDT OF ITS SHARES IN ROTHMANS INTERNATIONAL CONSTITUTES A REAL THREAT WHICH MIGHT INFLUENCE THE NORMAL MANAGEMENT OF REMBRANDT AND ROTHMANS INTERNATIONAL.

56 THERE IS NOTHING IN THE EVIDENCE TO LEAD THE COURT TO DISAGREE WITH THE COMMISSION' S ASSESSMENT. MOREOVER, THE FACT THAT THE PROVISIONS IN QUESTION CREATE OBSTACLES TO THE PURCHASE OF AN INTEREST IN ROTHMANS INTERNATIONAL BY A THIRD COMPANY CANNOT BE REGARDED AS A PRESENT RESTRICTION OF COMPETITION ON THE MARKET FOR CIGARETTES CONTRARY TO ARTICLE 85. FIRST OF ALL, AS THE INTERVENERS HAVE SUBMITTED, PROVISIONS OF THIS KIND MAY BE JUSTIFIED BY THE LEGITIMATE INTEREST OF THE CONTRACTING PARTIES IN PROTECTING THEIR SUBSTANTIAL INVESTMENT . SECONDLY, IN THE CIRCUMSTANCES OF THIS CASE THE FACT THAT PHILIP MORRIS, WITHOUT ITSELF GAINING CONTROL OF ROTHMANS INTERNATIONAL, IS NOW IN A POSITION TO PREVENT ANY OTHER COMPETING COMPANY FROM GAINING CONTROL CANNOT IN ITSELF AMOUNT TO A RESTRICTION OF COMPETITION.

57 WITH REGARD TO THE POTENTIAL EFFECTS OF THE PROVISIONS IN QUESTION, IT IS CLEAR THAT THE COMMISSION HAS TAKEN MEASURES INTENDED TO PREVENT ANY SUCH EFFECTS CONTRARY TO ARTICLE 85 OF THE TREATY. PHILIP MORRIS HAS UNDERTAKEN TO INFORM THE COMMISSION OF ANY AMENDMENT, MODIFICATION OR SUPPLEMENT TO THE AGREEMENTS AND TO NOTIFY THE COMMISSION WITHIN 48 HOURS IF IT SHOULD INCREASE ITS SHAREHOLDING IN ROTHMANS INTERNATIONAL OR IN ANY WAY OBTAIN 25% OR MORE OF THE TOTAL VOTING RIGHTS IN ROTHMANS INTERNATIONAL. PHILIP MORRIS HAS ALSO UNDERTAKEN, SHOULD THE COMMISSION SO REQUEST FOLLOWING SUCH NOTIFICATION, TO PUT INTO EFFECT A "HOLD SEPARATE" ARRANGEMENT REGARDING THE INTERESTS OF PHILIP MORRIS AND ROTHMANS INTERNATIONAL IN THE COMMUNITY TOBACCO MARKET SO AS TO ENSURE MAINTENANCE OF THE STATUS QUO FOR A PERIOD OF THREE MONTHS, DURING WHICH THE COMMISSION MAY EXAMINE THE NEW SITUATION FROM THE POINT OF VIEW OF ARTICLES 85 AND 86 OF THE TREATY.

58 IT IS TRUE, AS THE APPLICANTS HAVE EMPHASIZED, THAT THOSE UNDERTAKINGS WILL NOT APPLY SHOULD PHILIP MORRIS OBTAIN EFFECTIVE CONTROL OF ROTHMANS INTERNATIONAL WITHOUT INCREASING ITS VOTING RIGHTS, IN PARTICULAR IN THE EVENT OF THE DISPOSAL BY REMBRANDT OF ITS SHARES TO AT LEAST 10 INDEPENDENT PURCHASERS. IN SUCH A CASE (WHICH SEEMS THE LEAST LIKELY HYPOTHESIS WITH REGARD TO THE DISPOSAL OF REMBRANDT' S INTEREST AND ASSUMES THAT PHILIP MORRIS WOULD HAVE FAILED TO EXERCISE ITS RIGHTS UNDER THOSE PROVISIONS),

PHILIP MORRIS' S CONTROL WOULD BE EXTREMELY TENUOUS INASMUCH AS IT WOULD NOT BE ABLE TO PREVENT ANY SUBSEQUENT CONCENTRATION OF THE VOTING RIGHTS IN THE HANDS OF ANOTHER COMPANY. IT MUST THEREFORE BE ACCEPTED THAT BY MEANS OF THE UNDERTAKINGS ENTERED INTO BY PHILIP MORRIS AND REMBRANDT THE COMMISSION HAS REINFORCED ITS GENERAL POWERS OF SURVEILLANCE AND CONTROL IN SUCH A MANNER AS TO PREVENT THE PROVISIONS OF THE AGREEMENTS CONCERNING THE SUBSEQUENT DISPOSAL OF THE PARTIES' SHARES IN ROTHMANS INTERNATIONAL FROM HAVING EFFECTS CONTRARY TO ARTICLE*85.

59 IT THUS FOLLOWS FROM THE FOREGOING CONSIDERATIONS THAT EXAMINATION OF THE APPLICANTS' COMPLAINTS REGARDING THE APPRAISAL OF THE PROVISIONS OF THE AGREEMENTS AT ISSUE HAS NOT SHOWN THAT THE COMMISSION WAS WRONG TO HOLD THAT NO ANTI-COMPETITIVE OBJECT OR EFFECT HAD BEEN ESTABLISHED.

60 HOWEVER, THE APPLICANTS ALSO SUBMIT THAT EVEN IN THE EVENT THAT THE VARIOUS ELEMENTS OF THE AGREEMENTS IN QUESTION, VIEWED SEPARATELY, SHOULD NOT BE REGARDED AS CONTRARY TO ARTICLE 85*(1), IT IS ALSO NECESSARY TO CONSIDER WHETHER THOSE ELEMENTS IN COMBINATION PRODUCE ANTI-COMPETITIVE EFFECTS.

61 ANY EXAMINATION OF THE EFFECTS OF THE AGREEMENTS MUST INDEED BE BASED ON AN ASSESSMENT OF THE AGREEMENTS AS A WHOLE. THE APPLICANTS DO NOT ASSERT THAT THE COMMISSION FAILED TO MAKE SUCH AN ASSESSMENT BUT CHALLENGE THE CONCLUSION WHICH THE COMMISSION ARRIVED AT ON THAT POINT .

62 THAT INVOLVES AN APPRAISAL OF COMPLEX ECONOMIC MATTERS, AND IT SHOULD BE RECALLED THAT IN ITS JUDGMENT OF 11 JULY 1985 IN CASE 42/84 REMIA V COMMISSION ((1985)) ECR 2566 THE COURT HELD THAT ALTHOUGH AS A GENERAL RULE IT UNDERTAKES A COMPREHENSIVE REVIEW OF THE QUESTION WHETHER OR NOT THE CONDITIONS FOR THE APPLICATION OF ARTICLE 85*(1) ARE MET, ITS REVIEW OF SUCH APPRAISALS MADE BY THE COMMISSION IS NECESSARILY LIMITED TO VERIFYING WHETHER THE RELEVANT RULES ON PROCEDURE AND ON THE STATEMENT OF REASONS HAVE BEEN COMPLIED WITH, WHETHER THE FACTS HAVE BEEN ACCURATELY STATED AND WHETHER THERE HAS BEEN ANY MANIFEST ERROR OF APPRAISAL OR A MISUSE OF POWERS.

63 IN THE VIEW OF THE COURT, THE EVIDENCE BEFORE IT DOES NOT DISCLOSE ANY MANIFEST ERROR WITH REGARD TO THE CIRCUMSTANCES EXISTING WHEN THE CONTESTED DECISIONS WERE ADOPTED. AS FOR THE APPRAISAL OF THE POTENTIAL EFFECTS OF THE AGREEMENTS AT ISSUE, IT MUST BE EMPHASIZED THAT THE COMMISSION HAS STATED THAT IT INTENDS TO FOLLOW CLOSELY ANY DEVELOPMENTS IN THE COMPETITIVE SITUATION BETWEEN THE PARTIES AND, FURTHERMORE, THAT THE APPLICANTS MAY AT ANY TIME CALL FOR FURTHER SCRUTINY OF THE AGREEMENTS WHEN THEY ARE ABLE TO SUBMIT NEW EVIDENCE .

64 CONSEQUENTLY, THE ARGUMENT BASED ON THE ALLEGED INCORRECT ASSESSMENT OF THE AGREEMENTS AS A WHOLE CANNOT BE UPHELD. THE SUBMISSION REGARDING THE APPLICATION OF ARTICLE 85 MUST THEREFORE BE REJECTED .

THE APPLICATION OF ARTICLE 86

65 WITH REGARD TO ARTICLE 86 OF THE TREATY, IT IS NO LONGER NECESSARY, IN THE LIGHT OF THE FINDINGS SET OUT ABOVE, TO CONSIDER TO WHAT EXTENT ROTHMANS INTERNATIONAL OCCUPIES A DOMINANT POSITION IN A SUBSTANTIAL PART OF THE COMMON MARKET. AN ABUSE OF SUCH A POSITION CAN ONLY ARISE WHERE THE SHAREHOLDING IN QUESTION RESULTS IN EFFECTIVE CONTROL OF THE OTHER COMPANY OR AT LEAST

IN SOME INFLUENCE ON ITS COMMERCIAL POLICY. AS APPEARS FROM THE DISCUSSION CONCERNING THE APPLICATION OF ARTICLE 85, IT HAS NOT BEEN ESTABLISHED THAT THE 1984 AGREEMENTS HAVE ANY SUCH EFFECT. THE SUBMISSION BASED ON ARTICLE 86 MUST THEREFORE ALSO BE REJECTED.

C - THE STATEMENT OF REASONS FOR THE DECISIONS AT ISSUE

66 THE APPLICANTS ARGUE THAT THE DECISIONS AT ISSUE ARE INVALID BECAUSE THE COMMISSION DID NOT STATE PRECISELY HOW IT ARRIVED AT ITS CONCLUSION . THEY SUBMIT THAT THE DECISIONS GO MUCH FURTHER THAN PREVIOUS DECISIONS OF THE COMMISSION AND LAY DOWN NEW PRINCIPLES, SO THAT THE COMMISSION WAS UNDER AN OBLIGATION TO EXPLAIN ITS REASONING IN A FULL AND COMPLETE MANNER.

67 THE APPLICANTS ADD THAT THE COMMISSION HAD A PARTICULAR OBLIGATION TO GIVE A FULL AND COMPLETE ACCOUNT OF ITS REASONING WITH REGARD TO THOSE ELEMENTS OF THE 1984 AGREEMENTS WHICH ARE TAKEN OVER FROM THE 1981 AGREEMENTS, SINCE IN THE CONTESTED DECISIONS IT ALTERED ITS PREVIOUS POSITION ON THE 1981 AGREEMENTS AS SET OUT IN THE STATEMENT OF OBJECTIONS.

68 FINALLY, THE APPLICANTS ARGUE THAT ALTHOUGH THE DECISIONS ADDED NEW ARGUMENTS WHICH WERE NOT CONTAINED IN THE LETTERS SENT PURSUANT TO ARTICLE 6 OF REGULATION NO 99/63, THEY DID NOT ANSWER CERTAIN OF THE OBSERVATIONS SUBMITTED BY THE APPLICANTS IN REPLY TO THOSE LETTERS.

69 AS THE COURT HAS CONSISTENTLY HELD, THE EXTENT OF THE DUTY TO PROVIDE A STATEMENT OF REASONS PRESCRIBED IN ARTICLE 190 OF THE TREATY DEPENDS ON THE NATURE OF THE MEASURE IN QUESTION AND ON THE CIRCUMSTANCES IN WHICH IT WAS ADOPTED.

70 IN THE CASE OF A MEASURE REJECTING AN APPLICATION PURSUANT TO ARTICLE 3 OF REGULATION NO 17/62, IT IS SUFFICIENT THAT THE COMMISSION SHOULD STATE THE REASONS FOR WHICH IT DID NOT CONSIDER IT POSSIBLE TO HOLD THAT AN INFRINGEMENT OF THE RULES ON COMPETITION HAD OCCURRED. IN PARTICULAR, THE COMMISSION IS NOT OBLIGED TO EXPLAIN ANY DIFFERENCES IN RELATION TO THE STATEMENT OF OBJECTIONS, SINCE THAT IS A PREPARATORY DOCUMENT CONTAINING ASSESSMENTS WHICH ARE PURELY PROVISIONAL IN NATURE AND ARE INTENDED TO DEFINE THE SCOPE OF THE ADMINISTRATIVE PROCEEDINGS WITH REGARD TO THE COMPANIES AGAINST WHICH THEY ARE BROUGHT.

71 IT IS TRUE THAT IN ITS JUDGMENT OF 26 NOVEMBER 1975 IN CASE 73/74 PAPIER PEINTS V COMMISSION ((1975)) ECR 1491 THE COURT HELD THAT WHERE, IN A WELL-ESTABLISHED LINE OF DECISIONS, ONE DECISION GOES APPRECIABLY FURTHER THAN THE PREVIOUS ONES, THE COMMISSION MUST GIVE AN ACCOUNT OF ITS REASONING. IN THIS CASE THE CONTESTED DECISIONS CONCERN AGREEMENTS OF A TYPE WHICH HAD NOT BEEN DEALT WITH IN THE PREVIOUS ADMINISTRATIVE PRACTICE OF THE COMMISSION; THEY DO NOT LAY DOWN NEW PRINCIPLES BUT ARE LIMITED ESSENTIALLY TO AN EXAMINATION OF THE SPECIAL FEATURES OF THE AGREEMENTS IN QUESTION.

72 WITH REGARD TO THE COMPLAINT CONCERNING THE ALLEGED FAILURE TO REPLY TO THE APPLICANTS' ARGUMENTS, IT SHOULD BE RECALLED THAT IN ITS JUDGMENT OF 17 JANUARY 1984 IN JOINED CASES 43 AND 63/82 VBVB AND VBBB V COMMISSION ((1984)) ECR 19, THE COURT EMPHASIZED THAT ALTHOUGH UNDER ARTICLE 190 OF THE TREATY THE COMMISSION IS REQUIRED TO SET OUT THE CIRCUMSTANCES JUSTIFYING

THE ADOPTION OF A DECISION AND THE LEGAL CONSIDERATIONS WHICH HAVE LED THE COMMISSION TO ADOPT IT, THAT ARTICLE DOES NOT REQUIRE THE COMMISSION TO DISCUSS ALL THE MATTERS OF FACT AND OF LAW WHICH MAY HAVE BEEN DEALT WITH DURING THE ADMINISTRATIVE PROCEEDINGS .

73 IN THIS CASE, THEREFORE, IT IS SUFFICIENT THAT THE COMMISSION SHOULD INDICATE THE CIRCUMSTANCES AND THE LEGAL CONSIDERATIONS ON THE BASIS OF WHICH IT FOUND IT IMPOSSIBLE TO HOLD THAT THE 1984 AGREEMENTS CONSTITUTED AN INFRINGEMENT OF THE COMPETITION RULES. VIEWED IN THAT LIGHT, THE STATEMENT OF THE REASONS FOR THE CONTESTED DECISIONS CANNOT BE REGARDED AS INSUFFICIENT.

74 THIS LAST SUBMISSION MUST THEREFORE BE REJECTED, AND THE APPLICATIONS MUST ACCORDINGLY BE DISMISSED IN THEIR ENTIRETY.

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APPLICA Person

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PROCEDU Action for annulment - unfounded

ADVGEN Mancini

JUDGRAP Due

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Judgment of the Court of First Instance (First Chamber)

First Instance (First Chamber)First Instance (First Chamber)1994. Société Anonyme à Participation Ouvrière Compagnie Nationale Air France v Commission of the European Communities. Competition - Concentrations between undertakings - Admissibility - Sole or joint control - Definition of the market - Dominant position - Legitimate expectations. Case T-2/93.

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1. Actions for annulment of measures ° Natural or legal persons ° Measures of direct and individual concern to them ° Decision finding a concentration compatible with the common market ° Competitor taking part in the administrative proceedings ° Admissibility

(EC Treaty, fourth paragraph of Art. 173)

2. Competition ° Concentrations ° Appraisal of compatibility with the common market ° Account taken of the nature of sole or joint control of an undertaking ° Assessment criteria

(Council Regulation No 4064/89, Arts 2 and 3(3))

3. Competition ° Concentrations ° Appraisal of compatibility with the common market ° Point in time to be taken into consideration

(Council Regulation No 4064/89, Art. 2)

4. Competition ° Concentrations ° Appraisal of compatibility with the common market ° Relevant market ° Sectoral demarcation ° Geographical demarcation ° Air transport

(Council Regulation No 4064/89, Art. 2(2))

5. Competition ° Concentrations ° Appraisal of compatibility with the common market ° Concentrations neither creating nor strengthening a dominant position

(Council Regulation No 4064/89, Art. 2(2) and (3))

6. Acts of the institutions ° Statement of reasons ° Obligation ° Scope ° Decision to apply the rules regarding concentrations between undertakings

(EEC Treaty, Art. 190)

7. Community law ° Principles ° Protection of legitimate expectations ° Limits

1. Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.

That is the position, in relation to a decision of the Commission finding a concentration between undertakings compatible with the common market, as regards an undertaking

° which, following the communication provided for by Article 4(3) of Regulation No 4064/89, submitted observations that would, it was assured in reply, be taken fully into consideration;

° the particular circumstances of which were examined by the Commission in the course of the latter' s assessment of the competitive situation in the markets concerned following the concentration;

° which had previously been obliged, pursuant to an agreement concluded between itself, the competent Member State and the Commission, to give up its interest in one of the undertakings which was a party to the concentration.

2. The sole or joint nature of the control to be exercised by one undertaking over another following

the completion of a concentration subject to control by the Commission is a relevant factor for the purposes of the assessment to be carried out by the Commission pursuant to Article 2 of Regulation No 4064/89.

Having regard to the factors which may, according to the wording of Article 3(3) of the aforementioned regulation, constitute control, the Commission was correct in finding that an undertaking, although exercising a substantial influence, only controlled another undertaking jointly with a third undertaking, since the holdings of shares in the controlled undertaking and the conferment of powers laid down by its statutes were such that major decisions could only be taken with the consent of the third undertaking.

3. The appraisal by the Commission of the compatibility of a concentration between undertakings with the common market must be carried out solely on the basis of the matters of fact and law existing at the time of notification of that transaction, and not on the basis of hypothetical factors, such as the acquisition of total control by the exercise of an option to purchase shares not yet held, the economic implications of which cannot be assessed at the time when the decision is adopted.

4. In assessing whether a concentration between undertakings creates or strengthens a dominant position, the Commission must first define the relevant market. In the present case, involving a concentration between undertakings in the air transport sector, the Commission, by defining as the relevant market each "city-pair" constituting the point of departure and the point of arrival of the routes regarded as being directly concerned by the transaction at issue, correctly defined that market, as regards both the product concerned and the geographical area. That definition is based on the finding, first, that there is no substitutability between those two routes and other routes, and, secondly, that there is very little substitutability between the two routes themselves.

5. It follows from Article 2(2) and (3) of Regulation No 4064/89 that the Commission is bound to declare a concentration compatible with the common market where the transaction in question neither creates nor strengthens a dominant position and where competition in the common market is not significantly impeded by the creation or strengthening of such a position. If, therefore, there is no creation or strengthening of a dominant position, the transaction must be authorized, without there being any need to examine the effects of the transaction on effective competition.

Where the applicant has not claimed that the Commission committed an error of assessment in finding that the transaction at issue neither created nor strengthened a dominant position on the markets regarded by the Commission as relevant, or on the market as it should, in the applicant' s view, have been defined, the applicant cannot contest the legality of the Commission' s decision to declare the transaction compatible with the common market. That result is not in any way vitiated by the fact that the concentration at issue may make it easier for the parties to the transaction to develop their commercial activities in the future.

6. Although the Commission is obliged, under Article 190 of the Treaty, to state the reasons on which its decisions are based, mentioning the factual and legal elements which provide the legal basis for the measure in question and the considerations which have led it to adopt its decision, it is not required, in the case of a decision applying the rules relating to concentrations between undertakings, to discuss all the issues of fact and of law raised by every interested party during the administrative proceedings.

7. One consequence of the hierarchy of Community legal acts is that an act of general application cannot be implicitly altered by an individual decision. It follows that a Community institution cannot be forced, by virtue of the principle of the protection of legitimate expectations, to apply Community rules contra legem.

In Case T-2/93,

Société Anonyme à Participation Ouvrière Compagnie Nationale Air France, a company incorporated under French law, established in Paris, represented by Eduard Marissens, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Lucy Dupong, 14a Rue des Bains,

applicant,

v

Commission of the European Communities, represented by Francisco Enrique Gonzalez Díaz, a member of its Legal Service, and by Géraud de Bergues, a national civil servant on secondment to the Commission, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by John D. Colahan, of the Treasury Solicitor' s Department, acting as Agent, and Christopher Vajda, of the Bar of England and Wales, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

TAT SA, a company incorporated under French law, established in Tours (France), represented by Antoine Winckler, of the Paris Bar, and Romano Subiotto, Solicitor, with an address for service in Luxembourg at the Chambers of Elvinger and Hoss, 15 Côte d' Eich,

and

British Airways plc, a company incorporated under English law, established in Hounslow (United Kingdom), represented by William Allan and James E. Flynn, Solicitors, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 11 Rue Goethe,

interveners,

APPLICATION for the annulment of the decision of the Commission of 27 November 1992 (IV/M. 259 - British Airways/TAT) relating to a proceeding under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (in the corrected version published in Official Journal 1990 L 257, p. 13),

THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: R. Schintgen, President, R. García-Valdecasas, H. Kirschner, B. Vesterdorf and K. Lenaerts, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 23 February 1994,

gives the following

Judgment

Costs

105 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party' s pleadings. Since the applicant has failed in its submissions, and since the defendant and the interveners have asked for their costs to be paid, the applicant must be ordered to pay the costs, including those of the interveners

TAT and British Airways. Since the applicant is to pay its own costs as well as those of the defendant and of the interveners TAT and British Airways, TAT' s claim for application by the Court of Article 87(3) of the Rules, relating to the payment of costs unreasonably or vexatiously incurred, has become nugatory.

106 Under Article 87(4) of the Rules, the Member States which intervened in the proceedings are to bear their own costs. Consequently, the United Kingdom shall bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to bear its own costs and to pay the costs of the defendant and of the interveners TAT and British Airways;

3. Orders the United Kingdom to bear its own costs.

Factual background

1 By application lodged at the Court Registry on 5 January 1993 the Société Anonyme à Participation Ouvrière Compagnie Nationale Air France (hereinafter referred to as "Air France") brought an action pursuant to Article 173 of the EEC Treaty for the annulment of the decision of the Commission of 27 November 1992 (IV/M. 259 - British Airways/TAT, hereinafter referred to as "the decision") relating to a proceeding under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (in the corrected version published in Official Journal 1990 L 257, p. 13, hereinafter referred to as "the Regulation").

2 It appears from the documents before the Court that the concentration in question was notified to the Commission on 23 October 1992 pursuant to Article 4 of the Regulation. On 31 October 1992 the Commission published in the Official Journal of the European Communities the notice provided for by Article 4(3) of the Regulation (Official Journal 1992 C 283, p. 10). In paragraph 4 of that communication, the Commission invited "interested third parties to submit their possible observations on the proposed concentration".

3 Following that publication, the applicant submitted its observations by letter of 9 November 1992; in particular, it disputed the Commission' s definition of the market, submitting that the definition did not take account of the competitive situation throughout the Community civil aviation market, especially as regards the strengthening of the position of one of the parties to the concentration in question, British Airways plc (hereinafter referred to as "British Airways"), in the international intra-Community network.

4 The correspondence between the applicant and the Commission took the form of letters of 10 November, 17 November, 19 November, 23 November, 2 December and 21 December 1992.

The contested decision

5 In the decision, the Commission finds, in application of Article 6(1)(b) of the Regulation, that the concentration in question does not raise serious doubts as to its compatibility with the common market.

6 It is apparent from the decision that the concentration in question concerns the acquisition by British Airways of 49.9 % of the share capital of TAT European Airlines (hereinafter referred to as "TAT E.A."), with the remaining 50.1 % continuing to be held by TAT SA (hereinafter referred

to as "TAT").

7 The acquisition agreement further provides for the grant to British Airways of an option to purchase the aforementioned 50.1 % at any time up to 1 April 1997. TAT is in turn granted the right to require British Airways to purchase the remaining 50.1 % of the shares held by TAT on 1 April 1997. According to the actual wording of paragraph 5 of the decision, the Commission considered that, since it was not certain whether those options would be exercised, the possible second transaction should not be taken into account for the purposes of assessing the operation which had been notified.

8 The decision also refers (in paragraphs 6 and 7) to the following provisions contained in a shareholders' agreement concluded between British Airways and TAT:

(a) the board of directors of TAT E.A. is to have nine members, five of whom are to be nominated by TAT and four by British Airways;

(b) the President and the Director-General of TAT E.A., who hold the same positions in TAT, are confirmed in their functions for an initial period of two years with the consent of British Airways;

(c) major decisions can only be taken by the board of TAT E.A. if at least one director nominated by TAT and one director nominated by British Airways vote in favour of the proposal (such decisions include, inter alia, any changes to the business plan for the period 1993-96 drawn up and agreed by TAT and British Airways simultaneously with the acquisition agreement);

(d) the deputy Director-General responsible for commercial matters is to be nominated by British Airways.

9 The business plan sets forth, in particular:

(1) the routes TAT E.A. will operate and the aircraft and timetables with which it will operate;

(2) the fleet plan;

(3) projections for the number of passengers to be carried and the yield to be achieved;

(4) the strategy on international routes.

10 On the basis of those factors, the Commission concludes that TAT E.A. "will be jointly controlled" by British Airways and TAT (paragraph 9).

11 In paragraphs 10 to 13 of the decision, which deal with the question whether a concentration, within the meaning of Article 3 of Regulation No 4064/89, exists, the Commission concludes, first, that the anticipated duration of the joint venture - approximately six and a half years, given that the agreement on the joint undertaking is to cease on 1 April 1997 if the options are not exercised - is sufficiently long to bring about a lasting change in the structure of the undertakings concerned.

12 Next, it finds that, in consequence of the transfer of part of the share capital, TAT has ceased to operate in the field covered by the transfer, with the result that it can no longer be regarded as an actual or potential competitor of either TAT E.A. or British Airways. As to the competitive relationships between British Airways and TAT E.A., the Commission finds that British Airways will have a substantial and growing influence on the way in which the joint venture is to be run and developed, and will play a leading role in its management.

13 On the basis of those considerations, the Commission states that the acquisition by British Airways of joint control of TAT E.A. does not have as its object or effect the coordination of the competitive behaviour of undertakings which remain independent, within the meaning of the first paragraph of Article 3(2) of the Regulation, and concludes from this that the transaction in question constitutes a concentration within the meaning of Article 3(1) of the Regulation.

14 Having found, in paragraph 14 of the decision, that the concentration has a Community dimension within the meaning of Article 1(2) of the Regulation, the Commission examines, in paragraphs 15 to 26, its compatibility with the common market.

15 The Commission finds that British Airways did not have any presence whatever on the French domestic routes prior to the contested transaction, whereas in 1991 TAT E.A. accounted for 3.8% of the total scheduled traffic on those routes, in terms of the overall number of passengers carried, and Air France (directly or through Air Inter) had an 84.9% share of the number of passengers. It concludes from this that the transaction in question does not lead to any overlap with respect to TAT E.A.' s domestic routes, its effect being to allow British Airways a limited access to the French domestic network and certain possibilities to feed its operations from France.

16 As regards the international services offered by TAT E.A. and British Airways, the Commission goes on to find that it is only on the Paris-London and Lyons-London routes that there is any overlap between the services operated by TAT E.A. and British Airways.

17 It is on the basis of those two international routes that the Commission gives its definition of the relevant market. According to the decision (paragraph 19), that definition has to start from a route, or from a bundle of routes to the extent that there is substitutability between the routes comprised in it. Other factors which could prove to be relevant, according to the decision, are the structural conditions prevailing at airports and their capacity, as well as the impact of an extensive or high volume network in a given geographical area.

18 As regards substitutability between the routes in question, the Commission considers that each "pair of cities", namely Paris-London and Lyons-London, may be regarded as a market. It takes the view, however, that, in the context of the transaction at issue, the question of substitutability between airports is of considerable importance. In that regard, and in the case of the London-Paris route, the Commission examines the situation in respect of competition between the different airports involved. It states that, whilst all airlines operate solely from Charles-de-Gaulle airport in Paris, a variety of airports are used on the London side. British Airways operates the London-Paris route mainly from Heathrow, but, through the intermediary of Dan Air, it also provides a Paris service from Gatwick airport. TAT E.A. serves that route only from Gatwick. The main competitors of TAT E.A. and of British Airways do not fly to Paris from Gatwick.

19 On the basis of that examination, the Commission finds that the transaction at issue does not alter the market shares of British Airways and TAT E.A. as regards the Heathrow-Paris route, but that, on the Gatwick-Paris route, its effect is to give the parties to the contested transaction a market share of 98.6%, with Dan Air (British Airways) holding 81.6% and TAT E.A. 17%.

20 Overall, that is to say, as regards the total air traffic between London and Paris, the concentration results in the British Airways-TAT E.A. group having a market share of 52.2%, with British Airways having 49.5% and TAT E.A. 2.7%, whilst, of their competitors, Air France has 32.9%, British Midland 9.4%, Air UK 3.7%, Air Brymon 1.1% and "others" 0.6% of the market.

21 As regards the London-Lyons route, the Commission states that British Airways and Air France operate only from Heathrow, whilst TAT E.A. serves Lyons only from Gatwick. There are no other competitors on either route. Whilst the transaction at issue does not have any effect on the Heathrow-Lyons route, it gives British Airways-TAT E.A. 100% of the market from Gatwick. Overall, that means that the group holds 58.6% of the market (British Airways having 45.3% and TAT E.A. 13.3%), with Air France holding the remaining 41.4%.

22 In the Commission' s view, a certain degree of substitutability exists between Heathrow and Gatwick, but the fact that both those airports are congested means that substitutability does not necessarily operate.

23 The Commission concludes from this (paragraph 23) that the position in which British Airways finds itself as a result of the concentration may restrict competition on the routes concerned. The absence of slots at Heathrow and Gatwick could constitute a barrier to the entry into the market of any competitors interested in the routes in question. In order to take that factor into account, the parties to the transaction have undertaken to the Commission if need be to make a number of slots available to companies wishing to operate the routes concerned.

24 On the basis of those considerations, and of the commitments entered into by the parties to the concentration, the Commission concludes, at point VII of its decision, that the transaction at issue does not raise serious doubts as to its compatibility with the common market.

Procedure and forms of order sought by the parties

25 By order of 15 July 1993, the Court of First Instance (First Chamber) granted leave to the United Kingdom, British Airways and TAT to intervene in this case in support of the form of order sought by the defendant.

26 On hearing the report of the Judge-Rapporteur, the Court (First Chamber) decided to open the oral procedure without any preparatory inquiry.

27 The parties presented oral argument and answered questions from the Court at the hearing on 23 February 1994.

28 The applicant claims that the Court should:

(i) annul the decision of the Commission of 27 November 1992 (IV/M. 259 - British Airways/TAT);

(ii) order the Commission to pay the costs.

29 The Commission contends that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

30 The United Kingdom contends that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs, including those incurred by the intervener.

31 TAT, intervener, contends that the Court should:

(i) dismiss the application as inadmissible;

(ii) alternatively, dismiss it as unfounded in fact and in law;

(iii) declare the application unreasonable and vexatious within the meaning of Article 87(3) of the Rules of Procedure;

(iv) order the applicant to pay all the costs, including those incurred by the intervener.

32 British Airways, intervener, contends that the Court should:

(i) dismiss the application as inadmissible or unfounded;

(ii) order the applicant to pay the costs, including those incurred by the intervener.

Admissibility

Brief summary of the pleas in law and arguments of the parties

33 Without formally raising any objection of inadmissibility, the Commission expresses "its doubts

as to the admissibility of the present application, given that the applicant has not shown that the act which it seeks to have annulled is of individual concern to it". The Commission maintains in that regard that, since the Regulation does not lay down any procedural rules for the submission of complaints, the conditions specified by the Court of Justice in its judgment in Case 169/84 Cofaz v Commission [1986] ECR 391, in the context of Article 93(2) of the EEC Treaty, could be applied, mutatis mutandis, as the relevant criteria for the purposes of assessing the admissibility of an action contesting a decision, adopted under the Regulation, declaring a concentration compatible with the common market.

34 The Commission acknowledges that the applicant' s observations regarding the transaction at issue were prompted by the notice provided for by Article 4(3) of the Regulation, which, in its view, is a necessary condition, but still not enough to render its application admissible.

35 It further acknowledges that Air France is TAT' s main competitor. According to the Commission, however, Air France has not shown how its position in the market in question is significantly affected by the transaction at issue, as the aforementioned case-law requires it to do. It notes, by way of example, that the applicant has not defined the markets in which the new entity might use its possible dominant position to the detriment of Air France.

36 The United Kingdom agrees with the Commission that it would be appropriate for the Court to apply, in the present case, the principles laid down in the judgment in the case of Cofaz v Commission, cited above, and also considers that the rules on State aid provide a convenient analogy with the rules on concentrations laid down by the Regulation.

37 TAT also concurs, in essence, with the Commission' s line of argument. As regards, more particularly, the first criterion to be applied in determining the admissibility of an application, namely effective intervention in the administrative proceedings, TAT adds that that condition is not fulfilled in the present case. TAT maintains that Air France merely responded to an invitation to submit observations contained in the notice published pursuant to Article 4 of the Regulation, and that those observations do not constitute a request for the opening of a thoroughgoing proceeding or for the prohibition of the notified transaction, which would have been rejected by the Commission.

38 British Airways maintains that Air France does not have a legal interest in bringing proceedings in accordance with the second paragraph of Article 173 of the EEC Treaty, as interpreted by the settled case-law of the Court of Justice. It observes that Air France has made no serious effort to show how its own economic or legal interests are affected by the measure which it is contesting. According to British Airways, Air France brought its action merely as a competitor, both on the particular routes to which the transaction relates and within the Community generally.

39 The applicant considers, first, that merely through taking part in the administrative proceedings it is already sufficiently individualized for its application to be held admissible. Secondly, the applicant considers that, since it is engaged in the same field of activities as the undertakings benefiting from the decision, its competitive position has necessarily been significantly affected by the transaction in question, because of its concentrative nature. Those two factors result in its being individually interested for the purposes of Article 173 of the EEC Treaty.

Findings of the Court

40 The Court notes, as a preliminary point, that the decision was addressed not to the applicant but to British Airways and to TAT. It follows that the application can only be admissible if it is of direct and individual concern to the applicant within the meaning of the fourth paragraph of Article 173 of the EC Treaty, which reproduces the second paragraph of Article 173 of the EEC Treaty.

41 It is common ground between the parties that the decision is of direct concern to the applicant. It is necessary to consider, therefore, whether the decision is also of individual concern to it.

42 It should be borne in mind in this regard that it is settled law that "persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed" (see the judgment of the Court of Justice in Case 25/62 Plaumann v Commission [1963] ECR 95 and the judgment of the Court of First Instance in Case T-83/92 Zunis Holding and Others v Commission [1993] ECR II-1169).

43 The Court must therefore examine whether in the present case the applicant' s circumstances are such as to differentiate it from all other persons.

44 The Court observes, first, that, following the communication provided for by Article 4(3) of the Regulation, the applicant informed the Commission by letters of 9, 10, 19 and 23 November 1992 of its critical observations, supported by figures and statistical data, regarding the concentration at issue, and that the Commission replied to those criticisms by letter of 17 November 1992, signed by the Commissioner responsible for competition matters. The criticisms related to the definition of the market which, according to the applicant, had to be taken into account in assessing the effects of the concentration on the market, and to the effects of the concentration on the competitive position of British Airways vis-à-vis other operators, particularly Air France. Thus, the applicant made essentially the same criticisms in that correspondence as those which it put forward in the written pleadings which it submitted to the Court. According to the Commission' s written response of 17 November 1992, the Commissioner responsible for competition matters had instructed his staff to make a careful study of Air France' s comments "so that they are taken fully into consideration in the examination of the compatibility of that transaction with the common market".

45 Secondly, it is apparent from the actual wording of the contested decision that, in assessing the competitive situation on the two markets identified as being the markets concerned after the concentration, the Commission mainly took into account the position of Air France. In paragraph 17 of the decision, the Commission compares the competitive positions, on the French domestic routes, of British Airways, TAT and Air France, concluding that "the main airline operating in this market is by far Air France... with an 84.9% share of the overall number of passengers...". Paragraph 20 of the decision, in which the Commission considers the question of substitutability between airports, contains a very detailed examination of the positions of British Airways, TAT and Air France. That is also the case with paragraph 21 of the decision.

46 Thirdly, it is apparent from the documents before the Court that the applicant was obliged, pursuant to an agreement concluded on 29 October 1990 between it, the French Government and the Commission, to give up the whole of its interest in TAT by 30 June 1992, and that the concentration between TAT and British Airways was notified to the Commission four months later.

47 The Court considers that those three factors are sufficient to differentiate the applicant from all other persons and that they are such as to distinguish it individually, just as in the case of the persons addressed by the decision.

48 It follows that the application is admissible.

Substance

49 The applicant puts forward four pleas in support of its claims.

(a) The first plea is that the Commission infringed Article 3(1), (2) and (3) of the Regulation by failing to take account of the true nature of the transaction at issue and by wrongly regarding

it as a transaction creating a common undertaking in the nature of a concentration, instead of acknowledging that British Airways has in fact assumed sole control of TAT E.A.

(b) The second plea is that the Commission infringed Article 1(1) and (2), Article 2(1) and (3) and Article 8(2) and (3) of the Regulation in not defining precisely the relevant market, as regards either the products or the geographical area involved.

(c) The third plea is that the Commission infringed Article 190 of the EEC Treaty in that in describing the relevant market the Commission confined itself to the routes directly concerned by the transaction in question.

(d) By its fourth plea the applicant contends that the Commission acted in breach of the principle of the protection of legitimate expectations and infringed Article 155 of the EEC Treaty in declaring the transaction at issue compatible with the common market despite the fact that, had such a transaction been known about in good time, it would have made it impossible for the agreement of 29 October 1990 between the applicant, the French Government and the Commission to be concluded.

The first plea: infringement of Article 3(1), (2) and (3) of the Regulation

(1) Admissibility of the plea

50 The Commission regards the first plea as inadmissible since in its view the applicant has failed, in the light of the particular circumstances of this case, as described in paragraph 12 of the decision, to show how British Airways' sole control, as opposed to joint control, of TAT E.A. adversely affects the legitimate interests of Air France by significantly affecting its position on the relevant market or markets. On the contrary, if British Airways were considered merely to have acquired joint control with TAT, it would be necessary to re-examine the transaction if control became exclusive, that is to say, if the purchase option granted in favour of British Airways is exercised. It might be that, in the context of such examination, and taking account of developments in the field of air transport, which the Commission regards as undergoing major changes, it could reach a different conclusion as to the compatibility of the transaction with the common market or consider it necessary, for the purposes of declaring it compatible, to attach fresh conditions to its decision. It concludes in its rejoinder that "the acquisition by an undertaking of sole or joint control of another undertaking is an important factor for the purposes of assessing the impact of such an acquisition on competition pursuant to Article 2 of the Regulation".

51 The applicant replies that the effect on competition in the case of the acquisition of sole control is different from that in the case of the acquisition of joint control. Where sole control is acquired, an economic operator disappears from the market, thereby strengthening the market position of the undertaking making the acquisition. According to the applicant, it follows that the Commission' s assessment of the compatibility of a concentration with the common market must depend in particular on the sole or joint nature of the control which is acquired.

52 The Court finds that the Commission' s pleadings clearly show that the Commission itself considers the question whether TAT E.A. is controlled solely by British Airways or jointly by British Airways and TAT to be "an important factor" for the purposes of assessing the transaction at issue with reference to Article 2 of the Regulation. The Commission states in its rejoinder that, in the event of British Airways ceasing to have joint control over TAT E.A. and acquiring sole control, notification would be necessary and it would have to examine the matter afresh, which, according to the Commission, could result in a different conclusion as to the compatibility of the transaction with the common market.

53 It follows, accordingly, that the applicant undeniably has an interest in seeking from the Court a review of the Commission' s assessment as to the joint or sole nature of the control acquired

by British Airways over TAT E.A. and that the plea is therefore admissible.

(2) The substance of the plea

54 The plea falls into two parts, the first being to the effect that the Commission failed to have regard to the true nature of the concentration at issue and the second being to the effect that the Commission erred in its assessment of the option granted to British Airways by the shareholders' agreement.

(a) The first part

- Brief summary of the parties' arguments

55 The applicant maintains that the issue whether sole or joint control is acquired over an undertaking is a question of fact which must be assessed in the light of the economic objectives pursued by the acquiring undertaking. The extent of the interest acquired, the voting systems and the existence of a business plan are merely financial and legal aspects which do not by themselves enable that question to be resolved.

56 According to the applicant, the findings contained in the decision itself clearly show that the real object of the concentration at issue is to integrate the domestic and international operations of TAT E.A. into the organization and structure of British Airways. However, the Commission omitted to examine the underlying reality. Thus, it failed to take into consideration the contents of the business plan, even though, according to the applicant, they are such as to lead inevitably to the conclusion that the entity appearing to take the legal form of a joint venture is no more than a screen concealing what is in fact an acquisition vesting sole control in British Airways.

57 The applicant arrives at the conclusion that in deciding that the transaction at issue resulted in the creation of a joint venture within the meaning of Article 3(2) of the Regulation, and not an acquisition, within the meaning of Article 3(1), of TAT E.A. by British Airways, with sole control vesting in the latter undertaking, the Commission had regard only to the legal aspects, and failed to draw the logical conclusions from its own findings regarding the economic aspects, thereby infringing Article 3(1) to (3) of the Regulation.

58 The Commission denies that it infringed Article 3 of the Regulation by concluding that British Airways acquired joint control with TAT over TAT E.A., and states that it took into consideration in this regard not only the legal and financial aspects but also, and above all, the nature of the decisions requiring at all times the agreement of the two founding undertakings, particularly the contents of the business plan of the joint undertaking. It states that the business plan relates to a number of matters, such as the routes served by the joint subsidiary, aircraft, timetables, strategy on international routes, etc. which are, by their nature, closely linked to TAT E.A.' s commercial strategy.

59 The United Kingdom considers that the Commission rightly concluded that TAT E.A. is jointly controlled by British Airways and TAT and that, in any event, if the Commission' s reasoning on that point is incorrect, it does not vitiate the operative part of the decision, in which the notified concentration is found to be compatible with the common market.

60 According to TAT, it is clear from the facts of the case that British Airways cannot in any way be regarded as having sole control of the joint undertaking TAT E.A., either in law or in fact. In law, TAT has control over all important decisions relating to the operations of TAT E.A. so long as the purchase option is not exercised by British Airways.

61 British Airways maintains that it clearly does not have exclusive control over TAT E.A., given that TAT retains a majority shareholding and appoints the majority of the directors of TAT E.A., and given further that TAT representatives occupy the positions of president and director-general

of TAT E.A.

Findings of the Court

62 It should be recalled, as a preliminary point, that Article 3(3) of the Regulation provides as follows: "For the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking...".

63 In view of the factual and legal aspects of this case, the Court considers that the Commission was correct in finding that there exists joint control by British Airways and TAT over the joint venture created by the transaction at issue.

64 In particular, it is apparent from the decision, first, that TAT now retains 50.1% of the shares in TAT E.A., and, secondly, that major decisions can only be taken by the board of TAT E.A. if at least one director nominated by TAT and one director nominated by British Airways vote in favour of the proposal.

65 In view of those findings, and even though British Airways exercises a substantial and growing influence, the Commission was correct in finding that there exists joint control. The business plan, containing the main aspects of the policy of the joint venture, was drawn up jointly by British Airways and TAT and cannot be changed without the agreement of TAT, which constitutes the majority shareholder in TAT E.A. and holds the majority of the voting rights on the board of that company, as well as the posts of president and director-general. In the light of the foregoing, the existence of an agreement as to representation and of a system of "code-sharing" between TAT E.A. and British Airways is not inconsistent with British Airways' controlling TAT E.A. jointly with TAT, since such agreements do not in any way alter the allocation of responsibilities in the management of TAT E.A., and thus the way in which control is exercised over that undertaking, nor its legal status. Such agreements are the result of negotiations between the parties and cannot be concluded without the consent of the directors of TAT E.A., in accordance with the rules contained in the statutes of that company, as analysed above.

66 It follows that the first part of the plea must be rejected.

(b) The second part of the plea

- Brief summary of the arguments of the parties

67 The applicant observes that the date of expiry of the period in which British Airways may exercise its option to acquire the remaining shares in TAT E.A. is coterminous with the date of entry into force of the Community rules providing for the free exercise of cabotage traffic rights within the Member States, namely 1 April 1997. That is by no means a fortuitous coincidence, and in fact removes the uncertainty regarding the exercise of the option by British Airways. By failing to take that fact into consideration, the Commission infringed Article 3 of the Regulation.

68 The Commission states in reply that, when it examines the compatibility of a concentration with the common market, it has to base its findings not on factors of a more or less hypothetical nature, such as the possible exercise of an option in the future, but solely on the matters of fact and law existing at the time of the notification. The simultaneity in dates pointed out by the applicant cannot alter that analysis.

69 TAT argues, first, that the air transport services provided by TAT E.A. in France are not in any way capable of being termed cabotage, and, secondly, that the purchase by British Airways of an interest in an undertaking established in another Member State constitutes no more than the exercise of its freedom of establishment.

Findings of the Court

70 As the defendant maintains, the appraisal by the Commission of the compatibility of a concentration with the common market must be carried out solely on the basis of the matters of fact and law existing at the time of notification of that transaction, and not on the basis of hypothetical factors the economic implications of which cannot be assessed at the time when the decision is adopted.

71 In the present case, it is apparent from the documents before the Court that the exercise by British Airways of the option granted to it is a factor of a hypothetical nature, given that, first, it is common ground that British Airways had not exercised that option at the date when the decision was adopted, and, secondly, that the applicant has not established that British Airways had the intention at that date of exercising it or that it has since formed such intention.

72 In the circumstances, the Commission was right to leave that potential transaction out of account in its appraisal of the concentration which it had to consider. It follows that the second part of the plea must be rejected.

The second plea: infringement of Articles 1, 2 and 8 of the Regulation

Brief summary of the arguments of the parties

73 In the applicant' s view, the definition of the relevant market adopted by the Commission in paragraphs 19 to 22 of the decision, according to which the two relevant markets are the Paris-London and Lyons-London routes, is very incomplete, and thus erroneous, since it does not correspond to economic reality. It complains that the Commission did not take into consideration the economic reality of the European network of British Airways. That reality is such as to require the Commission to find that the relevant market is the market in international air transport provided anywhere in the common market between different Member States. Had the Commission proceeded on that basis, it would have found, first, that the concentration at issue enables British Airways, through the intermediary of TAT E.A., to attract French customers towards London so that they can use its international air transport services from that city, and, secondly, that by virtue of that transaction British Airways owns or controls four out of the seven carriers serving the London-Paris link and is the only company operating directly or indirectly from all the airports in the London area.

74 The applicant further complains that the Commission overlooked the fact that Article 3(2) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (Official Journal 1992 L 240, p. 8) provides that all Member States are to be obliged, with effect from 1 April 1997, to authorize cabotage traffic rights within their territory by air carriers licensed by another Member State. The applicant maintains that, as from 1 April 1997, British Airways will thus be able, by virtue of the concentration at issue, to develop, under its own banner or that of TAT E.A., services inside French territory operating from Paris and Lyons, and that the Commission should have taken that factor into account.

75 The applicant concludes that the Commission, in assessing the effects of the concentration at issue solely on the two routes directly concerned by it, did not make a correct appraisal of the compatibility of the concentration with the common market. It further states that, having demonstrated the Commission' s failure correctly to define the relevant market, it cannot be criticized for not showing, or seeking to show, that the transaction in question creates or strengthens a dominant position on the market.

76 The Commission replies that the definition of the relevant market which it adopted in the decision is consistent with both the case-law of the Court of Justice (judgment in Case 66/86 Ahmed Saeed Flugreisen and Others v Zentrale zur Bekaempfung unlauteren Wettbewerbs [1989] ECR 803) and its own practice. It further states that it also took into consideration, as the applicant demands,

the effects of the transaction at a wider level on competition between air carriers of a European size and, in particular, the effect which the integration of TAT E.A. into the British Airways network would have on future competition at that wider level on the part of carriers of that size.

77 The United Kingdom and the interveners TAT and British Airways concur with the Commission' s arguments regarding the definition of the relevant market. In the United Kingdom' s view, it has not been established that the concentration involved the creation or strengthening, on one of the relevant markets, of a dominant position as a result of which effective competition would be significantly impeded. It considers, therefore, that there was no legal basis for the Commission to take any decision other than the one which it adopted. TAT observes that, by widening the definition of the market, Air France makes it appear all the more unlikely that British Airways has established a dominant position in the market thus defined. It considers, therefore, that if the definition of the market proposed by the applicant were to be accepted, this would make it all the more necessary to authorize the concentration at issue. Lastly, British Airways states once again that owing to the diversity and widespread nature of the services to be taken into consideration it is inappropriate to define the market as widely as the applicant proposes.

Findings of the Court

78 Article 2(2) of the Regulation provides that: "A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market". However, Article 2(3) provides that a concentration which creates or strengthens such a position must be declared incompatible with the common market.

79 It follows from those provisions that the Commission is bound to declare a concentration compatible with the common market where two conditions are fulfilled, the first being that the transaction in question should neither create nor strengthen a dominant position and the second being that competition in the common market must not be significantly impeded by the creation or strengthening of such a position. If, therefore, there is no creation or strengthening of a dominant position, the transaction must be authorized, without there being any need to examine the effects of the transaction on effective competition.

80 In order to assess whether the first condition is fulfilled in a given case, the Commission must first define the relevant market (see, by analogy, the judgment of the Court of First Instance in Case T-30/89 Hilti v Commission [1991] ECR II-1439, paragraph 69, and, on appeal, the judgment of the Court of Justice of 2 March 1994 in Case C-53/92 P Hilti v Commission [1994] ECR I-0000).

81 It should be borne in mind in this regard that in the present case the Commission found in paragraph 19 of its decision that the relevant market was "each city-pair" constituting the point of departure and the point of arrival of the routes regarded by it as being directly concerned by the transaction at issue, and that it concluded, in paragraph 26 of its decision, that the transaction does not create or strengthen a dominant position as a result of which effective competition is impeded.

82 Since the applicant has asserted, on the one hand, that it does not in principle contest the validity of the definition adopted by the Commission, but, on the other hand, that it regards it as very incomplete, and thus erroneous, the Court must review the definition of the relevant market adopted by the Commission.

83 In this regard, the Court considers that the Commission' s definition of the market is correct, as regards both the product concerned and the geographical area.

84 The definition of the market adopted by the Commission accords with the principles stated by the Court of Justice in its aforesaid judgment in Ahmed Saeed, in that the Commission examined,

in paragraphs 17 to 21 of its decision, the two routes on which there was an overlap between the services proposed by the parties to the concentration, namely Paris-London and Lyons-London, and their possible substitutability with other routes, and arrived at the convincing conclusion, first, that there is no substitutability between those two routes and other routes, and, secondly, that there is very little substitutability between the two routes themselves.

85 Furthermore, it is apparent from paragraphs 17 and 19 of the decision, even though the explanations given are short and concise, that the Commission did not limit its examination to consideration of the effects of the planned transaction solely on the two routes directly concerned by the planned transaction, but also assessed the effects of that transaction at a wider level, with regard to international operations from France (paragraph 17) and to the effects on an extensive or high volume network (paragraph 19). It follows that the criticism directed at the Commission by the applicant on this point has no basis in fact and cannot therefore be accepted by the Court.

86 In any event, as the United Kingdom observes, the applicant does not claim in its pleadings before the Court, either expressly or impliedly, that the Commission committed an error of assessment in finding that the transaction at issue neither created nor strengthened a dominant position on the markets regarded by the Commission as relevant; nor does it claim that such a position would have been created or strengthened on the market as it should, in its view, have been defined. In the circumstances, it cannot contest the legality of the Commission' s decision to declare the transaction compatible with the common market.

That result is not in any way vitiated by the arguments advanced by the applicant in the second and third parts of the plea. Even if, as the Commission states in paragraph 17 of its decision, the concentration at issue enables British Airways to attract French customers to its international air transport services departing from the United Kingdom, and even if it is correct that British Airways controls four of the seven carriers operating on the London-Paris route, and even assuming, further, that British Airways will be able, by means of the transaction in question, to develop operations within French territory from 1 April 1997 more easily than other non-French airlines, the fact remains that the applicant has not shown how such circumstances should have led the Commission to prohibit the concentration at issue, in the absence of the creation or strengthening of a dominant position on any market whatever.

87 It follows that the plea must be rejected.

The third plea: infringement of Article 190 of the Treaty

Brief summary of the arguments of the parties

88 The applicant maintains that the Commission, confronted by the applicant with two different, and necessarily complementary, definitions of the market for the product and the geographical market concerned by the concentration at issue, infringed Article 190 of the Treaty in failing to state the grounds which led it to base the contested decision on only one of those two definitions.

89 The Commission points out that, as the Court of Justice has consistently held, it is not bound to state reasons for the rejection of arguments put forward by parties to the administrative proceedings, nor, a fortiori, for the rejection of those advanced by third parties. Moreover, it not only incorporated in its definition factors connected, in particular, with the existence of European networks and the conditions prevailing at airports but also provided the data needed to justify the fact that no detailed consideration was given to the effects of the concentration on British Airways' network.

90 In so far as the interveners make any observations on this point, they concur with the reasoning put forward by the Commission.

Findings of the Court

91 The Court of Justice and the Court of First Instance have consistently held that, although under Article 190 of the Treaty the Commission is obliged to state the reasons on which its decisions are based, mentioning the factual and legal elements which provide the legal basis for the measure in question and the considerations which have led it to adopt its decision, it is not required to discuss all the issues of fact and of law raised by every party during the administrative proceedings (see, inter alia, the judgment of the Court of First Instance in Case T-8/89 DSM v Commission [1991] ECR II-1833, paragraph 257).

92 In the present case, the Court considers that the statement of reasons for the decision clearly indicates the matters of fact and of law and the other considerations which led the Commission to adopt the contested decision. Since the Commission is not obliged to state the reasons for its rejection of the wider definition of the market advanced by Air France, a third party in the matter, it cannot be regarded as having failed on this point to fulfil its obligation to provide a statement of reasons.

93 Moreover, as stated above (paragraph 86), the Commission' s decision in fact not only takes into consideration the two routes directly affected by the concentration but also contains a more general appraisal of the effects of the proposed concentration.

94 It follows that the plea must be rejected.

The fourth plea: breach of the principle of legitimate expectations

Brief summary of the arguments of the parties

95 In the context of this plea, the applicant explains that on 29 October 1990, following its concentration with other French carriers - UTA and Air Inter, it concluded with the Commission and the French Government an agreement obliging it to cease its involvement in the decision-making organs of TAT, of which it was then a shareholder, and to divest itself totally of its interest in that company by 30 June 1992. The sole purpose of that obligation to divest was to ensure that there was an independent competitor, vis-à-vis the applicant, on the French domestic air transport market.

96 According to the applicant, not only was it never envisaged that a foreign company of a comparable size, namely British Airways, could be substituted in its place as a shareholder having joint or sole control over TAT E.A., such a possibility would have made it impossible for the agreement to be concluded. It also states that the Commission gave no indication, either during the preliminary negotiations or when the agreement was concluded on 29 October 1990, that it thought it conceivable, and even compatible with the common market, for the applicant to be replaced as a shareholder in TAT by a foreign competitor of the same size. In its view, the contested decision therfore conflicts with the agreement in question.

97 The applicant accordingly concludes that, by declaring the concentration between British Airways and TAT E.A. compatible with the common market, the Commission failed, at least as regards the latter' s domestic operations, to fulfil its obligation to protect the applicant' s legitimate expectations, thereby breaching the general principle of the protection of legitimate expectations enshrined in Community law and infringing Article 155 of the Treaty, both of which take precedence over the provisions of a regulation.

98 The Commission contends, in opposition to that argument, that, far from going against the letter and the spirit of the agreement of 29 October 1990, the control over TAT E.A. acquired by British Airways only strengthens the possibility of increased competition on the French domestic market by reaffirming the position of TAT E.A. as an "independent competitor of Air France", which was its sole concern at the time when the agreement was concluded. According to the Commission, the fact that such a possibility, which it could not in any event have foreseen, was not envisaged

during the discussions prior to the conclusion of the agreement cannot result in its being obliged to prohibit - in breach, moreover, of fundamental Community principles including that of freedom of establishment - a concentration compatible with the competition rules applying to the common market.

99 The United Kingdom submits that this plea is, "as a matter of principle, fundamentally misconceived". Furthermore, it does not consider there to be any incompatibility between the agreement in question and the decision, nor, in consequence, any prejudice to legitimate expectations.

100 The two other interveners concur with the reasoning of the Commission and of the United Kingdom.

Findings of the Court

101 It should be recalled that a consequence of the hierarchy of Community legal acts, as laid down in the Treaty and upheld in Community case-law, is that an act of general application cannot be implicitly altered by an individual decision (see the judgment of the Court of Justice in Case C-313/90 CIRFS and Others v Commission [1993] ECR I-1125, paragraph 44). It follows that a Community institution cannot be forced, by virtue of the principle of the protection of legitimate expectations, to apply Community rules contra legem.

102 The Court finds that the documents before it in the present case show in any event that the agreement concluded on 29 October 1990 between the French Government, Air France and the Commission only contains commitments on the part of the first two parties, the Commission, for its part, not entering into any commitment. There is nothing, therefore, either in the actual terms of that agreement or in any other matter relied on before the Court, to indicate in any way that the Commission undertook not to declare a concentration between TAT and a competitor of the same size as Air France compatible with the common market. Consequently, the applicant has not established to the requisite legal standard that any legitimate expectations were created in its regard.

103 It follows that the plea must be rejected.

104 It follows from all the foregoing that the application must be dismissed.

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NOTES Idot, Laurence: Europe 1994 Juillet Comm. no 289 p.17 ; Heidenhain, Martin: Europäische Zeitschrift für Wirtschaftsrecht 1994 p.540-541 ; Brown, Adrian: Judicial Review of Commission Decisions under the Merger Regulation: The First Cases, European Competition Law Review 1994 p.296-305 ; Bolze, Christian: Régime communautaire de l'entreprise, Revue trimestrielle de droit commercial et de droit économique 1995 p.256-260 ; Van der Woude, M.H.: S.E.W. ; Sociaal-economische wetgeving 1995 p.275-276 ; Simon, Denys: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes. Institutions et ordre juridique communautaire, Journal du droit international 1995 p.440-443 ; Simon, Denys: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes. Institutions et ordre juridique communautaire, Journal du droit international 1995 p.443-444 ; Dana-Démaret, Sabine: Concentration entre entreprises - Contrôle unique ou conjoint, La Semaine juridique - édition entreprise 1995 I 484 no 10

PROCEDU Action for annulment - unfounded

DATES of document: 19/05/1994
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Judgment of the Court of First Instance (Second Chamber)
First Instance (Second Chamber)First Instance (Second Chamber)1993. Zunis Holding SA and Finan Srl and Massinvest SA v Commission of the European Communities. Competition - Control of concentrations - Admissibility. Case T-83/92.

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1. Actions for annulment of measures ° Actionable measures ° Definition ° Measures having binding legal effects ° Letter sent by an institution

(EEC Treaty, Art. 173)

2. Actions for annulment of measures ° Action brought against a decision refusing to withdraw or amend an earlier measure ° Admissibility to be determined in the light of the possibility of contesting the measure in question

(EEC Treaty, Art. 173)

3. Actions for annulment of measures ° Natural or legal persons ° Measures of direct and individual concern to them ° Decision confirming that Community rules are not applicable to a notified concentration and refusal to withdraw that decision ° Shareholder of one of the companies concerned ° Inadmissible

(EEC Treaty, Art. 173, second para.)

4. Competition ° Concentrations ° Investigation by the Commission ° Request for the reopening of proceedings by reason of the discovery of a new fact ° Submission within a reasonable period

(EEC Treaty, Art. 173, second para.; Council Regulation No 4064/89)

1. The fact that a letter has been sent by a Community institution to a person in response to a request by that person is not sufficient for it to be regarded as a decision within the meaning of Article 173 of the Treaty, thereby opening the way for an action for annulment. Only measures having binding legal effects of such a nature as to affect the interests of the applicant by having a significant effect on his legal position constitute acts or decisions against which proceedings for annulment may be brought under Article 173 of the Treaty.

2. In the examination as to whether an action seeking the annulment of a negative decision taken by an institution is admissible, that decision must be appraised in the light of the nature of the request to which it constitutes a reply. In particular, the refusal by a Community institution to withdraw or amend an act may constitute an act whose legality may be reviewed under Article 173 of the Treaty only if the act which the Community institution refuses to withdraw or amend could itself have been contested under that provision.

3. The mere fact that a Commission decision declaring that a concentration does not come within the scope of Regulation No 4064/89 may affect the relations between the different shareholders of the notifying companies does not of itself mean that any individual shareholder can be regarded as directly and individually concerned by that decision. That decision is not of such a nature as by itself to affect the substance or extent of the rights of those shareholders, either as regards their proprietary rights or the ability to participate in the company management conferred on them by such rights.

4. The legal certainty which must be guaranteed to traders and the shortness of the time-limits which is a feature of the general system of Regulation No 4064/89 on concentrations between undertakings require in any event that a request for the reopening of the investigation proceedings provided for under that regulation on the ground of the discovery of an allegedly new fact should be submitted within a reasonable period.

A shareholder of one of the companies in question cannot rely on such a request submitted late for the purpose of contending that he must be regarded as individually concerned, within the meaning of the second paragraph of Article 173 of the Treaty, by the decision taken by the Commission at the conclusion of those proceedings on the ground that, if he had been aware from the outset of that fact, he would have applied to intervene in the proceedings and would consequently have had a right of action to protect his legitimate interests.

In Case T-83/92,

Zunis Holding SA, a company incorporated under Luxembourg law and having its registered office in Luxembourg,

Finan Srl, a company incorporated under Italian law and having its registered office in Bergamo (Italy) and

Massinvest SA, a company incorporated under Swiss law and having its registered office in Mendrisio (Switzerland),

represented by Nicholas Forwood QC, of the Bar of England and Wales, and Stanley Crossick, Solicitor, with an address for service in Luxembourg at the Chambers of Jean Hoss, 15 Côte d' Eich,

applicants,

v

Commission of the European Communities, represented by Giuliano Marenco, Legal Adviser, and Bernd Langeheine, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the decision allegedly contained in the Commission' s letter of 31 July 1992 to the applicants refusing to reopen its investigation in Case IV/M.159 (Mediobanca/Generali),

THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: J.L. Cruz Vilaça, President, D.P.M. Barrington, J. Biancarelli, C.P. Briet and A. Kalogeropoulos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 24 June 1993,

gives the following

Judgment

Costs

41 Pursuant to Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party' s pleadings. Since the applicants have failed in their submissions, the Commission' s claims must be upheld and the applicants ordered jointly and severally to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application as inadmissible;

2. Orders the applicants jointly and severally to pay the costs.

The factual background to the proceedings

1 On 27 November 1991 the Commission received notification, under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (corrected version published in OJ 1990 L 257, p. 14) ("Regulation No 4064/89"), of an operation by which Mediobanca ° Banca di Credito Finanziario SpA ("Mediobanca") had increased its shareholding in Assicurazioni Generali SpA ("Generali") from 5.98% to 12.84%.

2 By a decision of 19 December 1991, adopted pursuant to Article 6(1)(a) of Regulation No 4064/89, the Commission concluded that the notified operation did not fall within the scope of that regulation on the ground that Mediobanca would not, following that concentration, be in a position to exercise, by itself or together with others, a "decisive influence" on Generali.

3 In a letter of 26 June 1992 addressed to the Commission the applicants, all of whom are shareholders in Generali, requested the reopening of the proceedings following the publication on 19 March 1992 in the Italian daily newspaper Il Sole 24 Ore of an article reproducing the full text of a previously secret agreement signed in Paris on 26 June 1985 between Mediobanca, Lazard Frères de Paris ("Lazard") (whose subsidiary Euralux SA was the second largest shareholder in Generali with 4.77% of the share capital) and Generali itself ("the agreement"). That agreement provides, inter alia, for the creation of a steering committee composed of representatives of Generali and its two main shareholders with a view to examining Generali' s problems which were of common interest and influencing the appointment of certain members of the company' s administrative and senior management bodies.

4 In reply to a written question put by the Court, the applicants stated that they became aware of that article "at the end of March or beginning of April 1992" and that they had their first informal contact with the Commission on 6 May 1992, prior to the formal request by letter of 26 June 1992 that the proceedings be reopened.

5 In that request, the applicants claimed essentially that the Commission' s conclusion in its decision of 19 December 1991 that the notified operation did not fall within the scope of Regulation No 4064/89 resulted from a fundamental misapprehension as to the essential facts concerning the extent of the influence and control exercised by Mediobanca, both by itself and in conjunction with Lazard, prior to the increase in its shareholding by the notified operation. In the view of the applicants, such a misapprehension could be attributable only to manifestly incomplete or incorrect information regarding the terms of the agreement concluded between Mediobanca, Lazard and Generali and in particular regarding its effects. The applicants claimed further that the existence of a notification which was incomplete and incorrect had the procedural consequence that the Commission remained competent to reopen the case and that this would be justified both in the public interest and in that of the parties concerned.

6 In a letter of 31 July 1992, signed by the Commission' s Director-General for Competition, the latter rejected the applicants' request that the procedure be reopened, on the ground, inter alia, that:

> "... the Mediobanca/Generali decision was not based on 'incorrect information' , as you alleged, since the Commission knew of the 1985 Paris agreement and took it into account when making its decision. I refer to Commission' s statement that 'Il predetto accordo non contiene disposizioni circa l' esercizio congiunto dei diritti di voto né include qualsivoglia meccanismo societraio che garantisca il risultato finale delle proposizioni concernenti la composizione degli organi

sociali' [the aforementioned agreement does not include any provisions concerning the joint use of voting rights nor any company mechanism guaranteeing the final result of the propositions concerning the composition of the company' s bodies] (Par. 9(2) of the decision).

It follows that there exist no grounds to reopen the examination of the case and, consequently, there is no need to take any decision concerning the suspension of the operation."

Procedure and forms of order sought by the parties

7 It was in those circumstances that the applicants, by application lodged at the Registry of the Court of First Instance on 30 September 1992, brought an action seeking the annulment of the decision alleged to be contained in the above letter.

8 By a document lodged at the Registry of the Court of First Instance on 17 December 1992, the Commission raised an objection of inadmissibility against the action brought by the applicants in accordance with Article 114 of the Rules of Procedure.

9 The applicants claim that the Court should:

° order the Commission, as measures of inquiry, to produce the full text of the decision of 19 December 1991 and the formal notification by Generali/Mediobanca, along with all other documents relating to the agreement and its effects;

° declare the Commission' s decision as notified in the letter of 31 July 1992 to be void;

° order the Commission to pay the costs.

10 The Commission contends that the Court should:

° dismiss the application as inadmissible;

° order the applicants to pay jointly and severally the costs of the proceedings.

11 In their observations on the objection of inadmissibility raised by the Commission, the applicants claim that the Court should:

° reject the Commission' s objection as unfounded and declare the application admissible; alternatively

° join the issue of admissibility to the substance of the case, and adopt all necessary measures of inquiry as to the true nature of the letter of 31 July 1992;

° order the Commission to pay all costs.

12 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to accede to the Commission' s request that it rule on the objection of inadmissibility without hearing argument on the substance of the case. At the same time, it requested the parties to reply to a number of written questions. The applicants and the Commission replied to the Court' s questions by documents lodged on 14 June 1993. The parties presented oral argument and replied to questions put to them by the Court at the hearing on 24 June 1993.

13 At the conclusion of the hearing, the President declared the oral procedure regarding the objection of inadmissibility closed.

The admissibility of the application for annulment

The arguments of the parties

14 In support of the objection of inadmissibility which it has raised, the Commission argues in the first place that the letter of 31 July 1992 does not constitute a decision amenable to judicial review since it simply informs the applicants that the Commission, when taking its decision, was

aware of the agreement and took it into account. It points out in that regard that while it is not legally impossible for it to reopen the investigation into a merger operation which has led to a decision under Article 6(1)(a) of Regulation No 4064/89, there is no provision of Community law which would oblige it to reopen such an investigation at the request of an undertaking concerned, and certainly not at the request of a third party relying on what is alleged to be a new fact. The Commission also takes the view that it must be careful when exercising its discretionary powers with regard to the reopening of cases in this field in view of the principle of the protection of legitimate expectations and the difficulty in undoing the consequences of a concentration.

15 The Commission draws a parallel in this regard with the rules governing applications for revision of a judgment of the Court of Justice or Court of First Instance and takes the view that a request for review of a decision adopted under Regulation No 4064/89 would be "valid" only after discovery of a fact which, prior to the adoption of the decision, was unknown to the Commission and to the party requesting the review. According to the Commission, the applicants have failed to put forward any new fact and do not claim that the agreement constituted a fact which was unknown to the Commission when it took its decision of 19 December 1991, limiting themselves instead to the contention that the Commission did not properly assess the effects of that agreement.

16 In its objection of inadmissibility, the Commission also argues that the letter of 31 July 1992 does not embody a decision and that it follows from its wording and spirit that it was situated within a preliminary stage of the examination of the applicants' request and expressed no more than a first reaction of the Commission' s services which was thus devoid of legal effect. The Commission also contends that a definitive refusal to reopen the proceedings would have had to be adopted by the same body as that which was competent for a reopening of a merger case, that is to say, the Commission acting as a collegiate body. At the hearing, however, the Commission stated that it did not wish to pursue that argument.

17 Secondly, the Commission considers that in any event the letter of 31 July 1992 could not be construed as an act of direct and individual concern to the applicants and that they consequently lacked locus standi to challenge that letter in the same way as they also lacked locus standi to challenge the decision of 19 December 1991 or to request a reopening of the investigation which led to that decision. The Commission argues in this connection that, without prejudice to the general question whether and when minority shareholders might be directly and individually affected by decisions taken under Regulation No 4064/89, this was not the case with regard to the applicants in the present proceedings. Furthermore, it notes that they did not submit any observations or otherwise participate in the administrative proceedings which led to the decision of 19 December 1991.

18 Finally, the Commission contends, in the alternative, that the letter of 31 July 1992 is not amenable to separate judicial review as it merely confirms the earlier decision. That letter, in the opinion of the Commission, simply repeated the statement that nothing in the agreement had the effect of giving Mediobanca control of Generali, either alone or with others, and merely quoted the relevant passage from the decision of 19 December 1991. The Commission takes the view that the applicants' action is in reality an inadmissible attempt to challenge the earlier decision long after the expiry of the time-limit laid down in the third paragraph of Article 173 of the EEC Treaty.

19 In their application, the applicants begin by pointing out that the Commission, in its letter of 31 July 1992, did not dispute their locus standi to seek a reopening of the proceedings and thereby implicitly accepted that, if its decision were based on incorrect information provided by the notifying parties, it would have sufficient grounds to reopen the examination of the case.

20 The applicants point out first in that regard that the facts which led to the present proceedings have their origin in an increase in Generali' s share capital in July 1991, the unusual structure

of which allowed Mediobanca to acquire control of approximately 50 000 000 of the 145 750 000 new shares, thereby increasing its own direct shareholding from 5.98% to 12.84% of the issued share capital. In the opinion of the applicants, the primary, if not the sole, objective of the capital increase was to provide a mechanism whereby Mediobanca could disproportionately increase its influence over Generali to a position in which, together with the Lazard subsidiary Euralux, it could exercise effective control over Generali.

21 According to the applicants, it follows from the documents on the case file that if there had been full and effective disclosure by Mediobanca and Generali, as required by the relevant regulations, the Commission could not have concluded that the composition of the Generali board confirmed that Mediobanca was unable to exercise a decisive influence on any of the organs of Generali, and would also not have failed to refer to the composition of the executive committee. Likewise, in the applicants' view, it is inconceivable that, had there been full and frank disclosure of the content and effect of the agreement, the Commission could have reached the conclusion recorded at point 9 of the decision of 19 December 1991 to the effect that there was no "company mechanism" guaranteeing the result of propositions concerning the company' s bodies.

22 In their observations on the objection of inadmissibility, the applicants dispute in particular the Commission' s interpretation suggesting that the "new fact" on which they relied was the mere publication of the text of the agreement. According to the applicants, the "new fact" revealed by such publication was that the Commission had been misled in the course of the administrative proceedings as to the true effect of the agreement and in particular as to the actual role and influence of the coordinating committee in Generali' s corporate governance. Such a misunderstanding by the Commission as to the true nature of the applicants' request, they argue, undermines the Commission' s arguments on inadmissibility.

23 The applicants also take issue with the Commission' s view that the validity of a request for review is subject to the same conditions as those which apply to an application for revision of a judgment of the Court of Justice or the Court of First Instance. Such an analogy is, in the view of the applicants, inappropriate for two reasons. First, since the Commission is an administrative body and not a court, considerations as to the desirability of the finality of judicial proceedings are not directly relevant. Secondly, the competence of the Commission to reopen proceedings which led to an earlier decision on the basis of the discovery by the applicants of a material new fact is widely recognized in other areas of Community law.

24 With regard to the Commission' s arguments concerning the applicants' lack of locus standi, the latter submit in particular that if they had sought to intervene in the proceedings prior to the adoption of the decision of 19 December 1991, as they undoubtedly would have done had they known then the facts which they subsequently discovered, their locus standi could not have been in issue. They point out that their interests are in any event affected even more directly than those of the employees in the undertakings concerned, whose potential interest has been recognized in the interim order of the President of the Court of First Instance in Case T-96/92 R Comité Central d' Entreprise de la Société Générale des Grandes Sources and Others v Commission [1992] ECR II-2579, at paragraph 31 et seq. At the hearing, the applicants explained that the existence of an agreement between Mediobanca and Lazard prohibiting them from transferring their shares to third parties had been known for a long time and had already been referred to in the minutes of Generali' s 1991 annual general meeting. However, the true nature of the agreement had not been revealed to them and that, they claim, was the reason why they did not intervene in the proceedings before the Commission or seek to obtain the text of the decision adopted on 19 December 1991.

25 In conclusion, the applicants contest the Commission' s argument that the letter of 31 July 1992 is not amenable to separate judicial review on the ground that it merely confirms the earlier

decision of 19 December 1991. They claim in particular that their request that the case be reopened consisted almost entirely in elaborating those new factors which had come to light since the original decision of 19 December 1991 and that the Commission cannot rely on its failure to consider those new factors as justification for treating the letter of 31 July 1992 as merely confirming the earlier decision.

The Court' s appraisal

The legal framework of the proceedings

26 Article 4 of Regulation No 4064/89 provides that concentrations with a Community dimension must be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That notification is suspensive, inasmuch as the concentration cannot, in the absence of express derogation, be put into effect either before its notification or within the first three weeks following its notification. At the same time, Article 10 of the regulation requires the Commission, in order to ensure the effectiveness of the control and the legal certainty of the undertakings involved, to comply with the strict time-limits for initiating proceedings and for adopting the final decision, failure to do which results in the concentration' s being deemed compatible with the common market.

27 With particular regard to the examination of the notification and initiation of proceedings, Article 10(1) of Regulation No 4064/89 provides that the Commission must decide, by means of a decision taken within one month, that the concentration does not fall within the scope of the regulation or does not raise serious doubts as to its compatibility with the common market and need not be opposed, or alternatively that it does raise serious doubts and that it is necessary to initiate proceedings.

28 Regulation No 4064/89 nowhere provides expressly for the possibility of requesting the Commission to reopen proceedings. Article 8(5)(a), however, allows the Commission to revoke a decision taken pursuant to Article 8(2) declaring a concentration compatible with the common market, in particular if such a decision is based on information which is incorrect or was obtained by deceit.

The objection of inadmissibility raised by the Commission

29 The second paragraph of Article 173 of the EEC Treaty provides that any natural or legal person may, under the conditions set out in the first paragraph of that article, institute proceedings "against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former".

30 In deciding whether the present application is admissible, it should first be pointed out that, as the Court of Justice has ruled (order in Case C-25/92 Miethke v Parliament [1993] ECR I-473), the fact that a letter has been sent by a Community institution to a person in response to a prior request by that person is not sufficient for that letter to be regarded as a decision within the meaning of Article 173 of the Treaty, thereby opening the way for an action for annulment. Only measures having binding legal effects of such a nature as to affect the interests of the applicant by having a significant effect on his legal position constitute acts or decisions against which proceedings for annulment may be brought under Article 173 of the EEC Treaty (see the judgment of the Court of First Instance in Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 Cimenteries CBR and Others v Commission [1992] ECR II-2667, paragraph 28).

31 Secondly, it follows from the case-law of the Court of Justice that when an act of the Commission amounts to a rejection it must be appraised in the light of the nature of the request to which it constitutes a reply (see, most recently, the judgment of the Court of Justice in Joined Cases

C-15/91 and C-108/91 Buckl & and Others v Commission [1992] ECR I-6061, paragraph 22). In particular, the refusal by a Community institution to withdraw or amend an act may constitute an act whose legality may be reviewed under Article 173 of the EEC Treaty only if the act which the Community institution refuses to withdraw or amend could itself have been contested under that provision (with regard to acts in the form of a regulation, see the judgments of the Court of Justice in Case 42/71 Nordgetreide v Commission [1972] ECR 105, paragraph 5, in Joined Cases 97/86, 193/86, 99/86 and 215/86 Asteris v Commission [1988] ECR 2181, paragraph 17, and in Case C-87/89 Sonito and Others v Commission [1990] ECR I-1981, paragraph 8; see also point 14 of the opinion of Advocate General Gulmann in Buckl, cited above).

32 In the present case, the applicants have requested the Commission to reopen the proceedings in respect of the concentration between Mediobanca and Generali on which the Commission set out its views in the decision of 19 December 1991. The Court notes that the Commission concluded in that decision that the notified operation did not fall within the scope of Regulation No 4064/89 on the ground that Mediobanca would not, following the notified operation, be in a position to exercise, by itself or together with others, a "decisive influence" on Generali (see paragraph 2 above).

33 The Court takes the view that the applicants were in fact attempting, through their request that the proceedings be reopened, to secure the adoption by the Commission of a decision withdrawing the earlier decision of 19 December 1991, on the ground that the latter decision was based on incorrect information, and the adoption of a new decision in respect of the operation which had been notified to it. The letter of 31 July 1992, which is the subject of the present proceedings, must therefore be interpreted as a refusal by the Commission to decide on such a withdrawal and, consequently, a refusal to re-examine the operation brought to its attention by the notifying parties. It is accepted that the applicants have the status of third parties with regard to the decision first adopted by the Commission on 19 December 1991 and addressed to the undertakings involved in the concentration at issue. In those circumstances, and in accordance with the principle set out above (paragraph 31), the applicants may seek the withdrawal of the original decision of 19 December 1991 only in so far as they are directly and individually concerned by that decision within the meaning of the second paragraph of Article 173 of the EEC Treaty.

34 The Court points out first of all in that regard that the mere fact that a measure may affect the relations between the different shareholders of a company does not of itself mean that any individual shareholder can be regarded as directly and individually concerned by that measure. Only the existence of specific circumstances can enable such a shareholder, claiming that the measure affects his position within the company, to bring proceedings under Article 173 of the EEC Treaty (see the judgment of the Court of Justice in Joined Cases 10/68 and 18/68 Società "Eridania" Zuccherifici Nazionali and Others v Commission [1969] ECR 459).

35 With regard to the question whether such specific circumstances exist in the present case, the Court considers first that the applicants, who rely on their capacity as shareholders of one of the notifying parties, cannot be included among the third parties whose legal or factual position may be affected by that decision. A finding made by the Commission in accordance with Article 6(1)(a) of Regulation No 4064/89 that a concentration notified to it does not fall within the scope of that regulation is not of such a nature as by itself to affect the substance or extent of the rights of shareholders of the notifying parties, either as regards their proprietary rights or the ability to participate in the company management conferred on them by such rights. The applicants, who in this regard merely contend that "it is self-evident that the acquisition by Mediobanca of such influence will severely diminish the effectiveness of the votes of remaining shareholders, such as the applicants, who are thenceforth in a permanent minority" (point 3.3 of their observations on the objection of inadmissibility), have failed to prove that the decision of 19 December 1991

has affected their legal or factual position.

36 Secondly, the Court notes that that decision finding that the concentration notified does not fall within the scope of Regulation No 4064/89 affects the applicants, in their capacity as Generali shareholders, in the same way as any other of the 140 000 or so shareholders of that company. Even if one were to accept, as the applicants contend and contrary to the findings made in the decision, that Mediobanca had, by itself or together with other companies, acquired control of Generali, such an assumption of control would affect the applicants' interests in the same way as those of the other shareholders. It follows that the Commission decision of 19 December 1991 cannot concern the applicants individually, in particular because their respective shareholdings in the capital of Generali at the material time each represented less than 0.5% of the share capital and because they have failed to prove that by reason of that decision they were placed in a different position to that of any other shareholder. As the Court of Justice has ruled, "persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed" (Case 25/62 Plaumann v Commission [1963] ECR 95).

37 The Court considers, finally, that the applicants wrongly argued, in support of their contention that they were individually concerned by the decision of 19 December 1991, that their locus standi could not be questioned because, if they had sought to intervene in the proceedings which resulted in the adoption of that decision (a course of action which they claim they would have taken had they been aware of the matters subsequently disclosed), they would have had a right of action to protect their legitimate interests, in accordance with settled case-law in the areas of competition, State aid, dumping and subsidies (see the order in Case T-96/92 R Comité Central d' Entreprise de la Société Générale des Grandes Sources and Others v Commission, cited above, and the judgments of the Court of Justice referred to therein).

38 Even if the Court were to accept that that case-law can be applied to disputes involving concentrations, considerations relating to the legal certainty of traders and the shortness of the time-limits which is a feature of the general system of Regulation No 4064/89 would in any event require that a request for the reopening of proceedings on the ground of the discovery of an allegedly new fact should be submitted within a reasonable period.

39 The Court takes the view in this case that the applicants' informal contact on 6 May 1992 with the Commission' s services cannot be regarded as a request for the reopening of the proceedings. Moreover, given that the applicants themselves stated that they had become aware "at the end of March or beginning of April 1992" of the allegedly new fact, namely the full text of the 1985 Paris agreement, the request for the reopening of the proceedings, submitted to the Commission on 26 June 1992, was made out of time since it was not submitted within a reasonable period. The applicants' argument based on the alleged existence of a new fact must for that reason be rejected.

40 The Court accordingly takes the view that the applicants are not directly and individually concerned by the Commission decision of 19 December 1991 and that the application is for that reason inadmissible, without its being necessary to decide whether reliance on a new fact might in different circumstances have enabled the applicants to circumvent the limitation periods laid down by the Treaty.

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NOTES	Colson, Jean-Louis ; Gunther, Jacques-Philippe: Droit des actionnaires minoritaires en matière de contrôle communautaire des concentrations, Actualités communautaires 1993 no 292 p.7-10 ; X: European Law Review Competition Law Checklist 1993 p.124-126 ; Blaise, Jean-Bernard ; Robin, Catherine: Concurrence, Revue des affaires européennes 1994 no 1 p.97-98 ; Hermitte, Marie-Angèle: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes. Concurrence, Journal du droit international 1994 p.524-526 ; Brown, Adrian: Judicial Review of Commission Decisions

under the Merger Regulation: The First Cases, European Competition Law Review 1994 p.296-305

PROCEDU Action for annulment - inadmissible

DATES of document: 28/10/1993
of application: 30/09/1992

Judgment of the Court (Grand Chamber)
of 2 May 2006
Eurofood IFSC Ltd. Reference for a preliminary ruling: Supreme Court - Ireland. Judicial cooperation in civil matters - Regulation (EC) No 1346/2000 - Insolvency proceedings - Decision to open the proceedings - Centre of the debtor's main interests - Recognition of insolvency proceedings - Public policy. Case C-341/04.

1. Judicial cooperation in civil matters - Insolvency proceedings - Regulation No 1346/2000

(Council Regulation No 1346/2000, Art. 3(1))

2. Judicial cooperation in civil matters - Insolvency proceedings - Regulation No 1346/2000

(Council Regulation No 1346/2000, Art. 16(1))

3. Judicial cooperation in civil matters - Insolvency proceedings - Regulation No 1346/2000

(Council Regulation No 1346/2000, Art. 26)

4. Judicial cooperation in civil matters - Insolvency proceedings - Regulation No 1346/2000

(Council Regulation No 1346/2000, Art. 26)

1. Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of Regulation No 1346/2000, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the regulation.

(see para. 37, operative part 1)

2. On a proper interpretation of the first subparagraph of Article 16(1) of Regulation No 1346/2000, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State. The rule of priority laid down in that provision, which provides that insolvency proceedings opened in one Member State are to be recognised in all the Member States from the time that they produce their effects in the State of the opening of proceedings, is based on the principle of mutual trust, which has enabled a compulsory system of jurisdiction to be established, and, as a corollary, has enabled the Member States to waive the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in the context of insolvency proceedings. If an interested party, taking the view that the centre of the debtor's main interests is situated in a Member State other than that in which the main insolvency proceedings were opened, wishes to challenge the jurisdiction assumed by the court which opened those proceedings, it may use, before the courts of the Member State in which they were opened, the remedies prescribed by the national law of that Member State against the opening decision.

(see paras 39-40, 43, operative part 2)

3. On a proper interpretation of the first subparagraph of Article 16(1) of Regulation No 1346/2000,

a decision to open insolvency proceedings is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to that regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to that regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets. The mechanism providing that only one main set of proceedings may be opened, producing its effects in all the Member States in which the regulation applies, could be seriously disrupted if the courts of those States, hearing applications based on a debtor's insolvency at the same time, could claim concurrent jurisdiction over an extended period. It is therefore necessary, in order to ensure the effectiveness of the system established by the regulation, that the recognition principle laid down in that provision be capable of being applied as soon as possible in the course of the proceedings.

(see paras 52, 54, operative part 3)

4. On a proper interpretation of Article 26 of Regulation No 1346/2000, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys. Though the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency. Whilst it is for the court of the State to which application has been made to establish whether a clear breach of the right to be heard has actually taken place in the conduct of the proceedings before the court of the other Member State, that court cannot confine itself to transposing its own conception of the requirement for an oral hearing and of how fundamental that requirement is in its legal order, but must assess, having regard to the whole of the circumstances, whether or not the persons concerned by that procedure were given sufficient opportunity to be heard.

(see paras 66-68, operative part 4)

In Case C-341/04,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Supreme Court (Ireland), made by decision of 27 July 2004, received at the Court on 9 August 2004, in the proceedings

Eurofood IFSC Ltd,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann (Rapporteur), C.W.A. Timmermans, A. Rosas and J. Malenovsku, Presidents of Chambers, J.-P. Puissochet, R. Schintgen, N. Colneric, J. Kluka, U. Lohmus and E. Levits, Judges,

Advocate General: F.G. Jacobs,

Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 12 July 2005,

after considering the observations submitted on behalf of:

- Mr Bondi, by G. Moss QC and B. Shipsey SC, J. Gleeson, G. Clohessy and E. Barrington, barristers-at-law, and by B. O'Neil, D. Smith and C. Mallon, solicitors,

- the Bank of America NA, by M.M. Collins SC and L. McCann SC, and by B. Kennedy, barrister-at-law, and W. Day, solicitor,

- Mr Farrell, Official Liquidator, by M.G. Collins SC and D. Murphy, barrister-at-law, and by T. O'Grady, solicitor,

- the Director of Corporate Enforcement, by A. Keating, principal solicitor, and C. Costello, barrister-at-law,

- the Certificate/Note holders, by D. Baxter, solicitor, D. McDonald SC, and J. Breslin, barrister-at-law,

- Ireland, by D. O'Hagan, acting as Agent, assisted by D. Barniville, barrister-at-law,

- the Czech Government, by T. Boek, acting as Agent,

- the German Government, by W.-D. Plessing, acting as Agent,

- the French Government, by G. de Bergues, JC. Niollet and A. Bodard-Hermant, acting as Agents,

- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by O. Fiumara and M. Massella Ducci Teri, acting as Agents,

- the Hungarian Government, by P. Gottfried, acting as Agent,

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the Finnish Government, by T. Pynnä and A. Guimaraes-Purokoski, acting as Agents,

- the Commission of the European Communities, by C. O'Reilly and A.-M. Rouchaud-Joet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 September 2005,

gives the following

Judgment

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

1. Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation.

2. On a proper interpretation of the first subparagraph of Article 16(1) of Regulation No 1346/2000, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State.

3. On a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, a decision to open insolvency proceedings for the purposes of that provision is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a

liquidator referred to in Annex C to the Regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets.

4. On a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.

1. This reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) (the Regulation').

2. The reference was submitted in the context of insolvency proceedings concerning the Irish company Eurofood IFSC Ltd (Eurofood').

Legal context

Community legislation

3. According to Article 1(1) thereof, the Regulation applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator'.

4. According to Article 2 of the Regulation, headed Definitions':

For the purposes of this Regulation:

(a) insolvency proceedings shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;

(b) liquidator shall mean any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C;

...

(e) judgment in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator;

(f) the time of the opening of proceedings shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not;

...'

5. Annex A to the Regulation, concerning the insolvency proceedings referred to in Article 2(a) of the Regulation, mentions under Ireland the procedure of compulsory winding up by the Court'. By way of liquidators referred to in Article 2(b) of the Regulation, Annex C indicates, in relation to Ireland, the provisional liquidator'.

6. Concerning the determination of the court having jurisdiction, Article 3(1) and (2) of the Regulation provide:

The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the

territory of the latter Member State'.

7. Concerning the determination of the law to be applied, Article 4(1) of the Regulation provides:

Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened...'.

8. Concerning the recognition of insolvency proceedings, Article 16(1) of the Regulation states:

Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.'

9. Article 17(1) of the Regulation states:

The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings ...'.

10. However, according to Article 26 of the Regulation:

Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.'

11. According to Article 29(a) of the Regulation, the liquidator in the main proceedings may request the opening of secondary proceedings.

12. Article 38 of the Regulation provides that, where the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings'.

National legislation

13. Section 212 of the Companies Act 1963 (the Companies Act') confers on the High Court jurisdiction to wind up any company.

14. Section 215 of the Companies Act provides that an application to the court for the winding up of a company is to be by petition presented either by the company or by any creditor or creditors.

15. Section 220 of the Companies Act provides:

1. Where, before the presentation of a petition for the winding up of a company by the court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

2. In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.'

16. Section 226(1) of the Companies Act provides that the court may appoint a provisional liquidator at any time after the presentation of a winding-up petition. The appointment of the liquidator, pursuant to section 225, is otherwise made at the time the winding-up order is made. Pursuant to section 229(1), a provisional liquidator, once appointed, is obliged to take into his custody or

under his control all the property and things in action to which the company is or appears to be entitled'.

Background and questions referred for a preliminary ruling

17. Eurofood was registered in Ireland in 1997 as a company limited by shares' with its registered office in the International Financial Services Centre in Dublin. It is a wholly owned subsidiary of Parmalat SpA, a company incorporated in Italy, whose principal objective was the provision of financing facilities for companies in the Parmalat group.

18. On 24 December 2003, in accordance with Decree-Law No 347 of 23 December 2003 concerning urgent measures for the industrial restructuring of large insolvent undertakings (GURI No 298 of 24 December 2003, p. 4), Parmalat SpA was admitted to extraordinary administration proceedings by the Italian Ministry of Production Activities, who appointed Mr Bondi as the extraordinary administrator of that undertaking.

19. On 27 January 2004, the Bank of America NA applied to the High Court (Ireland) for compulsory winding up proceedings to be commenced against Eurofood and for the nomination of a provisional liquidator. That application was based on the contention that that company was insolvent.

20. On the same day the High Court, on the strength of that application, appointed Mr Farrell as the provisional liquidator, with powers to take possession of all the company's assets, manage its affairs, open a bank account in its name, and instruct lawyers on its behalf.

21. On 9 February 2004, the Italian Minister for Production Activities admitted Eurofoods to the extraordinary administration procedure and appointed Mr Bondi as the extraordinary administrator.

22. On 10 February 2004, an application was lodged before the Tribunale Civile e Penale di Parma (District Court, Parma) (Italy) for a declaration that Eurofoods was insolvent. The hearing was fixed for 17 February 2004, Mr Farrell being informed of that date on 13 February. On 20 February 2004, the District Court in Parma, taking the view that Eurofood's centre of main interests was in Italy, held that it had international jurisdiction to determine whether Eurofoods was in a state of insolvency.

23. By 23 March 2004 the High Court decided that, according to Irish law, the insolvency proceedings in respect of Eurofood had been opened in Ireland on the date on which the application was submitted by the Bank of America NA, namely 27 January 2004. Taking the view that the centre of main interests of Eurofood was in Ireland, it held that the proceedings opened in Ireland were the main proceedings. It also held that the circumstances in which the proceedings were conducted before the District Court in Parma were such as to justify, pursuant to Article 26 of the Regulation, the refusal of the Irish courts to recognise the decision of that court. Finding that Eurofood was insolvent, the High Court made an order for winding up and appointed Mr Farrell as the liquidator.

24. Mr Bondi having appealed against that judgment, the Supreme Court considered it necessary, before ruling on the dispute before it, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Where a petition is presented to a court of competent jurisdiction in Ireland for the winding up of an insolvent company and that court makes an order, pending the making of an order for winding up, appointing a provisional liquidator with powers to take possession of the assets of the company, manage its affairs, open a bank account and appoint a solicitor all with the effect in law of depriving the directors of the company of power to act, does that order combined with the presentation of the petition constitute a judgment opening ... insolvency proceedings for the purposes of Article 16, interpreted in the light of Articles 1 and 2, of Council Regulation (EC) No 1346/2000?

(2) If the answer to Question 1 is in the negative, does the presentation, in Ireland, of a petition to the High Court for the compulsory winding up of a company by the court constitute the opening

of insolvency proceedings for the purposes of that regulation by virtue of the Irish legal provision (section 220(2) of the Companies Act, 1963) deeming the winding up of the company to commence at the date of the presentation of the petition?

(3) Does Article 3 of the said regulation, in combination with Article 16, have the effect that a court in a Member State other than that in which the registered office of the company is situated and other than where the company conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, but where insolvency proceedings are first opened has jurisdiction to open main insolvency proceedings?

(4) Where,

(a) the registered offices of a parent company and its subsidiary are in two different Member States,

(b) the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the Member State where its registered office is situated and

(c) the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control and does in fact control the policy of the subsidiary, in determining the centre of main interests, are the governing factors those referred to at (b) above or on the other hand those referred to at (c) above?

(5) Where it is manifestly contrary to the public policy of a Member State to permit a judicial or administrative decision to have legal effect in relation [to] persons or bodies whose right to fair procedures and a fair hearing has not been respected in reaching such a decision, is that Member State bound, by virtue of Article 17 of the said regulation, to give recognition to a decision of the courts of another Member State purporting to open insolvency proceedings in respect of a company, in a situation where the court of the first Member State is satisfied that the decision in question has been made in disregard of those principles and, in particular, where the applicant in the second Member State has refused, in spite of requests and contrary to the order of the court of the second Member State, to provide the provisional liquidator of the company, duly appointed in accordance with the law of the first Member State, with any copy of the essential papers grounding the application?'

25. By order of the President of the Court of Justice of 15 September 2004, the application by the Supreme Court that the accelerated procedure provided for in the first subparagraph of Article 104a of the Rules of Procedure be applied to the present case was rejected.

The questions

The fourth question

26. By its fourth question, which should be considered first since it concerns, in general, the system which the Regulation establishes for determining the competence of the courts of the Member States, the national court asks what the determining factor is for identifying the centre of main interests of a subsidiary company, where it and its parent have their respective registered offices in two different Member States.

27. The referring court asks how much relative weight should be given as between, on the one hand, the fact that the subsidiary regularly administers its interests, in a manner ascertainable by third parties and in respect for its own corporate identity, in the Member State where its registered office is situated and, on the other hand, the fact that the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control the policy of the subsidiary.

28. Article 3 of the Regulation makes provision for two types of proceedings. The insolvency proceedings

opened, in accordance with Article 3(1), by the competent court of the Member State within whose territory the centre of a debtor's main interests is situated, described as the main proceedings', produce universal effects in that they apply to the assets of the debtor situated in all the Member States in which the regulation applies. Although, subsequently, proceedings under Article 3(2) may be opened by the competent court of the Member State where the debtor has an establishment, those proceedings, described as secondary proceedings', are restricted to the assets of the debtor situated in the territory of the latter State.

29. Article 3(1) of the Regulation provides that, in the case of a company, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

30. It follows that, in the system established by the Regulation for determining the competence of the courts of the Member States, each debtor constituting a distinct legal entity is subject to its own court jurisdiction.

31. The concept of the centre of main interests is peculiar to the Regulation. Therefore, it has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation.

32. The scope of that concept is highlighted by the 13th recital of the Regulation, which states that the centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'.

33. That definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with Article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.

34. It follows that, in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.

35. That could be so in particular in the case of a letterbox' company not carrying out any business in the territory of the Member State in which its registered office is situated.

36. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation.

37. In those circumstances, the answer to the fourth question must be that, where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of the Regulation, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business

in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation.

The third question

38. By its third question, which should be examined second, since it concerns the recognition system established by the Regulation in general, the referring court essentially asks whether, by virtue of Articles 3 and 16 of the Regulation, a court of a Member State, other than the one in which the registered office of the undertaking is situated, and other than the one in which that undertaking conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, but where insolvency proceedings are first opened, must be regarded as having jurisdiction to open the main insolvency proceedings. The referring court is thus essentially asking whether the jurisdiction assumed by a court of a Member State to open main insolvency proceedings may be reviewed by a court of another Member State in which recognition has been applied for.

39. As is shown by the 22nd recital of the Regulation, the rule of priority laid down in Article 16(1) of the Regulation, which provides that insolvency proceedings opened in one Member State are to be recognised in all the Member States from the time that they produce their effects in the State of the opening of proceedings, is based on the principle of mutual trust.

40. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in the context of insolvency proceedings [see by analogy, in relation to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters (OJ 1978 L 304, p. 36; the Brussels Convention'), Case C-116/02 Gasser [2003] ECR I-14693, paragraph 72; Case C-159/02 Turner [2004] ECR I3565, paragraph 24].

41. It is inherent in that principle of mutual trust that the court of a Member State hearing an application for the opening of main insolvency proceedings check that it has jurisdiction having regard to Article 3(1) of the Regulation, i.e. examine whether the centre of the debtor's main interests is situated in that Member State. In that regard, it should be emphasised that such an examination must take place in such a way as to comply with the essential procedural guarantees required for a fair legal process (see paragraph 66 of this judgment).

42. In return, as the 22nd recital of the Regulation makes clear, the principle of mutual trust requires that the courts of the other Member States recognise the decision opening main insolvency proceedings, without being able to review the assessment made by the first court as to its jurisdiction.

43. If an interested party, taking the view that the centre of the debtor's main interests is situated in a Member State other than that in which the main insolvency proceedings were opened, wishes to challenge the jurisdiction assumed by the court which opened those proceedings, it may use, before the courts of the Member State in which they were opened, the remedies prescribed by the national law of that Member State against the opening decision.

44. The answer to the third question must therefore be that, on a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State.

The first question

45. By its first question, the referring court essentially asks whether the decision whereby a

court of a Member State, presented with a petition for the liquidation of an insolvent company, appoints, before ordering that liquidation, a provisional liquidator with powers whose legal effect is to deprive the company's directors of the power to act, constitutes a decision opening insolvency proceedings for the purposes of the first subparagraph of Article 16(1) of the Regulation.

46. The wording of Article 1(1) of the Regulation shows that the insolvency proceedings to which it applies must have four characteristics. They must be collective proceedings, based on the debtor's insolvency, which entail at least partial divestment of that debtor and prompt the appointment of a liquidator.

47. Those forms of proceedings are listed in Annex A to the Regulation, and the list of liquidators appears in Annex C.

48. The Regulation is designed not to establish uniform proceedings on insolvency, but, as its second recital states, to ensure that cross-border insolvency proceedings... operate efficiently and effectively'. To that end, it lays down rules which, as its third recital indicates, are aimed at securing coordination of the measures to be taken regarding an insolvent debtor's assets'.

49. By requiring that any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings, the first subparagraph of Article 16(1) of the Regulation lays down a rule of priority, based on a chronological criterion, in favour of the opening decision which was handed down first. As the 22nd recital of the Regulation explains, [t]he decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision'.

50. However, the Regulation does not define sufficiently precisely what is meant by a decision to open insolvency proceedings'.

51. The conditions and formalities required for opening insolvency proceedings are a matter for national law, and vary considerably from one Member State to another. In some Member States, the proceedings are opened very shortly after the submission of the application, the necessary verifications being carried out later. In other Member States, certain essential findings, which may be quite time-consuming, must be made before proceedings are opened. Under the national law of certain Member States, the proceedings may be opened provisionally' for several months.

52. As the Commission of the European Communities has argued, it is necessary, in order to ensure the effectiveness of the system established by the Regulation, that the recognition principle laid down in the first subparagraph of Article 16(1) of the Regulation, be capable of being applied as soon as possible in the course of the proceedings. The mechanism providing that only one main set of proceedings may be opened, producing its effects in all the Member States in which the Regulation applies, could be seriously disrupted if the courts of those States, hearing applications based on a debtor's insolvency at the same time, could claim concurrent jurisdiction over an extended period.

53. It is in relation to that objective seeking to ensure the effectiveness of the system established by the Regulation that the concept of decision to open insolvency proceedings' must be interpreted.

54. In those circumstances, a decision to open insolvency proceedings' for the purposes of the Regulation must be regarded as including not only a decision which is formally described as an opening decision by the legislation of the Member State of the court that handed it down, but also a decision handed down following an application, based on the debtor's insolvency, seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such

divestment involves the debtor losing the powers of management which he has over his assets. In such a case, the two characteristic consequences of insolvency proceedings, namely the appointment of a liquidator referred to in Annex C and the divestment of the debtor, have taken effect, and thus all the elements constituting the definition of such proceedings, given in Article 1(1) of the Regulation, are present.

55. Contrary to the arguments of Mr Bondi and the Italian Government, that interpretation cannot be invalidated by the fact that the liquidator referred to in Annex C to the Regulation may be a provisionally-appointed liquidator.

56. Both Mr Bondi and the Italian Government acknowledge that, in the main proceedings, the provisional liquidator' appointed by the High Court, by decision of 27 January 2004, appears amongst the liquidators mentioned in Annex C to the Regulation in relation to Ireland. They argue, however, that this is a case of a provisional liquidator, in respect of whom the Regulation contains a specific provision. They note that Article 38 of the Regulation empowers the provisional liquidator, defined in the 16th recital as the liquidator appointed prior to the opening of the main insolvency proceedings', to apply for preservation measures on the assets of the debtor situated in another Member State for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings. Mr Bondi and the Italian Government infer from that that the appointment of a provisional liquidator cannot open the main insolvency proceedings.

57. In that respect, it should be noted that Article 38 of the Regulation must be read in combination with Article 29, according to which the liquidator in the main proceedings is entitled to request the opening of secondary proceedings in another Member State. That Article 38 thus concerns the situation in which the competent court of a Member State has had main insolvency proceedings brought before it and has appointed a person or body to watch over the debtor's assets on a provisional basis, but has not yet ordered that that debtor be divested or appointed a liquidator referred to in Annex C to the Regulation. In that case, the person or body in question, though not empowered to initiate secondary insolvency proceedings in another Member State, may request that preservation measures be taken over the assets of the debtor situated in that Member State. That is, however, not the case in the main proceedings here, where the High Court has appointed a provisional liquidator referred to in Annex C to the Regulation and ordered that the debtor be divested.

58. In view of the above considerations, the answer to the first question must be that, on a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, a decision to open insolvency proceedings for the purposes of that provision is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets.

The second question

59. In the light of the answer given to the first question, there is no need to reply to the second question.

The fifth question

60. By its fifth question, the referring court essentially asks whether a Member State is required, under Article 17 of the Regulation, to recognise insolvency proceedings opened in another Member State where the decision opening those proc eedings was handed down in disregard of procedural rules guaranteed in the first Member State by the requirements of its public policy.

61. Whilst the 22nd recital of the Regulation infers from the principle of mutual trust that grounds for non-recognition should be reduced to the minimum necessary', Article 26 provides that a Member State may refuse to recognise insolvency proceedings opened in another Member State where the effects of such recognition would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

62. In the context of the Brussels Convention, the Court of Justice has held that, since it constitutes an obstacle to the achievement of one of the fundamental aims of that Convention, namely to facilitate the free movement of judgments, recourse to the public policy clause contained in Article 27, point 1, of the Convention is reserved for exceptional cases (Case C-7/98 Krombach [2000] ECR I1935, paragraphs 19 and 21).

63. Considering itself competent to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State, the Court of Justice had held, in the context of the Brussels Convention, that recourse to that clause can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order (Krombach , paragraphs 23 and 37).

64. That case-law is transposable to the interpretation of Article 26 of the Regulation.

65. In the procedural area, the Court of Justice has expressly recognised the general principle of Community law that everyone is entitled to a fair legal process (Case C-185/95 P Baustahlgewebe v Commission [1998] ECR I-8417, paragraphs 20 and 21; Joined Cases C-174/98 P and C-189/98 P Netherlands and Van der Wal v Commission [2000] ECR I-1, paragraph 17; and Krombach , paragraph 26). That principle is inspired by the fundamental rights which form an integral part of the general principles of Community law which the Court of Justice enforces, drawing inspiration from the constitutional traditions common to the Member States and from the guidelines supplied, in particular, by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

66. Concerning more particularly the right to be notified of procedural documents and, more generally, the right to be heard, referred to in the referring court's fifth question, these rights occupy an eminent position in the organisation and conduct of a fair legal process. In the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance. Though the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency.

67. In the light of those considerations, the answer to the fifth question must be that, on a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.

68. Should occasion arise, it will be for the referring court to establish whether, in the main proceedings, that has been the case with the conduct of the proceedings before the Tribunale civile

e penale di Parma. In that respect, it should be observed that the referring court cannot confine itself to transposing its own conception of the requirement for an oral hearing and of how fundamental that requirement is in its legal order, but must assess, having regard to the whole of the circumstances, whether or not the provisional liquidator appointed by the High Court was given sufficient opportunity to be heard.

Costs

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

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of 17 March 2005
Commission of the European Communities v AMI Semiconductor Belgium BVBA and Others.
Arbitration clause - Designation of the Court of First Instance - Jurisdiction of the Court of Justice - Parties in liquidation - Capacity to be parties to legal proceedings - Council Regulation (EC) No 1346/2000 - Insolvency proceedings - Recovery of advances - Reimbursement under a clause of the contract - Joint and several liability - Recovery of sums paid but not due. Case C-294/02.

1. Procedure - Action brought before the Court on the basis of an arbitration clause - Jurisdiction of the Court of Justice as an institution comprising both the Court of Justice and the Court of First Instance - No requirement that the arbitration clause should indicate the Community Court having jurisdiction

(Art. 238 CE)

2. Procedure - Action brought before the Court on the basis of an arbitration clause - Action brought by a Community institution against an undertaking subject to insolvency proceedings - No Community provisions on the matter - Reference to principles common to the procedural laws of the Member States - Principles laying down the circumstances in which such an action is inadmissible

(Art. 238 EC; Council Regulation No 1346/2000, Arts 4(2)(f), 16 and 17)

3. Procedure - Application initiating proceedings - Subject-matter of the dispute - Definition - Amendment during the proceedings - Not permitted

(Rules of Procedure of the Court, Arts 38 and 42)

1. Since the term Court of Justice', as used in the Treaty, does not refer to one Community court or the other but to the Community institution comprising both the Court of Justice and the Court of First Instance, the reference to the Court of Justice' in Article 238 EC must be taken to be a reference to that institution, and it is to the latter that a contract must refer in order for it to be possible for jurisdiction to be conferred on either of the Community courts.

Since the Treaty does not lay down any particular wording to be used in an arbitration clause, any wording which indicates that the parties intend to remove any dispute between them from the purview of the national courts and to submit them to the Community courts must be regarded as sufficient to give the latter jurisdiction under Article 238 EC.

(see paras 49-50)

2. An action brought by the Commission before the Community courts against undertakings subject to insolvency proceedings in a Member State is inadmissible.

It follows from the principles common to the procedural laws of the Member States, from which it is necessary to deduce the rules to be applied in the absence of Community provisions in the matter, that a creditor is not entitled to pursue his claims before the courts on an individual basis against a person who is the subject of insolvency proceedings but is required to observe the specific rules of the applicable procedure.

Moreover, it is clear from Regulation No 1346/2000 on insolvency proceedings that the Member States are required, on a mutual basis, to respect proceedings commenced in any one of them and that the opening of insolvency proceedings in a Member State is to be recognised in all the other Member States and is to produce the effects attributed thereto by the law of the State in which the proceedings are opened.

Consequently, the Community institutions would enjoy an unjustifiable advantage over the other creditors if they were allowed to pursue their claims in proceedings brought before the Community

judicature when any action before national courts was impossible.

(see paras 68-70)

3. In accordance with Article 38 of the Rules of Procedure, parties are required to state the subject-matter of the proceedings in their originating application. It follows that, even though Article 42 of the Rules of Procedure allows new pleas in law to be introduced in certain circumstances, a party may not alter the actual subject-matter of the action in the course of the proceedings. New claims put forward for the first time at the hearing could not be allowed without depriving defendants of an opportunity to prepare a response and thereby breaching the rights of the defence.

(see para. 75)

In Case C-294/02,

APPLICATION under Article 238 EC brought on

12 August 2002

,

Commission of the European Communities, represented by G. Wilms, acting as Agent, assisted by R. Karpenstein, Rechtsanwalt, with an address for service in Luxembourg,

applicant,

v

AMI Semiconductor Belgium BVBA , formerly Alcatel Microelectronics NV, established in Oudenaarde (Belgium), represented by M. Hallweger and R. Lutz, Rechtsanwälte,

A-Consult EDV-Beratungsgesellschaft mbH (in liquidation), established in Vienna (Austria), represented by E. Roehlich, Rechtsanwalt,

Intracom SA Hellenic Telecommunications & Electronic Industry, established in Athens (Greece), represented by M. Lienemeyer, U. Zinsmeister and D. Waelbroeck, avocats,

ISION Sales + Services GmbH & Co. KG (in liquidation), established in Hamburg (Germany), represented by H. Fialski and T. Delhey, Rechtsanwälte,

Euram-Kamino GmbH , established in Hallbergmoos (Germany), represented by M. Hallweger and R. Lutz, Rechtsanwälte,

HSH Nordbank AG, formerly Landesbank Kiel Girozentrale, established in Kiel (Germany), represented by B. Treibmann and E. Meincke, Rechtsanwälte,

and

InterTeam GmbH (in liquidation), established in Itzehoe (Germany), represented by M. Hallweger and R. Lutz, Rechtsanwälte,

defendants,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, R. Silva de Lapuerta, K. Lenaerts, S. von Bahr and K. Schiemann (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on

8 July 2004,

after hearing the Opinion of the Advocate General at the sitting on

23 September 2004,

gives the following

Judgment

Costs

109. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs.

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

1. Dismisses the application;

2. Dismisses the counterclaim by Intracom SA Hellenic Telecommunications & Electronic Industry;

3. Orders the Commission of the European Communities to pay the costs.

1. By its application, the Commission of the European Communities seeks from the Court an order that, as joint and several debtors, AMI Semiconductor Belgium BVBA, formerly Alcatel Microelectronics NV (AMI Semiconductor'), a company governed by Belgian law, AConsult EDVBeratungsgesellschaft mbH (AConsult'), a company governed by Austrian law, Intracom SA Hellenic Telecommunications & Electronic Industry (Intracom'), a company governed by Greek law, and also ISION Sales + Services GmbH & Co. KG, formerly AllCon Gesellschaft für Kommunikationstechnologie mbH (Ision'), EuramKamino GmbH (Euram'), HSH Nordbank, formerly Landesbank Kiel Girozentrale (Nordbank'), and InterTeam GmbH (InterTeam'), all four of which are governed by German law, pay it the sum of EUR 317 214, plus interest, as reimbursement of advances made by it under a contract (the contract') concluded with those companies in the context of Esprit Project No 26927 Electronic Commerce Fulfilment Service for the Electronics Industry (ECFS/E) (the project').

I - Facts

A - The contract

2. On 8 June 1998 the European Community, represented by the Commission, concluded with the defendants a contract relating to the financial contribution made to those companies for execution of the project.

3. The contract was drawn up in English. Under Article 10 thereof, it is governed by German law.

4. Under Article 1.1.1 of the contract, the defendants were required to carry out this contract jointly and severally towards the Commission for the work set out in Annex I up to the milestone at month 18'.

5. Article 1.1.2 of the contract reads as follows:

Subject to force majeure (including strikes, lockouts and other events beyond the reasonable control of the contractors), the contractors shall use reasonable endeavours to achieve the results intended for the Project and to fulfil the obligations of a defaulting contractor. A contractor shall not be liable to take action beyond its reasonable control or to reimburse money due from a defaulting contractor unless it has contributed to the default. Measures to be taken in the event of force majeure shall be agreed between the contracting parties.'

1. The scope of the contract

6. According to Article 1.1.1 of the contract, its purpose was execution of the work set out in Annex I thereto.

7. According to the project summary in Part 1 of that annex, the aim of the project was to facilitate sales of excess stocks of semiconductor components between undertakings in the electronic industry without using a broker and thereby to reduce transaction costs. Execution of the project was to facilitate attainment of that objective:

- by bringing together excess supply and unmet demand for components on a global platform;

- by supporting all business processes for the trade transactions created;

- by carrying out freight forwarding and declaration processes to fulfil buying/selling contracts, and

- by expanding the use of electronic commerce in the electronics field.

According to the same summary, the project would enable the electronics industry:

- to expand trade opportunities and reduce transaction costs by using global information exchange technology;

- to employ borderless electronic commerce in a globalised economy.

The three main objectives were set out as follows in the summary:

- integration of multiple key services for the electronics industry;

- design of appropriate interfaces for an efficient brokerage system to be integrated into the professional ITenvironment of future users and service providers;

- stimulation of increased electronic commerce in the electronics industry, including developing means for rewarding usage (bonus component') and for quantitatively determining the costefficiency gained through implementation of the project.

2. The work schedule

8. According to Article 2.2.1 of the contract, the time-limit for execution of the project was to be 18 months, as from 1 May 1998, that is to say the end of October 1999.

9. According to Title 2, point 2.2 of Part 2 of Annex I to the contract, the work was divided into eight workpackages, which were to give rise to a total of 29 deliverables. The first package encompassed the following deliverables:

Workpackage 1: Specification of relevant business procedures

Task 1.1 Commercial processes at user site (Months 0-2)

Components procurement processes

Excess inventory control and handling

QA processes (ISO 9000 etc.)

Alternate sourcing

Established payment methods

New payment methods

Task 1.2 Software interfaces/Standards (Months 0-2)

Interfaces to commercial software employed by industrial users

Software interfaces: Banks

Software interfaces: Carriers

Definition of SAP-specific parameters

Task 1.3 Evaluation of IT environment (Months 0-2)

PC, Workstation, LANs

Operating systems PC and networks

Internet access, Intranets'.

10. Tables defining the specific roles of the contractors for completion of the various workpackages also appear in Title 2, point 2.2 of Part 2 of Annex I to the contract.

11. Workpackage number 1 is broken down as follows, as indicated in the table on pages 40 and 41 of Annex I to the contract:

>lt>2

>lt>3

3. Monitoring by the Commission

12. Article 8 of Annex II to the contract provided that the Commission could be assisted by experts in managing the contract. In any such case, it was incumbent on the Commission to take the appropriate steps to ensure that those experts did not disclose or use confidential data given to them. Detailed information concerning those experts was to be given in advance to the contractors and the Commission was to take reasonable account of any objections raised by the contractors for legitimate business reasons.

4. The financial provisions

13. According to Article 3 of the contract, the total allowable costs were estimated as ECU 1 080 000 for the project. The same article provided that the Commission's contribution was to cover 50% of those costs, subject to the ceiling of ECU 540 000. The cost basis to be used was given in Annex I to the contract and Articles 18 to 20 of Annex II to the contract contain specific criteria to be applied for the calculation of allowable costs.

14. In Form 1 on page 6 of Annex I to the contract, the division among the defendants of the total allowable amount was set out as follows:

- Inter team: ECU 153 500;

- [Ision]: ECU 70 000;

- Euram: ECU 40 000;

- [Nordbank]: ECU 10 000;

- [AMI Semiconductor]: ECU 97 000;

- Intracom: ECU 68 000;

- A-Consult: ECU 101 500.

15. Form 5.3 on pages 56 and 57 of Annex I to the contract specifies the efforts, in person-months, to be provided by each contractor for the completion of each workpackage.

16. According to Article 4 of the contract, payment of the Commission's contribution was to be made as follows:

- an advance of ECU 270 000 within two months after the last signature of the contracting parties;

- by instalments to be paid within two months after the approval of the respective periodic progress reports and corresponding cost statements; the advance and instalments were not cumulatively to exceed ECU 486 000;

- the balance of its total contribution to (a guarantee retention of ECU 54 000) within two months after the approval of the last report, document or other project deliverables and the cost statement for the final period.

17. Article 23.2 of Annex II to the contract provided that all payments made by the Commission were to be treated as advances until acceptance of the appropriate deliverables, or if none were specified, until acceptance of the final report.

5. Reimbursements

18. Under Article 23.3 of Annex II to the contract the contractors undertook, in the event of the total financial contribution to the project payable by the Commission being less than the total amount of the payments made by the Commission, to reimburse the difference to it immediately.

19. Article 5.3(a)(i) of Annex II provided that the Commission was entitled to terminate the contract immediately by written notice where remedial action to rectify non-performance within a reasonable period of time (being not less than one month) specified in writing had been requested by the Commission and was not satisfactorily taken.

20. Article 5.4 of Annex II to the contract provided that, in the event of termination, the Community contribution to costs would relate only to costs in respect of project deliverables accepted by the Commission and such other costs as were fair and reasonable, including expenditure commitments.

21. According to the same paragraph, in the event of termination under Article 5.3(a) of Annex II to the contract, interest could be added to any amount to be reimbursed, upon written request, at a rate two percentage points above the rate applied by the European Monetary Institute for ECU operations for the period between receipt of the funds and their reimbursement.

6. The arbitration clause

22. Article 7 of Annex II to the contract contains an arbitration clause worded as follows:

The Court of First Instance of the European Communities, and in the case of appeal, the Court of Justice of the European Communities shall have exclusive jurisdiction in any dispute between the Commission and the contractors concerning the validity, application and interpretation of this contract.'

B - Performance of the contract

23. Execution of the project commenced in May 1998.

24. On 15 December 1998, the contractors sent the Commission a report covering a period of six months and describing the objectives attained. In that report, they declared that they had fully provided the various deliverables included in workpackages 1, 2 and 3.

25. To enable it to verify the results set out in the contractors' reports, the Commission proposed establishing a review team. Having received information concerning the experts proposed by the Commission and in particular their curricula vitae, InterTeam, by e-mail of 8 April 1999, agreed to the appointment of two candidates, Messrs Guida and Ouzounis.

26. At a meeting of the contractors and the Commission on 11 June 1999, the review team delivered its first review report, in which it mentioned serious deficiencies in the execution of the project. On the basis of those findings, the team announced suspension of the project until 1 July 1999 and invited the defendants to send it all necessary information showing that they had remedied the defects set out in the review report.

27. In a letter dated 18 June 1999, the Commission summarised the decisions taken at the meeting of 11 June 1999. On that occasion it also set, under Article 5.3(a)(i) of Annex II to the contract, an additional time-limit for the defendants and threatened to terminate the contract. By letters of 29 June and 14 July 1999, the Commission again complained about the defendants' execution of their contractual obligations and gave them a formal notice to remedy the non-performance of works and the defects discovered, and to do so within a period of one month.

28. At the beginning of July 1999, the defendants submitted to the Commission a report covering a period of 12 months, describing the objectives attained. According to that report, they had executed the project in accordance with the contract.

29. On 5 July 1999, the review team submitted a second review report which took account of the information contained in the 12-month progress report and the other documents provided by the contractors. That report contained fundamental criticisms of all the deliverables. Some of them, although described as poor, were nevertheless accepted.

30. Notwithstanding a complete re-presentation of the objectives attained by the defendants at a meeting held on 8 September 1999, the review team did not change its conclusion.

31. By letter of 21 December 1999 to InterTeam, the Commission declared the contract terminated with retroactive effect to 8 September 1999.

C - The payments made by the Commission and the claim for reimbursement

32. As a result of the entry into force of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro and the effect of Article 2(1) thereof, all references to ECU were replaced by references to euros at the rate of one euro per ECU.

33. In accordance with the provisions of the contract, the Commission paid the following sums to the defendants:

- EUR 270 000 on 8 June 1998;

- EUR 191 394 on 6 May 1999 for the period from 1 May to 31 October 1998.

The total amount advanced was thus EUR 461 394.

34. On 21 December 1999 the Commission sent the defendants a letter claiming reimbursement of EUR 317 214, representing the difference between the EUR 461 394 actually paid and the sum of EUR 1 44 180 which, according to its calculation, was the contribution payable by it.

35. A table in the application shows how, according to the Commission, those amounts, in euro, are apportioned among the defendants:

>lt>4

A = maximum assistance according to the contract, B = amount actually paid, C = assistance approved, D = amount to be repaid (B - C)

D - The winding up of three of the defendants

1. InterTeam

36. On 22 December 1999, a general meeting of InterTeam resolved that the company was to be wound up. On 17 July 2001, InterTeam filed its balance sheet as at 31 December 1999, which it described as corresponding to its balance sheet on liquidation. The balance sheet showed a deficit of DEM 695 605.33 (EUR 355 657.35) which was not covered by the company's own funds. On 8 November 2001 InterTeam was removed from the commercial register.

2. A-Consult

37. On 10 July 2002, a procedure for putting A-Consult into court-supervised receivership was commenced and the present administrator of the insolvent company, E. Roehlich, was appointed by the court as its administrator.

38. A-Consult withdrew its application to be put into court-supervised receivership so that, under Austrian insolvency law, that procedure was brought to an end and the insolvency procedure following court-supervised receivership' (Anschlußkonkursverfahren) was commenced on 25 July 2002.

3. Ision

39. On 19 July 2002, insolvency proceedings concerning Ision's assets were commenced and the court appointed H. Fialski as administrator of that company.

II - The jurisdiction of the Court of Justice

A - Legal framework

40. Article 238 EC provides:

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

41. Article 225(1) EC, in the version resulting from the Treaty of Nice, reads as follows:

The Court of First Instance shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 230, 232, 235, 236 and 238, with the exception of those assigned to a judicial panel and those reserved in the Statute for the Court of Justice. The Statute may provide for the Court of First Instance to have jurisdiction for other classes of action or proceeding.

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

42. Article 51 of the Statute of the Court of Justice, as in force until 31 May 2004, before the entry into force of Council Decision 2004/407/EC, Euratom of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice (OJ 2004 L 132, page 5), provided:

By way of exception to the rule laid down in Article 225(1) of the EC Treaty ..., the Court of Justice shall have jurisdiction in actions brought by the Member States, the institutions of the Communities and the European Central Bank.'

B - The applicability of the arbitration clause

43. The arbitration clause in Article 7 of Annex II to the contract, the wording of which is reproduced in paragraph 22 of this judgment, purports to grant exclusive jurisdiction to the Court of First Instance of the European Communities for any dispute which might arise in relation to the contract.

44. However, it is common ground that the division of jurisdiction between the Court of First

Instance and the Court of Justice, under the EC Treaty and the Statute of the Court of Justice annexed thereto, did not, when the application was lodged, provide for the Court of First Instance to hear actions brought, as in this case, by a Community institution.

45. For that reason, after initially being lodged with the Court of First Instance, the application was forwarded, pursuant to Article 54 of the Statute of the Court of Justice, to the Registry of that Court.

46. Although the jurisdiction of the Court of Justice is not contested by the parties, the applicability of the arbitration clause must, as the Advocate General correctly observed in point 53 of her Opinion, be examined by the Court of Justice of its own motion.

47. In principle, therefore, the question arises whether the designation of the Court of First Instance in an arbitration clause may entail the result that the Court of Justice has jurisdiction under Article 238 EC, which grants jurisdiction specifically to the Court of Justice'.

48. The answer is necessarily affirmative, for the reasons given below.

49. As the Advocate General observed in point 59 of her Opinion, the term Court of Justice', as used in the Treaty, does not refer to one Community court or the other but to the Community institution comprising both the Court of Justice and the Court of First Instance. Consequently, the reference to the Court of Justice' in Article 238 EC must be taken to be a reference to that institution, and it is to the latter that a contract must refer in order for it to be possible for jurisdiction to be conferred on either of the Community courts.

50. The Treaty does not lay down any particular wording to be used in an arbitration clause. Accordingly, any wording which indicates that the parties intend to remove any dispute between them from the purview of the national courts and to submit them to the Community courts must be regarded as sufficient to give the latter jurisdiction under Article 238 EC.

51. Designation of the Court of First Instance clearly satisfies that requirement without it being necessary to interpret the clause in question in the light of the law applicable to the contract.

52. The fact that the parties incorrectly sought to determine the specific court within the institution of the Court of Justice' which was to deal with their disputes and that the arbitration clause is consequently partly ineffective does not detract from the clearly expressed intention of the parties to keep any disputes between them out of the national courts and to submit them to the Community courts.

53. The Court of Justice therefore has jurisdiction to adjudicate in the proceedings brought by the Commission and on the counterclaim brought by Intracom.

III - The admissibility of the action in so far as it is directed against the three defendants that are being, or have been, wound up

54. Three of the defendants, namely InterTeam, A-Consult and Ision, object that the action is inadmissible as far as they are concerned, primarily because, when the action was brought, they were involved, at various stages, in insolvency proceedings.

A - Legal background

1. Community law

55. Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1), which was adopted on the basis of Article 61(c) EC and Article 67(1) EC, includes the following recitals in its preamble:

(2) The proper functioning of the internal market requires that crossborder insolvency proceedings

should operate efficiently and effectively and this regulation needs to be adopted in order to achieve this objective which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

(3) The activities of undertakings have more and more crossborder effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets.

(4) It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).

...

(8) In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having crossborder effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States.'

56. The same regulation contains the following provisions:

Article 3

International jurisdiction

1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

...

Article 4

Law applicable

1. Save as otherwise provided in this regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the State of the opening of proceedings.

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

...

(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with

the exception of lawsuits pending;

...

Article 16

Principle [of the recognition of insolvency proceedings]

1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.

This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States.

2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State....

Article 17

Effects of recognition

1. The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under [the] law of the State of the opening of proceedings, unless this regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.

2. The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States. Any restriction of the creditors' rights, in particular a stay or discharge, shall produce effects visàvis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

...

Article 40

Duty to inform creditors

1. As soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States.

2. That information, provided by an individual notice, shall in particular include time-limits, the penalties laid down in regard to those time-limits, the body or authority empowered to accept the lodgement of claims and the other measures laid down. Such notice shall also indicate whether creditors whose claims are preferential or secured in rem need lodge their claims.'

2. National law

57. Under German law, the opening of insolvency proceedings against a company has, in particular, the following consequences:

- pursuant to Paragraph 80 of the Insolvenzordnung (German Insolvency Code of 5 October 1999, BGBl. I, p. 2866, in the version applicable to these proceedings, hereinafter the InsO'), control of the assets of the company is vested in the administrator. As a result the administrator has the right to commence and defend legal actions, which implies that any notice of proceedings against the company must be served on the administrator and not on the company;

- pursuant to paragraph 87 of the InsO, creditors may enforce their claims against the company only if they comply with the provisions governing insolvency procedure. Consequently, the provisions of Paragraph 174 et seq. of the InsO displace the normal remedies governed by the rules of civil procedure and actions brought directly against the company or the administrator are inadmissible.

58. Under Austrian law, Paragraph 6(1) of the Konkursordnung (Austrian Insolvency Code, RGBl. No 337/1914, in the version applicable to these proceedings, hereinafter the KO'), actions to enforce claims against assets forming part of the insolvency estate cannot be brought or continued once insolvency proceedings have been commenced.

B - The admissibility of the action in so far as it is directed against InterTeam

59. According to AMI Semiconductor, Euram and InterTeam, the action is inadmissible to the extent to which it relates to InterTeam because the latter was removed from the commercial register on 8 November 2001, that is to say nine months before the Commission lodged its application, and consequently InterTeam had lost its legal capacity by that date.

60. As the Advocate General states in point 67 of her Opinion, an action against a company is inadmissible if, when the action is brought, that company had neither legal capacity nor standing to be a party to legal proceedings. The applicable law in that connection is that governing the incorporation of the company in question, which in this case is German law (see Case 81/87 Daily Mail and General Trust [1988] ECR 5483, paragraph 19, and Case C-208/00 Überseering [2002] ECR I-9919, paragraph 81).

61. It is common ground that under German law a limited liability company (GmbH'), such as InterTeam, loses its capacity to be a party to legal proceedings as a result of being dissolved, which necessarily involves its removal from the commercial register following a finding that it has no assets. De-registration thus creates a presumption that there are no assets.

62. Whilst in principle that presumption could be rebutted, with the result that the de-registered company might recover its capacity to be a party to legal proceedings, the simple fact of affirming that a de-registered company still has assets is not, contrary to the Commission's contention, sufficient for that purpose. The Commission should have set out the factual support for its allegation, by indicating, for example, the assets which, in its opinion, still exist, and stating at least the approximate value and legal basis thereof and, if appropriate, identifying the debtor from which they are due.

63. In the absence of such information, the action must be declared inadmissible in so far as it is directed against InterTeam.

C - The admissibility of the action in so far as it is directed against A-Consult and Ision

64. When the action was brought, insolvency proceedings had been commenced against those two companies under their respective national laws.

65. It is common ground that, under the relevant national provisions, namely Paragraph 6 of the KO in the case of A-Consult and Paragraph 87 of the InsO in the case of Ision, an action of the kind brought by the Commission would in such circumstances have been held to be inadmissible if brought against those companies before national courts.

66. Article 238 EC, in conjunction with the arbitration clause, in principle confers on the Court of Justice jurisdiction to deal with disputes between the parties.

67. Nevertheless, the question has arisen of how that jurisdiction is to be exercised vis-à-vis a party against which insolvency proceedings have been instituted. That question must be examined in the light of the procedural law applicable in the Court of Justice.

68. Given that neither the Statute of the Court of Justice nor its Rules of Procedure contain any specific provisions concerning the treatment of applications brought against parties against which insolvency proceedings have been commenced, it is necessary to deduce what rules are applicable from the principles common to the procedural laws of the Member States in this area.

69. In that connection, it appears that in the procedural laws of most of the Member States a creditor is not entitled to pursue his claims before the courts on an individual basis against a person who is the subject of insolvency proceedings but is required to observe the specific rules of the applicable procedure and that, if he fails to observe those rules, his action will be inadmissible. Moreover, the Member States are required, on a mutual basis, to respect proceedings commenced in any one of them. That is clear from Article 4(2)(f) of Regulation No 1346/2000 according to which the law governing the effects of insolvency proceedings brought by individual creditors is that of the State in which they were opened, which in this case means Austrian law and German law. Furthermore, by virtue of Articles 16 and 17 of the same regulation, the opening of insolvency proceedings in a Member State is to be recognised in all the other Member States and is to produce the effects attributed thereto by the law of the State in which the proceedings are opened.

70. As the Advocate General observed in points 84 and 85 of her Opinion, the aim of Regulation No 1346/2000 is, as is clear in particular from recitals 2, 3, 4 and 8 in its preamble, to ensure the efficiency and proper coordination of insolvency proceedings within the European Union and thus to ensure equal distribution of available assets amongst all the creditors. The Community institutions would enjoy an unjustifiable advantage over the other creditors if they were allowed to pursue their claims in proceedings brought before the Community judicature when any action before national courts was impossible.

71. The Commission is also wrong to invoke Article 40 of Regulation No 1346/2000 by referring to the period of two-and-a-half months which had elapsed between the opening of the insolvency proceedings, on 10 July 2002, and the giving of notice thereof on 23 September 2002, in order to oppose the application of that regulation to this case. First, pursuant to Article 17(1) of that regulation, the opening of insolvency proceedings takes effect in the other Member States without the need for any notice to be given under Article 40 of that regulation. Second, even if the notice given to the Commission might be regarded as belated, Regulation No 1346/2000 does not provide for such belatedness to have any repercussions on recognition of the proceedings in other Member States, subject to possible entitlement to compensation for harm caused by late notification.

72. In view of the foregoing, the Commission's action, as set out in its application, must be declared inadmissible in so far as it is directed against A-Consult and Ision.

D - The additional claims made by the Commission

73. At the hearing, the Commission sought, in the alternative, to make additional claims, to the effect that, in so far as it is directed against A-Consult and Ision, its action should be regarded as seeking a declaration proving the debts payable to it for the purpose of pursuing them in national insolvency proceedings.

74. Those additional claims are manifestly inadmissible.

75. In the first place, they infringe the requirements of Article 38 of the Rules of Procedure.

According to that article, parties are required to state the subject-matter of the proceedings in their originating application. Even though Article 42 of the Rules of Procedure allows new pleas in law to be introduced in certain circumstances, a party may not alter the actual subject-matter of the action in the course of the proceedings (see Case 232/78 Commission v France [1979] ECR 2729, paragraph 3, and Case 125/78 GEMA v Commission [1979] ECR 3173, paragraph 26). New claims put forward for the first time at the hearing could not be allowed without depriving defendants of an opportunity to prepare a response and thereby breaching the rights of the defence.

76. Second, the relief sought falls outside the authority conferred on the Court of Justice by the arbitration clause in this case, which limits its jurisdiction to any dispute between the Commission and the contractors', and an application seeking a finding which is to be relied on in insolvency proceedings implies the involvement of other parties, namely the other creditors of the insolvent undertaking. In that connection, it should be emphasised that the Commission has not taken any steps with a view to involving those parties in the present proceedings.

77. Finally, the considerations set out in paragraphs 68 to 70 of this judgment are also applicable to the Commission's additional claims, and the latter must be declared inadmissible for that reason.

78. Consequently, the further forms of order sought by the Commission must also be rejected as inadmissible.

IV - The merits of the application in so far as it is directed against AMI Semiconductor, Intracom, Euram and Nordbank

79. The Commission's claims against the defendants have two legal bases. First, the Commission relies on its contractual right to reimbursement under Article 23.3 of Annex II to the contract. Second, it alleges unjust enrichment of the defendants within the meaning of paragraph 812 of the Bürgerliches Gesetzbuch (German Civil Code, the BGB'); according to that provision any person who without legal cause obtains anything to the detriment of a third party because of something done by that third party, or in any other way, is obliged to make restitution'.

A - The right to reimbursement based on Article 23.3 of Annex II to the contract

80. Article 23.3 of Annex II to the contract provides that if the payments made for the project exceed the total financial contribution due from the Commission, the contractors are required immediately to reimburse the difference between the payments and that contribution.

81. As far as the application of the provision to this case is concerned, two questions in particular have arisen. It is necessary first to determine whether the reimbursement obligation under that provision is joint and several or whether, on the contrary, a reimbursement may be sought only from those contractors who actually received funds from the Commission. Second, the calculation of the total financial contribution due from the Commission must be examined.

1. Joint and several liability

82. The expression contractors' is defined on the second page of the contract as referring collectively to the seven defendants who entered into the contract with the Commission. Nevertheless, the precise implications of the use of that expression in Article 23.3 of Annex II to the contract have been the subject of heated debate between the parties.

83. According to the Commission, the use of that expression shows that the reimbursement obligation laid down by that provision attaches to all the contractors and not only to those who received the advances at issue. The Commission is therefore entitled, in its view, to pursue each of the contractors for the total sum of the advances.

84. The defendants, on the contrary, contend that joint and several liability cannot be inferred

merely from the use of the expression the contractors' and that if such liability was what the parties had intended, it should have been made clearer. They also observe that the obligation imposed by Article 23.3 of Annex II to the contract is, according to the express terms of that provision, an obligation of reimbursement' which, by definition, presupposes that the amount of which reimbursement is sought has previously been received by the party from whom it is claimed.

85. Article 23.3 is not in itself sufficiently clear in that connection and must therefore be interpreted in the context of the other contractual provisions, notably Article 1 of the contract.

86. Article 1.1 at first sight imposes an obligation jointly and severally' on the parties to perform the contract for the work set out in Annex I'. That obligation, which in any event applies, according to the wording of the provision, only to performance of the work but not to the reimbursement of advances, is then strictly limited by Article 1.2.

87. Thus, the second sentence of Article 1.2 of the contract negates any joint and several liability for reimbursement of advances by providing that a contractor is not to be liable... to reimburse money due from a defaulting contractor unless it has contributed to the default'.

88. It follows from the above analysis that Article 23.3 of Annex II to the contract, interpreted in the light of Article 1.2 of the contract, requires a contractor to reimburse only advances which it has actually received, unless it is shown that the same contractor contributed to a default so as to confer on the Commission entitlement to reimbursement of an advance paid to another contractor. The burden of proving a contractor's contribution to such a default necessarily falls on the Commission as the claimant alleging that default.

89. The Commission has not shown that AMI Semiconductor, Intracom, Euram or Nordbank contributed in any way to a specific default by another contractor so as to entitle the Commission to reimbursement of an advance received by that other contractor. As the Advocate General observed in point 145 of her Opinion, allegations of a general nature that the defendants did not co-operate sufficiently or did not satisfy their obligations to provide the Commission with information are inadequate in that regard, even if they are partially based on the review reports.

90. It must therefore be accepted that none of the defendants can be required to reimburse under Article 23.3 of Annex II to the contract any greater sum than it itself received.

2. Calculation of the financial contribution due from the Commission

91. Article 23.3 of Annex II to the contract makes the right to reimbursement subject to the condition that the total financial contribution payable by the Commission in respect of the project is less than the sum of the advances already paid. In those circumstances, each of the defendants would be required to repay the difference between the advances received by it and the defrayal of the costs claimable by it.

92. In its application, the Commission gave a breakdown, in a table reproduced in paragraph 35 of this judgment, of the amounts which each of the defendants should, in its opinion, repay individually in the event of joint and several liability not being applicable. Those amounts were calculated by subtracting from the amount actually received by each contractor from the Commission the amounts relating to deliverables accepted by the Commission in so far as the contractor in question was considered to have contributed to them on the basis of the allocation of the work set out in Annex I to the contract.

93. Given that the Commission recognises that Nordbank was not the recipient of any payment and that Intracom received an amount less than that due to it, the Commission cannot claim any reimbursement from those two defendants.

94. It is common ground that AMI Semiconductor received in all the sum of EUR 26 743 and that

the Commission accepted deliverables up to a value of EUR 26 214.55. Consequently, the maximum amount that that company should repay is EUR 528.45. It is also common ground that Euram received the sum of EUR 21 606 and that none of the deliverables to which it contributed was accepted.

95. As regards the claims directed against those two defendants, the Commission is not entitled to refuse to approve deliverables or cost statements without giving a detailed explanation of how the work was deficient. Contrary to the Commission's contention, the specific nature of the contract, deriving from the fact that it is a contract for the payment of grants for which the Commission receives no consideration as such, does not mean that the Commission enjoys a discretion as to whether or not to accept the deliverables. As the Advocate General correctly observed in points 167 to 171 of her Opinion, for such wide unilateral powers of decision to have been conferred on the Commission, the contract would have had to contain clauses to that effect.

96. It is therefore necessary to consider whether the Commission's refusal to accept work done by AMI Semiconductor and Euram is justified. As the Advocate General observed in point 161 of her Opinion, the dispute is concerned essentially with deliverables 1.1 (Complete set of user-defined system functions and design specifications'), 1.2 (Complete set of design specifications for future software interfaces to integrate with the commercial software environment of these organisations') and 1.3 (Full description of future business partners' IT environment'), those three being the only rejected deliverables to which AMI Semiconductor and Euram had contributed.

97. The Commission based its rejection of those deliverables solely on the reports in which the review team recommended rejection. As regards the evidential force of those reports, the Commission's argument that they are binding on the defendants must be rejected at the outset. Although the defendants approved the choice of the two candidates proposed by the Commission, neither Article 8 of Annex II to the contract nor any other clause of the contract nor anything in the communications between them shows that the parties to the contract were to be bound by the reports drawn up by that team. Moreover, such binding force would manifestly run counter to the position taken on this point by the Commission which, at the hearing, contended that it could itself disregard those reports if it so wished.

98. In its second review report, the review team recommended that the deliverables at issue be rejected. Deliverable 1.1 was described as being largely incomplete and superficial. Deliverables 1.2 and 1.3 were judged to be non-existent on the ground that the documents provided to the team purported, according to their title, only to be summaries' and not complete documents.

99. There are certain unexplained contradictions in those reports. For example, with respect to deliverable 1.1, the review team criticises the fact that undertakings in the financial sector or the logistics sector, although represented in the consortium set up by the defendants, did not contribute to the execution of that deliverable. However, it is clear from Annex I to the contract that the participation of Nordbank or of Euram in that deliverable was not provided for by the contract. Clearly, the review team did not, in that respect, apply the contractual criteria in assessing the compliance of the work done, but wrongly applied its own criteria.

100. As regards deliverable 1.3, at the hearing the Commission observed that the presentation thereof by the defendants took up only one page, which was not compatible with the effort required in the contract for that deliverable. In fact, it is appropriate to point out that at first sight there is a surprising divergence between the four-and-a-half manmonths' envisaged on page 57 of Annex I to the contract for that deliverable and the brevity of the report submitted. Nevertheless, the fact that a report is brief does not necessarily imply that it lacks quality or does not comply with the contractual stipulations, the only relevant criteria in this case. If the Commission entertained doubts as to the amount of the costs invoiced for a deliverable, it should have contested the cost statements by reference to the criteria laid down in Articles 18 to 20 of Annex II to the contract

instead of rejecting the deliverable.

101. For rejection of a deliverable to be justifiable, the Commission must specifically identify the aspects of the deliverable which it wishes to criticise, giving the reasons for which, in its view, the deliverable failed to conform with the contractual stipulations. In this case, neither the review reports nor the Commission's application are sufficiently explicit in that regard.

102. Consequently, the Commission's pleas in law claiming a right of reimbursement under Article 23.3 of Annex II to the contract must be rejected. Therefore, the claim for interest based on Article 5.4 of the same annex must also be rejected.

B - The right to reimbursement based on Paragraph 812 of the BGB

103. As the Advocate General rightly observed in point 185 of her Opinion, a claim that amounts paid but not due should be reimbursed because they amount to unjust enrichment as provided for in Paragraph 812 of the BGB must be rejected for the same reasons as the claim for reimbursement based on the contract. In the absence of proof that the payments received exceeded the amounts due to the contractors, the Commission has not established the existence of any unjust enrichment.

104. The Commission's claim must therefore be dismissed in its entirety.

V - Intracom's counterclaim

105. By its counterclaim, Intracom seeks payment, from the Commission, of EUR 6 022. That amount represents the difference between the advance of EUR 10 362 actually paid by InterTeam to Intracom and the portion of the costs relating to the approved deliverables borne by Intracom which, according to the Commission's calculation, amounts to EUR 16 384.09.

106. Apart from alleging that the Commission obtained unjust enrichment', Intracom has not indicated the legal basis of its claim.

107. It is common ground that the Commission had, by its payments to InterTeam, transferred sufficient funds to the defendants to cover the payment of EUR 6 022 for Intracom. By the time the contract had come to an end, a sum of EUR 300 934 had been paid to InterTeam but that sum had not been passed on by the latter to the other defendants. Given that InterTeam could, according to the figures in the form on page 6 of Annex I to the contract, have been entitled in its own right t to payments of a maximum amount of EUR 153 500 under the contract, InterTeam was holding a sum of at least EUR 147 434 on behalf of the other contractors.

108. In those circumstances, the Commission did not obtain any unjust enrichment. Consequently, Intracom's counterclaim must be rejected.

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Judgment of the Court (Third Chamber) of 3 March 2005

I/S Fini H v Skatteministeriet. Reference for a preliminary ruling: Højesteret - Denmark. Sixth VAT Directive - Status of taxable person - Right to deduct - Winding up - Direct and immediate link - Transactions forming part of the economic activity as a whole. Case C-32/03.

Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Economic activities within the meaning of Article 4 of the Sixth Directive - Taxable person - Meaning - Person having ceased an economic activity but continuing to pay rent and charges relating to premises previously used for that activity owing to the impossibility of surrendering the lease - Included - Benefit of a right to a deduction - Conditions

(Council Directive 77/388, Art. 4 (1) to (3))

Article 4(1) to (3) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes is to be interpreted as meaning that a person who has ceased an economic activity but who, because the lease contains a non-termination clause, continues to pay the rent and the charges on the premises used for that activity, is to be regarded as a taxable person within the meaning of that article and is entitled to deduct the value added tax on the amounts thus paid, provided that there is a direct and immediate link between the payments made and the economic activity and that the absence of any fraudulent or abusive intent has been established.

Transactions such as the payments which a person continues to make during the period over which their business was wound up must be regarded as forming part of the economic activity within the meaning of Article 4 of the Sixth Directive. Moreover, there is a direct and immediate link between the obligation to continue to pay the rent and other charges after the economic activity has ceased and the carrying on of that activity, since the lease was entered into in order to have the premises available which were necessary for carrying on that activity, which was actually carried on there. The duration of the obligation to pay the rent and the charges on those premises has, in that respect, no bearing, provided that that period of time is strictly necessary to complete the winding-up of the business.

(see paras. 24, 26, 28-29, 35, operative part)

In Case C-32/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Højesteret (Denmark), made by decision of

22 January 2003

, received at the Court on

28 January 2003

, in the proceedings

I/S Fini H

v

Skatteministeriet

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Borg Barthet, J.-P. Puissochet, J. Malenovsku and U. Lohmus (Rapporteur), Judges,

Advocate General: F.G. Jacobs,

Registrar: H. von Holstein, Deputy Registrar

having regard to the written procedure and further to the hearing on

15 September 2004,

after considering the observations submitted on behalf of:

- I/S Fini H, by S. Halling-Overgaard and M. Krarup, advokaterne,

- the Skatteministeriet, by P. Biering, acting as Agent,

- the Danish Government, by J. Molde and P. Biering, acting as Agents,

- the Commission of the European Communities, by E. Traversa and T. Fich, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on

28 October 2004,

gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Article 4(1) to (3) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18, the Sixth Directive').

2. The reference was made in the course of proceedings between the limited partnership I/S Fini H (Fini H') and the Skatteministeriet (Ministry of Taxation). The Skatteministeriet demands that the partnership repay the negative value added tax (VAT') paid to it during the period from 1 October 1993 to 31 March 1998. Moreover, it refuses to pay Fini H negative VAT in respect of the period from 1 April to 30 September 1998.

Legal framework

Community legislation

3. According to the fourth recital in its preamble, the purpose of the Sixth Directive is, inter alia, to ensure that the common system of turnover taxes is non-discriminatory.

4. Article 4 of the Sixth Directive provides:

1. Taxable person shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

3. Member States may also treat as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in paragraph 2...

...'

5. Article 17(2) of the Sixth Directive is worded as follows:

In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

...'

National legislation

6. Article 3 of the momsloven (law on VAT), as published in Consolidating Regulation No 804 of 16 August 2000, (the VAT law') is worded as follows:

Taxable person shall mean any natural or legal person who independently carries on an economic activity.'

7. The right to deduct VAT on expenses linked to an independent economic activity is provided for in Article 37 of the VAT law.

The main case and the questions referred for a preliminary ruling

8. Fini H is a limited partnership which was created in 1989 with the object of running a restaurant. In order to carry on that activity, it leased premises from 20 May 1988. The lease, which was concluded for a term of 10 years, could be terminated only with effect from 30 September 1998.

9. Fini H closed its restaurant at the end of 1993 and the premises subsequently remained unused. It sought to terminate the lease but the landlord refused to consent, and relied on the absence in the lease of a clause providing for early termination. Moreover, Fini H failed to find a replacement tenant to take over the lease, which came to an end only on its contractual date of expiry.

10. During the period from the end of 1993 to 30 September 1998, Fini H remained registered in the VAT register even though it no longer carried on its restaurant business. It thus continued to deduct input tax paid by it on the costs incurred in relation to the lease in question, namely the rent and the heating, electricity and telephone charges. Once the restaurant was closed and there was no longer any output tax to declare, this resulted in net payments to Fini H.

11. In September 1998, the told-og skatteregionen (regional tax authority the authority') demanded repayment of the sums paid to Fini H as negative VAT between October 1993 and March 1998. It also decided that the amounts of VAT yet to be paid in respect of the period from 1 April to 30 September 1998 would not be reimbursed. The authority argued that Fini H had not carried on any activity subject to VAT since the third quarter of 1993.

12. That position was upheld by the Landsskatteretten (Supreme Administrative Tax Authority). It took the view that, following the cessation of its restaurant business, Fini H had not carried on an economic activity within the meaning of Article 3 of the VAT law. The lease could not, by itself, establish liability for VAT under that article. The Landsskatteretten added that the fact that the premises were, for a certain period, used for economic purposes in the form of a restaurant did not appear to justify a requirement that Fini H be regarded as a taxable person for VAT purposes under Article 3 once that activity had ceased.

13. Fini H then brought an action against that decision of the Landsskatteretten before the Vestre Landsret (Denmark), which dismissed it by judgment of 29 August 2001. The Vestre Landsret held that entitlement to deduct input tax requires that the taxable expenditure relate to an independent economic activity within the meaning of Article 3 of the VAT law. It ruled that the expenditure on rent and charges incurred after Fini H had ceased its restaurant business, which were not attributable to normal winding-up operations, could not be regarded as operational expenditure linked to an independent economic activity within the meaning of Article 3 of the VAT law.

14. Fini H lodged an appeal against that judgment of the Vestre Landsret before the Højesteret.

15. It was against that background that the Højesteret decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

1. Can a person be regarded as independently carrying on an economic activity within the meaning of Article 4(1) to (3) of the Sixth VAT Directive in a situation in which the person concerned originally entered into a lease agreement as part of an independent economic activity but has now ceased that actual activity, even though the lease continues to exist for a particular period as a result of a non-termination clause, and in which, after the actual activity ceases, no transactions subject to VAT are conducted by application of the lease for the purpose of obtaining income therefrom on a continuing basis?

2. Does the question whether or not the person concerned actively seeks, during the remaining part of the period of non-terminability, either to utilise the commercial lease to conduct transactions subject to VAT for the purpose of obtaining income therefrom on a continuing basis or to dispose thereof have any bearing on the answer to Question 1 and does the length of the period of non-terminability or the remaining part thereof likewise have any bearing?'

The questions referred for a preliminary ruling

The first question

16. By its first question, the national court is asking, essentially, whether Article 4(1) to (3) of the Sixth Directive must be interpreted as meaning that a person who has ceased his commercial activity but continues to pay the rent and charges on the premises used for that activity because the lease contains a non-termination clause is to be regarded as a taxable person and, therefore, as entitled to deduct VAT on the inputs thus paid.

17. Fini H submits that it derives its right to deduct from the fact that the lease was concluded for the purpose of starting or carrying on an economic activity. If it were not recognised as being entitled to deduct VAT, it would have to pay VAT on goods and supplies acquired for business purposes.

18. According to the Danish Government and the Commission of the European Communities, where a taxable person no longer exercises an economic activity, the right to deduct ceases to apply to him from the date on which he ceased that activity or after a reasonable period of brief duration calculated from that date. A taxable person cannot enjoy a right to deduct indefinitely on account of the fact that, in the past, he exercised an economic activity.

19. The Court observes, first of all, that Article 4(1) of the Sixth Directive defines taxable person' by reference to the term economic activity'. It is the existence of such an activity which establishes the status of taxable person' to whom the Sixth Directive gives the right to deduct.

20. Article 4(2) states that economic activities' are to be understood as comprising, in particular, all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The expression all activities' used in that provision suggests that the economic activity concerned may consist of several consecutive transactions.

21. The case-law also makes clear that an economic activity within the meaning of the Sixth Directive need not consist of a single act but may consist of a series of consecutive acts (see, in particular, Case 268/83 Rompelman [1985] ECR 655, paragraph 22).

22. Accordingly, preparatory acts must be regarded as economic activities within the meaning of the Sixth Directive. Any person performing such preparatory acts is consequently regarded as a taxable person within the meaning of Article 4 of that directive and is entitled to deduct (Rompelman , paragraph 23, and Case C110/94 INZO [1996] ECR I857, paragraph 18). Entitlement to deduct is retained, even if it is subsequently decided, in view of the results of a profitability study,

not to move to the operational phase but to put the company into liquidation, with the result that the economic activity envisaged does not give rise to taxed transactions (INZO , paragraph 20).

23. With respect to the transfer of a totality of assets, the Court has held that, where the taxable person no longer effects transactions after using services provided for that purpose, the costs of those services must be regarded as part of the economic activity of his business as a whole before the transfer and that he must be recognised as being entitled to deduct. Any other interpretation would amount to drawing an arbitrary distinction between, on the one hand, expenditure incurred for the purposes of a business before it is actually operated and that incurred during its operation and, on the other hand, the expenditure incurred in order to terminate its operation (see Case C408/98 Abbey National [2001] ECR I1361, paragraph 35, and Case C137/02 Faxworld [2004] ECR I0000, paragraph 39).

24. Those same considerations dictate that transactions such as the payments which Fini H continued to have to make during the period over which its restaurant business was wound up must be regarded as forming part of the economic activity within the meaning of Article 4 of the Sixth Directive.

25. Such an interpretation is justified by the deduction system, with regard to which the Court has repeatedly held that it is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see, to that effect, Rompelman , paragraph 19; Case C-37/95 Ghent Coal Terminal [1998] ECR I-1, paragraph 15; Joined Cases C-110/98 to C-147/98 Gabalfrisa and Others [2000] ECR I-1577, paragraph 44; and Case C-98/98 Midland Bank [2000] ECR I-4177, paragraph 19; and Abbey National , paragraph 24).

26. However, a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to entitlement to deduct is necessary before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement (Midland Bank , paragraph 24).

27. In the main case, Fini H's obligation, owing to a non-termination clause in the lease, to continue paying business rent and charges on a property which it had leased for the purpose of carrying on a restaurant business until the normal expiry of the lease could, in principle, be regarded as being directly and immediately linked to the restaurant business.

28. Since Fini H entered into the lease in order to have the premises necessary for carrying on its restaurant business and given that the premises were actually used for that business, it must be conceded that the partnership's obligation to continue paying the rent and other charges after it had ceased that business was a direct consequence of the carrying on of that business.

29. Accordingly, the duration of the obligation to pay the rent and the charges on those premises has no bearing on the existence of an economic activity within the meaning of Article 4(1) of the Sixth Directive, provided that that period of time is strictly necessary to complete the winding-up of the business.

30. It follows that, in respect of the rent and charges on the premises previously used for carrying on the restaurant business which were paid during the period for which the restaurant was not operated, that is to say, from October 1993 to September 1998, the taxable person must be entitled to deduct the VAT in the same way as during the period from the commencement of his restaurant business to the date on which it came to an end because, for the entire term of the lease, the premises were directly and immediately linked to his economic activity.

31. The right to deduct VAT on account of the winding-up of the business must therefore be recognised

in so far as its application does not give rise to fraud or abuse.

32. In that regard, the Court has already held that Community law cannot be relied on for abusive or fraudulent ends (see, inter alia, Case C367/96 Kefalas and Others [1998] ECR I2843, paragraph 20, and Case C373/97 Diamantis [2000] ECR I1705, paragraph 33). That would be the case, for example, if Fini H, whilst relying on the right to deduct VAT in respect of the payment of rent and charges relating to the period after the cessation of the restaurant business, continued to use the premises previously used as a restaurant as premises for purely private purposes.

33. If the tax authorities were to conclude that the right to deduct has been exercised fraudulently or abusively, they would be entitled to demand, with retrospective effect, repayment of the amounts deducted (see, inter alia, Rompelman , paragraph 24; INZO , paragraph 24; and Gabalfrisa , paragraph 46).

34. It is, in any event, a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent or abusive ends.

35. The answer to the first question must therefore be that Article 4(1) to (3) of the Sixth Directive is to be interpreted as meaning that a person who has ceased an economic activity but who, because the lease contains a non-termination clause, continues to pay the rent and charges on the premises used for that activity is to be regarded as a taxable person within the meaning of that article and is entitled to deduct the VAT on the amounts thus paid, provided that there is a direct and immediate link between the payments made and the economic activity and that the absence of any fraudulent or abusive intent has been established.

The second question

36. In light of the answer given to the first question, the second question is irrelevant and there is no need to answer it.

Costs

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

On those grounds, the Court (Third Chamber) rules as follows:

Article 4(1) to (3) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, as amended by Council Directive 95/7/EC of 10 April 1995, is to be interpreted as meaning that a person who has ceased an economic activity but who, because the lease contains a non-termination clause, continues to pay the rent and charges on the premises used for that activity is to be regarded as a taxable person within the meaning of that article and is entitled to deduct the VAT on the amounts thus paid, provided that there is a direct and immediate link between the payments made and the commercial activity and that the absence of any fraudulent or abusive intent has been established.

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NOTES	Slawitsch, Barbara: Vorsteuerabzug nach Einstellung des Betriebes, European Law Reporter 2005 p.176-177 ; Bernard, Elsa: Taxe sur la valeur ajoutée, Europe 2005 Mai Comm. no 175 p.24 ; Lundström, Susann: EG-aktuellt på mervärdesskatteområdet, Svensk Skattetidning 2005 p.232-233 ; Gay, Antonio: Closure of a business activity and deduction of VAT, Rivista di diritto tributario internazionale 2005 no 1 p.141-149 ; Gay, Antonio: Cessazione dell'attività economica e detrazione d'imposta nell'IVA, Rivista di diritto tributario internazionale 2005 no 1 p.151-159
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